Justice and Aboriginal Land Claims in British Columbia, Canada:

Lessons Learned from the Sliammon Nation

Zoe Bernatsky

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Professor: Carol Robb

On October 12, 2011, the British Columbia Treaty Commission issued a statement that was exceedingly disturbing in its failure to appreciate the complexities of justice in any treaty negotiations with First Nations in British Columbia. The Chief Commissioner, Sophie Pierre, stated that, while there have been some hopeful signs, all parties must take responsibility for their lack of urgency in negotiating: "No one should be satisfied with the progress being made in treaty negotiations in British Columbia."[1] While the limited number of full treaty ratifications is indeed a sobering thought, this news release is likely to cause unwarranted frustration for those Canadians who are unaware of the complexity of the First Nations land claims in British Columbia (BC).

If that happens, we may see a reprise of the 1970s and 1980s, when First Nations people resorted to direct action, eliciting anger from many Canadians, while causing delays in resource development projects and disrupting economic activity, in order to heighten concern for past injustices. At that time injustices were not acknowledged by the BC government, and appropriate processes to restore land titles and self-governance were blocked. First Nations people collectively stood up for their rights against the government. Since most provinces had already signed treaties with First Nations groups, many Canadians were unaware of the particularities of the BC situation, which involved the earlier appropriation of land *without* reimbursement.

What many then failed to grasp—and still fail to grasp—is that land treaties are not an act of *charity* on behalf of the Canadian government, but an act of *justice* in reparation for the historical practice of land confiscation without due *process*. The negotiation of land treaties and the

[1] BC Treaty Commission, "Treaty Commission Sees Lack of Urgency in Negotiations, News Release", October 12, 2011 http://www.bctreaty.net/files/pdf_documents/newsrelease_Treaty-Commission-Sees-Lack-of-Urgency-in-Negotiations.pdf (accessed October 22, 2011).

development of processes for self-government will assist the First Nations in achieving their right to the land and to enter into economic endeavors through free exchange in the marketplace, a right for which other citizens have not had to fight in recent historical memory. This process is not an easy one, but it is a process demanded by justice.

How We Got Here

A short review of Canadian history is required to understand the background of these long overdue negotiations. When Europeans first began to settle in North America, Britain recognized Aboriginal land title. The *Royal Proclamation of 1763* stated that only the British Crown could acquire land from the Aboriginal people through treaty. This is indeed what occurred in most of Canada before Confederation. The new Dominion of Canada continued this process before the west was opened for settlement, but in British Columbia, this process was never completed. When BC joined the Confederation in 1871, only 14 treaties on Vancouver Island had been signed and land title to the rest of the province was unresolved. Not until 1970 was a process developed for Aboriginal people of BC to pursue their rights to land.

In fact, most BC First Nations had to wait until 1993 to work towards recognition of their rights.[2] In landmark judgments such as the *Delgamuukw* case, the Supreme Court of Canada clarified that Aboriginal title is the *right to the land itself*, not just the right to hunt, fish, or gather; and that aboriginal title was never extinguished in BC, even though the land has been regarded as Crown land, owned by the federal or provincial government.[3] At present, until treaties are

[2] BC Treaty Commission, "Why Treaties? A Legal Perspective." http://www.bctreaty.net/files/pdf_documents/why_treaties.pdf (accessed October 22, 2011).

[3] Ibid.

established, the government must consult with First Nations people whose rights are affected by land development, and hence there have been many delays in development, delays that have angered many citizens, unaware of the underlying issues of Aboriginal justice.

The Sliammon People

This lack of knowledge and sensitivity became manifest when the City of Powell River came together with the Sliammon First Nation. Most people had no clue that the city was built in an area once seasonally inhabited by the Sliammon, whose territory had covered over 2,170 square miles of land in Northern British Columbia, including some village sites estimated to be 4,000 years old. The plentiful resources of the land, rivers, and sea supported the Sliammon people, whose stories tell of a rich and thriving culture with a deep connection to the land. After the first Indian Act in 1876, the federal government took control of the land and lives of Aboriginal people, relegating the Sliammon to six Indian Reserves, totaling approximately 12 square miles of land, less than 0.6% of their traditional territory. They stopped using the winter village located at the present Powell River City site after 1913 when the dam, built to support the pulp and paper mill, eradicated the salmon run.[4]

In 2002, a dispute arose between the City of Powell River and the Sliammon First Nations over the plan to develop a seawalk which would disturb or destroy significant cultural sites of the Sliammon, including petroglyphs and shell middens. The original planning excluded input from the Sliammon people, and this dispute served as a starting point for the City of Powell River and

[4] BC Treaty Commission, "Sliammon First Nations and City of Powell River: Sharing 'Best Practices' in Intergovernmental relations and Planning," http://www.bctreaty.net/files/pdf_documents/Sliammon_Best_Practices_Intergovtl_Plg.pdf (accessed October 23, 2011).

the Sliammon people to work more closely together through the development of the waterfront park and appreciation of each other`s values and culture.[5] This process facilitated an understanding of the Sliammon First Nation's history and the injustices that have occurred since the First Indian Act in 1876. Since 2002, the Sliammon First Nation completed treaty agreements with the government, which are yet to be ratified. But the citizens of Powell River learned that present-day justice is contingent upon the redress of historical injustice. [6]

The Nature of Justice

Distributive justice concerns the fair exchange of goods in a society. Fair distribution considers the available quantities of goods, the process by which goods are to be distributed, and the resulting allocation of goods to members of society. Theoretically, we should know that justice has been rendered when the process of exchange has been fair, arising from a just situation, based on the full knowledge and consent of both parties.[7]

By focusing on the construct of justice as free exchange in the marketplace, one might think it possible to settle land agreements more quickly, as the BC Treaty Chief Commissioner

[5] Ibid.

[6] Nozick uses historical principles of justice which claim that past circumstances or actions of people can create differential entitlements to things. He contrasts this approach to Rawl's patterned approach which Nozick argues interferes with people's free choice to do what they please with what they have. Nozick's theory applies in a very particular way to the situation of the First Nations people of BC, who have commodities of great value due to them based on history. Nozick defends a minimalist government, which critiques the overreach of the government in taking away Aboriginal land. Robert Nozick, *Anarchy, State and Utopia*, (Basic Books Inc.: New York, 1974), 39. An additional component of the present process is the achievement of self-governance, which all admit will be challenging, given the limited experience of Aboriginal people in Western capitalistic environments. Therefore, once justice related to land titles is solved, other issues related to, but not directly arising from this past injustice, may occur. Also, additional issues of justice such as the role of women in resource distribution and participation in leadership may arise. These issues will require the application of other theories of justice. Ibid., 53-155.

[7] Ibid., 151

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encourages. All that is required is consensus between the government and the First Nations people. But these negotiations do not operate with a blank slate; historical injustices and inequities have to be addressed before the parties can negotiate on equal terms. The complexities abound: the murky arrangement of Crown and private land holdings—land that historically belonged to the First Nations people—makes restitution in the contemporary setting difficult to achieve. The concepts of 'historical ownership' and 'due process in acquisition' are helpful principles, but the murkiness of the actual facts makes it difficult to solve this issue quickly.[8]

However, as demonstrated in the example of building the seawalk, the concept of justice includes a number of spheres:[9] land rights, but also other dimensions, such as the capacity to develop joint business ventures and the right to celebrate traditional spiritual and cultural practices. Proper treaty development requires, we have seen, mutual value clarification and respect for spiritual practices. Though vital, these spheres of justice are not likely to surface among most Canadians' understanding of land ownership It is therefore even more important that First Nations people, who often live next to non-native communities, develop a process for on-going cultural

[8] In Nozick's theory of justice in terms of land ownership, he refers to Locke's theory of acquisition in that a person can take an unowned object and mix it with their labor providing such that the previously "unowned thing" becomes permeated with what one owns. In this case however, the land was previously "owned," and this has been affirmed both by the earlier treaties and by the Supreme Court of Canada. A further complication is that land, for most Aboriginal nations historically and in the present, is not considered individual property, but is held in common. Because the Lockean proviso stipulates that resources not be depleted for future generations, Nozick does have a relevant point to make. Care of the environment for future generations is important to the First Nations people, but how that will happen in the present context remain uncertain. Ibid.,174.

[9] In mentioning Michael Walzer's description of the spheres of justice, I want to point out that there are various theories on distributive justice, each of which may be helpful in different situations or in the same situations to address varied social and cultural contexts. For Walzer, principles of justice should be based on "shared understandings" in each culture. In this context, non-Aboriginal Canadians must understand the values of First Nations people so that they might better live together as one society. In his description of complex equality, he advocates that different social goods be distributed in different ways, independently of each other, as opposed to dominance of one aspect, such as wealth or the dominant political party spilling into all spheres. Another dimension of Walzer's work that is not developed here, but is pertinent to this situation, is the government's blocking of legal justice for the Aboriginal people who were in many ways barred from citizenship and in this way barred from membership in the community, the primary social good to be distributed. Michael Walzer, *Spheres of Justice*, (Basic Books Inc.: United States, 1983), 31, 59.

education for neighboring communities—and that those communities develop a process to receive and honor that cultural education.

While due process is a necessary component to the administration of law, other broader definitions of distributive justice, such as these, can help to arrive at fair outcomes in diverse spheres of life. The experience of the Sliammon First Nation and the City of Powell River points toward the need for an understanding of justice that is comprehensive enough to meet the juridical requirements of the law, as well as complex enough to direct people toward integration of values that strengthen community wellness and a shared sense of prosperity. Yes, the process of treaty negotiations has been lengthy and expensive. But that length and expense pales in comparison with the First Nations' long and costly struggle for justice. While the Commissioner complains of months, the First Nations could complain of decades, of centuries. Thus, for the sake of the stability, longevity, and fairness of these treaties, it behooves the BC government to recognize the complex dimensions of justice… and to exercise, let us say, a modicum of patience.

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