

CANADIAN INDIAN POLICY : THE CONSTITUTIONAL TRAP

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ABSTRACT/RESUME

The author reviews the development of Indian policy in Canada over the past fifteen years in terms of the influence of domain-specific and environmental determinants. He concludes that a major effect of the White Paper of 1969 was to strengthen the influence upon Indian policy of such environmental determinants as the sociopolitical climate of the country. The Constitution Act, 1982, and the lengthy political debate leading to it, are viewed as a trap for Indians, adding provincial governments to the arena of Indian policy development. As a result, the domain-specific concerns of Indian organizations have now become relatively less important than environmental realities as perceived by federal and provincial governments.

L'auteur passe en revue l'évolution de la politique canadienne à l'égard des Indiens au cours des quinze dernières années, surtout en fonction des facteurs se rapportant au milieu et aux domaines spécifiques. Il en conclut que l'un des résultats principaux du Livre blanc de 1969 a été d'augmenter l'influence des facteurs provenant du milieu (tel que le climat socio-politique du pays) dans la formulation de la politique indienne. La Loi constitutionnelle de 1982 et le long débat politique qui a précédé son adoption, représentent à cet égard, de l'avis de l'auteur, un piège pour les Indiens, les gouvernements provinciaux ayant été effectivement ajoutés au système qui traite le développement de la politique indienne. Il en résulte que les domaines d'intérêt spécifiques des organisations indiennes sont devenus relativement moins importants que les réalités de milieu telles qu'elles sont conçues par les gouvernements fédéral et provinciaux.

In any policy area, be it national defence, health care or Indian affairs, public policy is the joint product of what might be termed domain-specific and environmental determinants. In the case of Indian affairs, domain-specific determinants would include such socio-demographic characteristics as high levels of Indian unemployment and poverty, low levels of formal education, chronic housing shortages, and high rates of infant mortality, along with growing demands for greater social, cultural and political autonomy. Environmental determinants refer to broader political constraints which are imposed upon any specific policy domain. In the case of Indian affairs in Canada, these would include a governmental commitment to liberalism and the protection of individual - as opposed to group - rights, fiscal constraints, public opinion, and competing demands from other policy domains, such as an interest in developing energy resources in areas where there are unsettled land claims.

In most cases groups have greater control over public policies that impact upon them when those policies are shaped by domain-specific determinants. Conversely, control is weakened to the extent that environmental determinants are dominant; the clientele of public policy are left exposed to environmental forces beyond their political capacity to control.

It is the thesis of this article that a decade of constitutional flux in Canada has strengthened the environmental determinants of public policy towards Indian affairs. As a consequence, while the search for a new constitution appeared at first to be an important opportunity for Indians, it has turned out to be a policy trap. The constitutional debate has brought a new set of environmental factors to bear upon Indian affairs which are largely beyond the control of Indian political organizations, and which threaten to constrain severely Indian policy options in the years ahead. Because Indian affairs have become entangled in broader constitutional issues, Indian control over those public policies which shape their very lives and futures may be further weakened.

Historical Background

Unlike the situation in the United States where over 4000 separate and unsystematized statutory enactments relating to Indian policy exist (Harper, 1946:298), Canadian public policy in the field of Indian affairs is concentrated within a single government (the Government of Canada) and a single piece of legislation (the Indian Act, last subjected to any comprehensive revision in 1951). While most federal departments have some programs which are tailored for native peoples, Indian policy per se is primarily lodged in one department, the Department of Indian Affairs and Northern Development. Moreover, during the last fifteen years a single party - the Liberal Party of Canada - and a single Prime Minister - Pierre Elliott Trudeau - have dominated the national government, apart from the nine month Conservative government of Joe Clark in 1979-80.

The Trudeau years have been important and tumultuous ones for Indian affairs in Canada, years that cannot be adequately summarized in the space available here. There are, however, three features of those years that are of

central importance to the present analysis. The first came with the 1969 publication of Ottawa's White Paper on Indian affairs which proposed a comprehensive "solution" to the Indian "problem".¹

For the present discussion, the most important aspect of the White Paper is neither its content nor the fact that it was formally retracted by the Trudeau government in 1971. Rather, it is that the White Paper was crafted almost exclusively in response to environmental factors (Weaver, 1981). Very little attention was paid to extensive academic and departmental studies of Indian affairs², or to input from Indians in any form. Instead, the White Paper bore the clear imprint of issues arising from the American civil rights movement, of Trudeau's philosophical commitment to the principles of liberalism, of the Prime Minister's suspicion of group-rights in any form, and of a general governmental reaction to the growing separatist movement in Quebec (Ponting and Gibbins, 1980:25-30). This inattention to domain-specific concerns not only promoted an ill-conceived public policy, but also led to vigorous opposition from the Indian population that the proposed policy was meant to serve.

The second feature of the Trudeau years stems from the aftermath of the White Paper. The 1970's were marked by an explosive growth in Indian political organizations. Funded in large part by the federal government, these organizations dramatically increased the political profile, expertise and power of Canadian Indians. Following the collapse of the White Paper initiative, Indian organizations tried to alter both the details and general principles of Canadian Indian policy. For its part, Ottawa was content to react to Indian policy initiatives, having been badly burned by its own foray with the White Paper. The 1970's thus witnessed intense and often productive interaction between the federal government and Indian organizations across a myriad of domain-specific concerns. However, before substantive legislative change could be accomplished, such as a re-writing of the Indian Act, environmental disturbances associated with constitutional change overtook, and to a degree overwhelmed, the domain-specific issues of Indian affairs. It is this constitutional change that forms the third and undoubtedly most important feature of the Trudeau years with respect to Indian affairs.

Constitutional Change in Canada

In 1971 the Trudeau government initiated a search for a new constitution which was eventually to culminate in the Constitution Act, 1982, proclaimed on April 17, 1982. Thus for over a decade Canadians were subjected to varying degrees of constitutional debate as governments, organizations and individuals wrestled with the nature of the Canadian federal system, the place of Quebec in Canadian national life, the desirability of an entrenched Charter of Rights that would be at least analogous to the American Bill of Rights, the status of women within the economic and political order, and a host of other issues both pragmatic and principled. In essence, Canadians were attempting to define the very nature of their political community.

This constitutional debate appeared to open up a tremendous opportunity

for Canada's aboriginal peoples. If the basic constitutional character of Canada was to be redefined, then surely it could be redefined so as to better reflect the rights, interests and aspirations of aboriginal peoples who to date had been all but ignored within the constitutional fabric of the Canadian state. If that fabric was to be rewoven, then surely past neglect could be rectified.

Thus Indian political organizations were drawn into the thick of the constitutional debate, responding not only to the opportunity but to necessity. If a new constitution was to be forged, Indians would be directly affected. Even if the new constitution was to say nothing about the status and rights of Canadian Indians, this very silence could have a devastating impact on Indian aspirations in the years and generations ahead. Furthermore, most of the central issues in Indian affairs during the 1970's - aboriginal rights, treaty rights, land claims, the various proposals for self-government in the North, and the push for Indian Government in the south - were inevitably entangled in the constitutional debate. Here, indeed, was the real crunch. If Indians were to claim, a constitutional right to self-government, then that right had to be embedded within the new constitution. Certainly any future claim to self-government would be handicapped if a new constitutional order could be proclaimed without Indian participation and consent.

Participation in the constitutional debate was therefore essential for native political organizations and, by the late 1970's, they were well equipped for the struggle. Native constitutional proposals became increasingly sophisticated and persuasive; early rhetorical statements, such as the Dene Declaration, gave way to detailed and well-argued proposals, such as the Nunavut proposal by the Inuit in the Eastern Arctic, the Denendeh proposal by the Dene Nation and the Metis Association of the Northwest Territories, and the various proposals for Indian government that emerged in southern Canada. If Canadian governments were going to rewrite the constitution, native political organizations were ready and able to play an active role in the constitutional framing of aboriginal rights.

The constitutional debate was important, not only to long term Indian interests, but also to the resolution of more pragmatic problems, as a new constitution could provide a framework within which other issues could be more satisfactorily addressed. However, the constitutional debate significantly shifted the balance of policy forces in Indian affairs away from domain-specific determinants and towards environmental determinants. This shift may well mean that in the years ahead Canadian Indians will be less able to control the public policies that will shape their lives and futures. It is in this sense that the constitutional debate formed a policy trap.

The Constitutional Shift in Policy Determinants

In ongoing negotiations with the federal government during the 1970's, the National Indian Brotherhood was largely able to control its political agenda. The NIB assumed a proactive stance across a wide range of issues, with the federal government in general - and the Department of Indian Affairs and Northern Development in particular - assuming a more reactive position.

While this is not to argue that the NIB enjoyed either overwhelming or continuous success, it was able to make at least incremental progress across a broad front of domain-specific issues including improved Indian housing and health care, Indian control of Indian education, and greater band control over trust funds. Furthermore, while the federal government made few formal or explicit concessions on the larger issue of Indian sovereignty, it can be argued that incremental policy changes moved the government along the road towards at least implicit recognition of Indian sovereignty. Maybe the progress was insufficient, but it was at least the right road.

However, by entering the constitutional arena, Indians encountered a more resistant and hostile policy environment. Whereas Indian political organizations had been on relatively strong ground when dealing with issues such as housing and education where social need and policy neglect could be clearly and forcefully demonstrated, the ground shifted considerably when the issues became ones of constitutional principle and national symbolism. Indian concerns were raised to a symbolic plane where they encountered major obstacles. Whereas Indian control over Indian education and more autonomous band governments were pills that the Canadian political system was quite prepared to swallow, and pills that would have incrementally promoted Indian sovereignty, the constitutional recognition of Indian sovereignty was a pill upon which the political system gagged.

Here it is useful to quote David Ahenakew, national chief of the Assembly of First Nations:

Whatever the social or economic indicator you wish to choose, the situation of Indian people in Canada constitutes an inexcusable embarrassment to all Canadians. These situations have accumulated over centuries of ignoring, bypassing and pushing aside the sovereignty and jurisdiction of Indian governments.³

There is no quarrel with the first sentence. Indeed, such embarrassment forms a useful political club for Indians in the pursuit of incremental policy change. However, the second sentence elevates the debate to a much more contentious constitutional plane.

In the constitutional debate, Indians encountered a number of opponents and obstacles which had been less significant factors in domain-specific negotiations during the 1970's:

- the constitutional debate brought provincial governments into the thick of Indian affairs for the first time with consequences that can only be described as problematic. Traditionally, Indians have opposed any provincial role in Indian affairs, arguing that the federal government has exclusive jurisdiction. For their part, the provincial governments proved to be more resistant to Indian claims than Ottawa had been. As McWhinney pointed out, "... satisfaction of Indian historical claims to land and to mineral and related property rights, and also of further claims about spoliation of their original territories, must occur mainly at the expense of the provinces"

(McWhinney, 1982:73). Thus on the constitutional plane, as opposed to the domain-specific plane, Indians now had to convince eleven governments, ten of which had little interest in or sympathy for Indian affairs. Moreover, the new amending formula in the Constitution Act, 1982, entrenches the need for provincial consent to any future constitutional changes relating to Indian affairs.

- many of the most innovative proposals for Native self-government in recent years have emerged in the Canadian north, an area which used to fall under the exclusive jurisdiction of the national government. However, section 42(f) of the Constitution Act, 1982, requires provincial consent for the creation of new provincial units in the North, units that are at least implicit in proposals such as Nunavut and Denendeh. Thus future constitutional change in the North must now clear the difficult hurdle of provincial consent.

- the centrepiece of the new constitution is the Canadian Charter of Rights and Freedoms, an inherently liberal document designed to protect the rights of individuals. It provides no protection for, or recognition of, group rights beyond the provisions for affirmative action programs. While it will be many years before the full impact on Indian affairs will be known, it is likely that the Charter will undermine the collective goals, aspirations and rights of Canadian Indians. By virtue of its constitutional affirmation of liberal principles, the Charter is an assimilationist document from the perspective of Indian affairs. Effective barriers between the Charter and Indian affairs will be difficult to maintain.

- feminist organizations have built gender equality into the new constitution. In the past, Indian organizations have been impaled upon gender politics as a result of gender inequalities embedded within the Indian Act. While there has been a protracted debate within the Indian community as to whether or not the Indian Act and related documents should be changed to reflect gender equality, the more important issue has been who should make such changes. In essence, Indian political organizations have argued that the decision as to who is and who is not an Indian must rest with Indians themselves, the right to determine citizenship being an essential condition of political sovereignty. The federal government has maintained that gender equality is an overriding principle that must apply to all Canadians, Indians or not. It appears that the case for Indian sovereignty has been eroded by the Charter guarantees for gender equality regardless of ethnic or racial origin.

The argument here is that by entering the constitutional debate, Indians encountered a much more constrained policy environment in which determinants specific to the domain of Indian affairs carried little weight, and in which environmental determinants carried a great deal of weight. This is not to argue that environmental determinants of Indian policy were ever absent; over the last decade Indian political organizations have had to deal with feminist issues; with the message of the American civil rights movement that political rights should not be based on racial characteristics; with generations of racial

prejudice in Canada; with environmentalist groups with provincial governments; and with the all-embracing liberalism of the Canadian society and national government which downplays political distinctions drawn on the basis of race or ethnicity. However, so long as negotiations with Ottawa centred on domain-specific concerns, environmental determinants of public policy were not all that restrictive. They could be bent, twisted, slid over or around. Once such negotiations are elevated to the constitutional plane, environmental constraints become much more rigid.

In summary, Indian organizations have been drawn into an ongoing constitutional debate that has elevated Indian concerns and aspirations to the plane of constitutional principles. At this level, environmental determinants have prevailed and Indians have not fared well. However, while the change in policy context has not been a beneficial one for Canadian Indians, it was a change they could not prevent.

Conclusions

Canadian Indians have had little success in the constitutional arena because their domain-specific concerns carry little weight within that arena just as Indian political organizations carry little weight in the intergovernmental negotiations guiding constitutional reform. The Constitution Act, 1982, did little if anything to advance Indian interests or aspirations.⁴ Indeed, the fact that the new constitution was proclaimed without Indian consent is in itself a rejection of Indian sovereignty by the eleven federal and provincial governments of Canada. It is true that the Constitution Act, 1982, did not slam the door on future constitutional changes affecting Canada's aboriginal peoples; Section 37 called for a First Ministers' conference to be held within a year in which an agenda item would deal with constitutional matters that directly affect aboriginal peoples.

To be charitable, the only significant outcome of the first such conference, held in March 1983, was a decision to meet again within a year and at least twice more by 1990. There is no reason to expect that in future meetings Indians will enjoy significantly greater constitutional success. Indians still remain petitioners rather than full participants, and any further constitutional change will require not the approval of Indians but the approval of both the federal government and at least seven of the ten provincial governments. Such approval is unlikely to be attained given the intransigence of some provincial governments on Indian issues and the current refusal of Quebec to participate in the formal amending process.

Canada's constitutional debate has become a trap for Canadian Indians by elevating the discussion of Indian affairs to a plane where it is very difficult for Indians to win and where major losses are possible. Unfortunately, the March 1983 agreement to hold a series of further constitutional meetings makes it difficult for Indian organizations and leaders to retreat from the constitutional plane. And yet, if the present analysis has any validity, such a retreat is to be advised. Indian sovereignty may be more successfully pursued through incre-

mental policy decisions in non-constitutional areas, no matter how symbolically unappealing this may be. In areas where domain-specific determinants dominate, incremental progress is possible if, over the short run, Indians are prepared to accept only the implicit recognition of Indian sovereignty. The pursuit of explicit constitutional recognition of Indian sovereignty is much less promising, for on the constitutional plane Indians lack the demographic clout and Indian organizations lack the political clout necessary to overcome environmental constraints.

NOTES

1. *Statement of the Government of Canada on Indian Policy*, Ottawa, Department of Indian Affairs and Northern Development, 1969. The White Paper proposed that all legal distinctions between Indians and other Canadians be removed, that the Indian Act and the Department of Indian Affairs and Northern Development be abolished, that the federal government's trust responsibility for Indian lands be ended, and that Indians receive social and economic assistance through the general programs of both the federal and provincial governments.
2. The most startling example here is the Hawthorn Report which provided a comprehensive and insightful analysis of Indian affairs (Harry B. Hawthorn et al., *A Survey of the Contemporary Indians of Canada: A Report on Economic, Political, Educational Needs and Policies*, Volumes I and II, Ottawa, Queen's Printer, 1966, 1967). Also ignored were contemporary American studies which were critical of assimilationist policies in the United States.
3. *The Globe and Mail*, National Edition, March 18, 1983, p. 8.
4. Section 25 states that "the guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement." Section 35(1) states that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." McWhinney refers to these as "saving clauses", designed to preserve the status quo without defining that status quo. This type of clause, he argues, is unnecessary in so far as the legal continuance of rights is concerned (1982:98; 177).

REFERENCES

Department of Indian Affairs and Northern Development

1969 *Statement of the Government of Canada on Indian Policy, 1969.*
Ottawa: Queen's Printer.

Harper, Allan G.

1946 *Canada's Administration, America Indigena* 5(3).

Hawthorn, H.B. et al.

1966-67 *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies.* 2 Vols. Ottawa: Queen's Printer.

McWhinney, Edward

1982 *Canada and the Constitution, 1979-1982.* Toronto: University of Toronto Press.

Ponting, J. Rick and Roger Gibbins

1980 *Out of Irrelevance: A Socio-Political Introduction To Indian Affairs in Canada.* Toronto: Butterworths.

Weaver, Sally M.

1981 *Making Canadian Indian Policy: The Hidden Agenda, 1968-1970.* Toronto: University of Toronto Press.