"ON THE CANADIAN ABORIGINAL RIGHTS DIALOGUE"

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It is a privilege to have been invited to join the many distinguished speakers and guests who have come to honour Peter Russell. I propose to offer some reflections today in the time available to me, on certain aspects of law and policy, two of Peter Russell's favourite things. My comments are reflections on Canada, which is another one of his, and my, favourite things. I believe we also share a fondness for other places, especially Australia, which is an adopted country of mine and a place where Peter, I understand, intends to spend quite some time working after his retirement.

My focus today will be mainly on the development of the rights of Aboriginal peoples, and on Aboriginal nationalism. The significance of the Calder decision in the 1970s, its influence on a subsequent dramatic federal policy shift to recognize aboriginal title and enter into the modern era of treaty negotiations, is well known. It was just around that time that Peter Russell was writing about Aboriginal nations and their accommodation within Canada, and that will be my next topic.

I should like to begin by offering some comments on certain apparent trends in the development of aboriginal rights in the Supreme Court of Canada.

The first issue raises the question, "Who are the proper claimants of aboriginal rights?" Who are these groups in whom are vested certain collective rights called aboriginal rights? It seems we are in Canada, at a very embryonic stage in the development of proper answers, and this is certainly so in the judicial response.

If we consider the jurisprudence of the last quarter century or so, there are some unfortunate statements in the Court which seem to indicate that Aboriginal peoples are 'races', rather than social and political communities. I imagine that approach is in part moved by the many shades of meaning adopted for the concept of 'race'. So, although it may be correct to characterize unequal treatment of status Indians under the Indian Act as 'racial discrimination' according to the Canadian Bill of Rights and the Charter of Rights and Freedoms, it would be a serious misunderstanding to propose that the Aboriginal peoples whose rights are recognized and protected in the Constitution Act 1982, and who

claim a right of self-government within Canada, are in the category of 'racial minorities'. [1]

The false notion that Aboriginal peoples are racial minorities is used to deny their aspirations to legitimate political autonomy within Canada. Such arguments take on various forms and have a long history. It is at times proposed that racial minorities require the benevolent attention of the liberal State, but are not entitled to rights to different status within Canada. Or the spectre of 'race-based' differences in law may be raised. The easy acceptance of this false notion is probably assisted by the Canadian awareness of the American civil rights movement for racial equality. Few seem to notice that in the United States there are American Indians who are recognized in domestic policy as dependent nations with judicially and legally recognized political autonomy. [2]

There is wide acceptance for affirmative action policies to remedy the effects of unjust racial discrimination in Canada. The remedy is a temporary expedient that aims to provide justice to individuals. The claims of Aboriginal peoples to collective rights are an entirely different category. They are group claims based on a demand that indigenous peoples ought to be accorded equal respect as distinct political societies with other 'peoples'. These claims demand the recognition of group rights that inhere in the relevant social and political community; it is not a temporary expedient. Political autonomy requires the establishment of permanent institutions to deal with the eternal exigencies of community life. No one believes that the institution of Parliament should be regarded as a temporary solution to the problems of Western democracies.

The recent final report of the Royal Commission on Aboriginal Peoples emphasizes the point that Aboriginal peoples comprise political communities, not racial minorities. [3] They are political communities in the sense that subjective elements to define both the groups themselves and the members of the groups, are essential elements. Objective factors, such as birth, 'race', 'ancestry', are never a sufficient defining characteristic. This understanding is grounded in the experience of all societies, where spouses are taken from other groups, and children adopted from biological parents. No useful social purposes are served

by group definitions based on the objective factor of birth alone. That is all that 'race-based' thinking has to offer and proper understanding of the legitimate legal and political claims of the Aboriginal peoples of Canada today require such notions to be tossed into the dustbins of history.

I turn, then, to briefly consider the way the courts have dealt with the question of identifying the proper group claimant of aboriginal rights.

In the Baker Lake case [4] the court canvassed four elements of a test for proof of aboriginal title at common law, including the requirement to show the existence of an 'organized society'. This was an attempt to grapple with the identity test of the claimant group, and here the court was eliminating, at least, temporary groups assembled for narrow social purposes, such as the crowd at a football game. Unfortunately, the court's attempt to deal with the legal requirements of identifying a proper claimant involves considerations of the social organization of Aboriginal claimant groups, a field ripe with possibilities for misunderstanding and offended sensibilities.

This year the Supreme Court of Canada delivered several landmark decisions on aboriginal rights that have established what is now called the 'Van der Peet' test for proof of aboriginal rights at common law. [5] In these cases the Court seems to be keeping the identity question open, preferring the broad generic term 'group' in cases where the identity issue is not directly argued. So the identity of a proper claimant group in respect to aboriginal rights remains an important open question to be decided in future cases.

The Constitution Act 1982 recognized and affirmed the existing aboriginal and treaty rights of the Aboriginal peoples of Canada [6] and it will be interesting to observe the relationship that develops between the judicial evolution of a test for identifying the proper claimants of common law aboriginal rights on the one hand, and the development of a definition of the 'peoples' whose rights are recognized in the Constitution. [7] Even if there are constitutional amendments to elaborate the rights of Aboriginal peoples now recognized in the Constitution, it is not likely that there will be easy general agreement about any definitions of 'peoples' or 'nations' [8]

The general agreement that exists in this area seems to concern the goal of protecting distinct aboriginal cultural societies, and this is indeed a point that Peter Russell was making as early as the 1970s. The recent cases, too, in their very narrow focus, refer to the goal of protecting those customs, practices and traditions which are integral to distinctive cultures. It is difficult, however, to reconcile the apparent direction of the Court in the development of aboriginal rights, with the aspirations expressed by Aboriginal people.

There is, of course, and has always been, in the law of Canada, an unseemly uncertainty with respect to the legal status and rights of Aboriginal people. It is an uncertainty that would not be tolerated by other Canadians, who have effective access to the institutions of the courts and Parliament. Not only with respect to arcane constitutional issues, but also with respect to many everyday issues, Aboriginal people can not know whether they are on the right side of the law or not, simply because the law is not known. In some of the most influential cases on the development of the jurisprudence of Aboriginal rights, the Aboriginal people themselves were not represented in court![9] Would it be contemplated today that the most basic collective rights could be litigated without the presence of representatives of the relevant group? I think not. Canadians might well reflect on the historical process by which the doctrine of aboriginal rights has been developed, and the consequent need to revise the unsavoury origins of its emerging doctrine. A new approach required by the 1982 constitutional recognition and affirmation of aboriginal and treaty rights requires wise and courageous judges willing to vindicate rights that Parliament and governments have failed to protect.

Looking at the developments in the most recent cases, prima facie, it seems that the Court is driving in more stakes to define the perimeter of the iron fence being erected around aboriginal rights. The sphere of protection is dwindling. It is not gratifying to observe the development of tests to protect distinctive practices centred around economic lifestyles that have long ago been destroyed by the activities of those whose interests the Courts now represent. By way of illustration, under the evolving tests it would seem that buffalo-

hunting as a pre-contact activity, and other activities centred on the buffalo hunt, would receive protection of the common law. But none of these activities remain today. The newcomers who have taken over have killed off the buffalo and the economic base of entire indigenous cultures. So, despite its protestations, the law seems to offer the best protection for metaphorical museum pieces under a frozen rights doctrine, and its contribution to the protection of the group interests that might be expected to meet the needs of protection of distinct cultures, is suspect.

On the other hand, it may be observed that the courts can hardly be expected to do otherwise. They are, after all, Canada's courts, not the courts of the Aboriginal peoples, whose rights Aboriginal claimants seek to protect. The courts, by judicial magic, can rationalize an unconscionable dispossession of Aboriginal peoples because the function of the court has an opposite to the usually perceived role of protecting the weak and politically powerless. The court must legally legitimize the exercise of State power, at least to a considerable extent, or risk losing the political confidence of the representatives of the State, and the disintegration of the legal order.

Since Aboriginal rights are one of the few power resources available to Aboriginal people, they are at times driven to make arguments in court that are not likely to be accepted. The courts play a limited function with limited tools and they produce limited decisions. If one uses the courts to make claims that can only be advanced in the other branches of the State's institutions, either executive government or Parliament, one should not be surprised at the court's inability to do justice in respect to a just claim. If you squeeze a cow in the right place you will get milk as a result because that is what the cow gives; if you make legal arguments to the State's judicial arm, you will get what the Courts can give, narrow decisions not likely to upset the status quo very much. The Courts are uniquely incapable of drawing the contours of a broad vision of political liberty for the Aboriginal peoples in Canada.

One of the fundamental puzzles about the nature of aboriginal rights has been decided in the recent cases. [10] We know now that all aboriginal rights are

not derived from aboriginal title to land; rather, aboriginal title to land is but one subset of aboriginal rights. We are at a crossroads where the doctrinal basis of aboriginal rights is being re-examined, particularly in light of their contemporary affirmation and recognition in the Constitution of Canada.

I would like to add the point that the judicial development of rights does not always result in an advancement of the social and political goals of Aboriginal people. So far the courts have generally dealt with the development of negative rights, that is, rights to carry on customs, traditions and practices without interference from the State and its agents. Such rights are helpful to protect access and use of resources, but are less helpful to advance goals requiring State assistance. On the basis of the test that aboriginal rights are activities, customs or traditions that are integral to the distinctive cultures of Aboriginal groups, it would seem that language rights are included, but it is far from clear if these will be developed as positive rights that require, not only protection from government interference in establishing autonomous educational systems, but also impose obligations on Canadian governments to provide resources to make the rights effective.

I move on now to consider my next topic, that of Aboriginal nationalism. It seems that one link between law and politics is to be found somewhere in the project of finding common ground in defining the public interest. If we view Aboriginal peoples as legitimate political communities, it is then understood that each people will argue its right to define the nature and scope of its public interest. The vision of what consititutes a happy neighborhood, and what means or institutions are necessary or helpful to build them, will vary from community to community. So the Mic Mac will insist on defining the Mic Mac public interest; the Cree will insist on defining the Cree public interest, and so on.

Moreover, each Aboriginal nation will argue that the definition of the nature and scope of its public interest ought not to take place through the filter of the general Canadian public interest. And this the courts can not do. The courts, because they are Canada's courts, must filter the elaboration of the nature and scope of the Aboriginal interests through the filter of the Canadian

public interest.

And that is why we need activity in both law and policy, the former developed with the participation of Aboriginal peoples, so that we can get to the point where mutual interests, common ground, is going to be found, where the interests of all Canadians too, will be filtered through the prism of the public interest of the Aboriginal nations.[11]

Perhaps the true vision of Canada's future lies in the concept of a multi-national North American country. Canada would be multinational if it accommodated the existence and flourishing of all of Canada's historic nations. It would be North American if it developed its corporate identity and vision of the future based on a real appreciation of its North American, or aboriginal foundations, rather than only on its European origins as a modern nation-state. And since Canada is often regarded as a model of a federal country that combines shared rule in national institutions and self-rule in regional institutions, there is every prospect within our existing constitutional traditions to accommodate such a vision.

One of the great obstacles standing in the way of a just accommodation of the Aboriginal peoples within Canada is the idea that Canada's present boundaries are legitimate borders within which all residents are to be treated alike under law and policy. 'One law for all' is the hue and cry of opponents of Aboriginal self-government on all sides. In reflecting upon this liberal conception of a legitimate nation-state within which no legal differences ought to be tolerated, it is important to go back to the prior question about the legitimacy of drawing those boundaries around previously distinct, independent nations in the first place. [12] In what circumstances were each of the Aboriginal peoples enclosed within the Canadian state? Was this inclusion based on consent, or effective participation, or other norms of public morality that Canadians wish to uphold? Even if all treaties were thought to legitimize Canada's exercise of power over Aboriginal peoples, a doubtful proposition, there are large portions of Canada with respect to which the aboriginal inhabitant s have not entered into treaties or been consulted on their wishes concerning the establishment of Canada, the

large and powerful State that now unconscionably asserts and exerts its raw power without justification or need of explanation over the small historic nations which it has dispossessed.

Even where apparent agreements have been entered into, and even entrenched in the Constitution of Canada, this country has forgotten that promises ought to be kept, even if they are made to those who are politically weak and despised by the promissors. In these cases even Canada's courts can not help those who lack power at the ballot box. Canada, by ignoring its most fundamental constitutional obligations, risks being seen as a constitutional outlaw, not only in the eyes of the aboriginal dispossessed, but by all those who may fear that some day, their interest too, may rely on constitutional protection from the rule of the majority.

It is important for Canada that it be seen as politically legitimate in the eyes of all its residents. Its security as an internationally medium but geographically vast and sparsely populated country and its international reputation, in addition to its moral foundation, require it. The Aboriginal peoples comprise but three per cent or so of the population, but surely it is not right, as has been proposed, that the legitimacy of a nation-state be established on the backs of a three per cent minority?

In order to accept the justice and legitimacy of the political claims of Aboriginal peoples for accommodation of their national institutions within Canada, it is not even essential to accept the Aboriginal peoples' own arguments and ideals; the most cherished ideals and values of Canadians generally can accommodate a measure of just political participation and community rights of Aboriginal peoples within Canada.

In concluding I would like to suggest that all Canadians have a stake in the dialogue of rights that has been raised by the claims of Aboriginal peoples, whether they be legal, political or moral rights. Rights, after all, depend upon a broadly accepted moral foundation, do they not? And surely it must be in the interests of all Canadians to see to it that Canada's basic institutions rest on a solid moral foundation. Our common ideals require that the interests of all

individuals and communities be accommodated. Canada should be a place where all its historic nations matter, even the very small ones. This is one of the points that was urged by the Metis leader, Louis Riel, the anniversary of whose hanging by the Canadian State on November 16, 1885 we commemorate today.

My brief presentation today has concerned the dialogue of aboriginal rights, in the courts and beyond the courts in Canada. I have suggested we reflect on a vision of Canada as a multi-national North American country. Is it not interesting to observe, that in this period of national introspection, the dialogue of Aboriginal rights suggests that it may be Canada's dispossessed and marginalized peoples, the Aboriginal peoples, who are the guardians of our most precious liberties?

And in the fight for a better place for the Aboriginal peoples within Canada, it is heartening to welcome the dedication, skills and energy of scholars, who, like Peter Russell, dare to put ideas into action.

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ADDENDUM AUGUST 1998

A number of significant developments and events in aboriginal law and policy have occurred since November 1996 that deserve comment.

In the field of policy, the federal government published its response to the recommendations of the Royal Commission on Aboriginal Peoples on January 7, 1998. Entitled 'Gathering Strength - Canada's Aboriginal Action Plan', the policy statement formally read by the Minister of Indian Affairs in Ottawa focussed on a Statement of Reconciliation which expressed the government's regret for past actions of the federal government which have contributed to the erosion of the political, economic and social systems of Aboriginal people and nations. The Minister promised discussions with territorial and provincial colleagues to build a common plan of action 'to make renewed partnerships a reality'.

Meetings were subsequently held between federal and provincial and territorial Ministers in Quebec City on May 19-20, 1998, out of which came the joint resolve to set up working groups to discuss the nature, structure and priorities of an on-going process of the forum of Ministers to explore a comprehensive approach to Aboriginal issues, and to begin the development of a National Aboriginal Youth Strategy.

The most immediate and significant aspect of the federal policy initiative was the creation of a $350 million Aboriginal Healing Fund to address the legacy of sexual and physical abuse of Aboriginal students at residential schools.

Although these aspects of the federal response to RCAP were

generally welcomed by Aboriginal leaders, there was considerable criticism of the federal government as well, especially about the lack of consultation with Aboriginal leaders on what the new policy calls 'a new partnership' with Aboriginal peoples. Ironically, the policy was devised largely without the participation of the proposed new partners, contrary to the strong recommendations of the Commission that the principle of Aboriginal participation ought to be the key feature of federal Aboriginal policy.

The policy approach of RCAP, to base federal policy on the recognition of historic Aboriginal nations, in a nation-to-nation process that recognized that aboriginal rights are vested in 'nations', and not in the 'Indian bands' created by federal statute, received little attention. The basic recommendations to initiate and sustain a twenty-year plan proposed in the RCAP Final Report were not adopted.

In the Supreme Court of Canada, the landmark decision in Delgamuukw was handed down on December 11, 1997. ([1998] 1 C.N.L.R. 14]) The decision elaborated the distinctions between aboriginal title, on the one hand, and aboriginal rights, on the other hand, and the elements of the tests to prove aboriginal title. In order to make out a claim for Aboriginal title, the Aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have

been exclusive. ([at page 69, CNLR)

On the issue of defining the relevant claimant group in which aboriginal title is vested, the court reviewed the Canadian jurisprudence and used the terms 'nations' and 'peoples' in general language on aboriginal title, but it still relied on 'claimant group' as indicated above. It does not seem profitable to speculate on the relationship the court might anticipate between the term 'claimant group' and 'peoples' and 'distinctive cultures', as used in the discussion on aboriginal rights.

The case has been sent back for trial and it seems quite possible that the question of defining more precisely the nature of the claimant group, especially in relation to a right of 'self-government' that may be argued there, may arise and be discussed by the courts.

Another interesting recent Supreme Court case that raised the question of the meaning of 'peoples' is the *Quebec Secession Case* (Reference re Secession of Quebec August 20, 1998, S.C.C. File No. 25506, not yet reported.) One of the questions in the reference was whether international law gives a right to the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally? In its discussion of the question, the Court noted that 'the right of a people to self-determination... is considered a general principle of international law'. In considering the definition of 'peoples' the Court noted that its precise meaning in international law remains somewhat uncertain. Although the Court recognized that 'a people' may

include only a portion of the population of an existing state, it decided that 'While much of the Quebec population certainly shares many of the characteristics (such as common language and culture) that would be considered in determining whether a specific group is a 'people', as do other groups within Quebec and/or Canada (emphasis mine) it is not necessary to explore this legal characterization to resolve Question 2 appropriately'... and ...'nor is it necessary to examine the position of the aboriginal population within Quebec."

A review of the aboriginal rights cases seems to suggest that the courts are developing a doctrine within which particular kinds of rights might well be vested in different kinds of groups. For example, specific traditional activities such as fishing in a specific site might be vested in a relatively small community, whereas a broad-based right of self-government at common law might be vested in a larger group. In this regard, the Final Report of the RCAP proposed that an Aboriginal 'nation' which is entitled to a common law right of self-government is characterized by tests similar to those defining 'peoples' in respect to the international law right of self-determination, viz; (i)the nation has a collective sense of national identity that is evinced by a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland; (ii) the nation is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-government in an effective manner; (iii) the nation

constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, operates from a defined territorial base. [RCAP Final Report, *supra* Volume Two, Part One, esp. p. 180 ff.]

Finally, a brief comment should be made on the historic Nisga'a Final Agreement in British Columbia. It was signed by representatives of the Nisga'a people, and the federal and provincial governments on August 4, 1998. The agreement is still subject to ratification by the Legislature and Parliament and a Nisga'a referendum, but is intended to be a treaty and land claims agreement within the meaning of the Constitution Act 1982. It is the first proposed treaty in B.C. since the establishment of the British Columbia Treaty Commission and the decision of the Province to participate in treaty negotiations, and has increased the controversial public debate that had earlier been generated by the Delgamuukw decision on aboriginal title. Much of the controversy involves the basic questions considered in the main paper, with opponents of Aboriginal rights raising the false cry of 'one law for all' and denouncing 'special laws for racial minorities'.

It is clear, as exemplified by aboriginal rights issues, that as we move towards the end of the year 1998 some of the same great questions which bring into focus the interplay between law and policy continue to be a significant part of the national debate in Canada. If the federal government's policy decisions are based more on political expediency than principle, which they appear to be, then the role of the courts and of academic commentators in

elaborating appropriate principles for public action seem to be as significant, if not more significant, than ever.

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1. See Paul Chartrand, "Aboriginal Self-Government: The Two Sides of Legitimacy", in Susan Phillips, ed., How Ottawa Spends: A More Democratic Canada...? 1993-1994 (Ottawa: Carleton University Press. 1993) Chapter 7, p.231-256.

2. See Will Kymlicka, Liberalism, Community and Culture (Clarendon Press. Oxford. 1991), especially chapter 7.

3. Report of the Royal Commission on Aboriginal Peoples (Ottawa: Minister of Supply and Services Canada 1996) Volume 2. Restructuring the Relationship. Part One. Chapter 3 "Governance" p. 105 ff.

4. The test in Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs and Northern Development), [1979] 3 C.N.L.R. 17 (Fed. T.D.) is the following:

1. That the peo Sple of the group claiming the right, as well as their ancestors, existed as an organized society;

2. That the organized society occupied the specific territory over which the claimants assert title;

3. That the occupation was to the exclusion of ohter organized societies; and

4. That the occupation was an established fact at the time sovereignty over the land was asserted by England.

5. See R v Van der Peet [1996] 2 S.C.R. 507; R. v. Gladstone [1996] 2 S.C.R. 723; R. v. N.T.C. Smokehouse Ltd. [1996] 2 S.C.R. 672; R. v. Pamajewon [1996] 2 S.C.R. 821.

6. Section 35 of the Constitution Act, 1982, Part II.

7. Historically, the federal government has administered policy respecting Aboriginal people largely through the authority of the Indian Acts which defined 'Indians' without reference to the various Aboriginal nations' own prefered self-definitions and this has certainly helped to disintegrate former group and national social and political bonds. Section 31 of the Manitoba Act, 1870 provided for the provision of lands for the benefit of the 'families' of the Metis people in Manitoba towards the extinguishment of their Indian title, and thus recognized, in the Constitution, a distinct group status for one of the Aboriginal peoples whose rights are not protected by s.35 of the Constitution Act 1982. See Paul L.A.H. Chartrand, Manitoba's Metis Settlement Scheme of 1870 (Saskatoon: University of Saskatchewan Native Law Centre 1991)

8. There are numerous fact situations and preferences for social organization and no formulation is likely to be acceptable enough to satisfy the requirements of an amendment. Internationally, indigenous peoples are opposed to the introduction of a definition in the Draft Declaration on the Rights of Indigneous Peoples.

Recently the final report of the Royal Commission on Aboriginal Peoples has proposed that federal policy recognize the existence of Aboriginal nations, and has suggested a number of elements of a definition that have been broadly acceptable: Report of the Royal Commission on Aboriginal Peoples (Ottawa: Minister of Supply and Services Canada 1996) Vol.II, Part One, esp. p. 180 ff.

9. St. Catharine's Case [St. Catharine's Milling and Lumber Company v. The Queen (1899) 14 App.Cas. 46 (JCPC), aff'g. (1887) 12 S.C.R.]

10. R. v. Cote (1996) 138 D.L.R. (4th) 385; R. v. Adams (1996) 138 D.L.R. (4th) 657.

11. For similar suggestions, see Hon. Douglas Graham, Minister of Justice (New Zealand) "British Law-Aboriginal Law: Merging Jurisprudence", a speech delivered at the 15th Australian Institute of Judicial Administration Annual Conference, Park Royal Hotel. Wellington, New Zealand. Saturday, 21 September 1996.

12. See Will Kymlicka, Multicultural Citizenship (Clarendon Press. Oxford 1995) esp. chapter 6. at p.116 ff.