CHAPTER FOUR

WHAT'S HAPPENED TO ABORIGINAL PEOPLES IN CANADA?

The fastest growing population in Canada is indigenous people. Their birth rate on reserves and in cities is high, and as children finish primary school, the exodus to urban centres picks up. In my work as an advocate for the First Nations in Ontario, I have seen that the federal government is not worried about that fact, because they interpret the constitutional responsibility for "Indians and lands reserved for Indians" in s.91 of the Constiution in the narrowest way and so pay scant attention, outside the blunt instrument of the criminal law, to what is happening in the major growth centres.

There was a time, not so long ago, when it was thought that Aboriginal people would disappear completely. The

1923 Williams Treaties in Ontario between the Crown and the Mississauga and Chippewa literally contained an "extinction clause." This dictated that whatever land and money was awarded to these Aboriginal people under the treaty had to be returned to the province of Ontario once the Aboriginal people disappeared.

Back at first contact in the sixteenth century, there were as many as 2 million people living in what is now Canada. European diseases decimated the population through one plague after the next. Add the violence that accompanied the new colonialism, and by 1871 the census only reported 100,000 Aboriginal people in Canada.

The government's plan was to bring that number to zero by assimilation. For a long time, the Indian Act dictated that any recognized Indian would lose status by voting, receiving a university degree, serving in the military, becoming a clergyman or lawyer, or marrying a non-native or non-status person. Death by a thousand clauses, or so the plan went.

It failed, not least because of the tremendous resilience of Aboriginal communities. In 2014, there were about 1.4 million Aboriginal Canadians, and given that population's consistently high birth rate, that number is swelling rapidly.

This trend will only grow, and the education, social service, and health care costs are, again, taken up by someone else further down the line.

The implications of this population boom were widely discussed by the Royal Commission on Aboriginal Peoples in the 1990s and then promptly ignored. The one emphatic response of the last decade—Paul Martin's Kelowna Accord, negotiated for over a year between Aboriginal leaders, the federal cabinet,

and the provinces—was scrapped days after Mr. Harper took office. Its replacement has dramatically increased the incarceration rate among Aboriginal people and made an attempt to deal with the education agenda, and scant else. Mr. Harper gave an eloquent apology for the truly disastrous and racist policy of forcing First Nations children into residential schools, but the government never followed those words with the actions that would show any seriousness of purpose.

For all the rhetoric about nation building, the unresolved relationship between indigenous people and other Canadians and their governments stands out emphatically as nothing less than our national shame.

Attawapiskat is an impoverished, remote community on James Bay where most of the community is unemployed and most of the budget comes in the form of handouts from Ottawa. The amount of the money granted to the community is controlled by bureaucrats and politicians in Ottawa, who can change or stop it at any time. It is a classic colonial arrangement.

Attawapiskat is not the only community with such an arrangement—there are over six hundred bands across Canada that are covered by the Indian Act. For most of them, housing is a major concern, and with money in short supply, they are little prepared to deal with the problems they face.

But there is a third, underlying crisis beyond poverty and beyond housing—a crisis of governance. Municipal and Aboriginal governments share the problem that they have neither the means nor the powers to address the challenges that their

citizens face, with the result that they are in a state of dependency on the federal government, with all the resentment and dysfunction that brings.

The solution rests in a new fiscal arrangement that ensures the right revenue streams go to the right levels of government, complete with all the transparency, responsibility, and accountability citizens want and need. Where there is corruption and waste, we must root it out, but colonialism is no way to govern.

Canada is an Aboriginal country as well as a settler country. We rarely see ourselves this way, but it is past time that we started doing so. The fact that settlers are in a significant majority does not take away from the simple fact that when Europeans made first contact with the northern half of North America, there were millions of people already here.

From the Beothuk in Newfoundland—a population completely wiped out by disease and violence—across every corner of Canada to the far west and north, Canada's first people had built a civilization, a way of life thousands of years old and rich in diversity. They were not "savages" (as they were called, in French and English), nor were they "ignorant wretches," nor were they less than people. They had developed complex societies with distinct languages, systems of governance; they were real people with a real way of life.

The first centuries after initial contact were marked by apocalyptic disease, racism, and colonial duplicity that promised peace and security and delivered neither.

The premise of colonial settlement was that the lands of the Americas were there to be conquered and populated as a matter of right. From a legal standpoint, the lands were described

as *terra nullius*—"no-man's-land"—and therefore belonging to whichever empire could enforce its control through superior force of arms. From the earliest days, the accounts of the time tell us of the discrepancy between the worldview of the indigenous people and that of the Europeans. Land could not be given away or surrendered because it was not the indigenous people's to give—a gift of the creator could be shared, but it could not be sold. To the settlers, these ideas were incomprehensible. Land needed to be divided, worked, and controlled. It had to belong to someone.

When the British Empire took control of the French Empire's North American territories in 1763, the Treaty of Paris was quickly followed by the Royal Proclamation of 1763. It was a true expression of British "statecraft." Just as the Quebec Act eleven years later was about securing the loyalty of French Canadians in the face of trouble in the thirteen colonies, the British knew that they had to recognize the integrity of indigenous societies in order to deal with the appetite for settlement and expansion that was such a powerful feature of North American society.

As settlers in both British North America and the United States were granted more autonomy, the rights of the First Nations were increasingly dismissed. Gone were the noble ideas of peoples who, in the language of the Royal Proclamation, had a right "not to be molested or disturbed." Lands were given and then taken away; promises were made and then broken; people were moved at will. In the words of the 1763 Royal Proclamation, "Great frauds and abuses were committed."

But the frauds and abuses did not stop when King George III ordered them to end. In Canada, as in the rest of

the Americas, the colonial process of settlement had the effect of dispossessing Aboriginal people, of moving them, of even killing them.

It is hard for us, today, to absorb the extent to which institutionalized racism was at the heart of public policy for so long in our own country, but it is something that we must acknowledge and remedy.

By the middle of the nineteenth century, it was a misguided conceit of public opinion that the "inferiority" of the indigenous people would lead to their disappearance. The Papal bulls of the sixteenth century that sanctified the invasion of the Americas had their Protestant equivalent, and the revival of the evangelical movement led to renewed efforts to convert the Aboriginal people and to subvert native customs and languages. The sheer number of settlers, their hunger for land, timber, and mineral wealth, led to a demand that reserve lands be broken up as much as possible and that the "illiterate and savage" population be kept apart.

As if this racism needed further support, social Darwinism was added to the mix. A new social science was emerging in Europe and the United States in which the idea of the survival of the fittest was said to justify racial hierarchies. Herbert Spencer wrote about how superior and muscular societies should not be held back by an interfering moralizing state. The science of eugenics—which appealed to many different streams of thought, even to a young social reformer, Tommy Douglas—justified the sterilization of the "unfit."

Only by understanding the depth and breadth of these ideas can we fully understand the enormity of what then happened and how a trio of policies emerged that wrought such havoc

to human life and created the nightmare from which Aboriginal people are struggling to awaken. These policies were the passage of the Indian Act in 1876, the creation of compulsory residential schools, and the negotiation of treaties of which the purpose in the eyes of the settlers and their governments was to confine the Aboriginal people to small, remote communities or force those same people to lose their status if they left the reserve.

Aboriginal peoples in Ontario, Manitoba, Saskatchewan, Alberta, and parts of British Columbia live under treaties that were, for the most part, signed between the second half of the nineteenth century and the early twentieth century. We call these the "historic" treaties. The majority of Aboriginal people today are connected to land that is 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 relatively recent study on community well-being that looked at twenty-five years of data on outcomes in education, employment, income, and housing showed that between 1981 and 2006, modern treaty First Nations improved well-being 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.

There are a couple of ways to explain this growing inequality. The first is that the historic treaties were interpreted and administered by both federal and provincial governments as

limiting Aboriginal people to reserves and giving up all traditional lands to the Crown. This view has never been accepted by the Aboriginal people, who have always insisted that they never abandoned jurisdiction and only agreed to share the land with newcomers and their governments. The other source of the divergence is forty years of progressive Supreme Court judgments and the related shifts in government policy toward the parts of Canada *without* historic treaties.

A lot of Canadian land is covered by these historic treaties, but not all. Much of the Yukon, the Northwest Territories, Quebec, British Columbia, and the entire eastern Arctic now known as Nunavut never had treaties that purported to address land. This is a major difference. And it has major consequences.

In 1973, shortly before I went to law school, the Supreme Court acknowledged in *Calder v. British Columbia* that Aboriginal people still had some rights ("Aboriginal title") to land that was not ceded to the Crown. A powerful dissent by Justices Hall, Spence, and Laskin in the case set out emphatically what many Canadians now realize to be true, namely that "the proposition . . . that after conquest or discovery the native people have no right at all except those subsequently granted or recognized by the conqueror or discoverer was wholly wrong." 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 federal 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 twenty-six modern treaties today and why 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 in 1997 fleshed out the legal tests for proving Aboriginal title. And the *Tsilhqot'in* case of 2014 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. As a result, 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

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bowl. Anyone who wants First Nations to be more prosperous and less dependent should be in favour of fundamental changes.

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, particularly at 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 meant.

Two examples in particular show the true nature of the change wrought by the historic treaties: Treaty 6 and Treaty 9.

Treaty 6 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 already living on this land. The federal government wanted to build the national railway, the Canadian Pacific, as quickly as possible. To do that, it decided to get the

Indians out of the way by "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 for food and trade for thousands of years, had gone nearly extinct within a decade. Aboriginal people were dying of starvation en masse.

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.

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 one hundred years ago? No. The answer is

plainly no. If you put a gun to someone's head and force him to make a deal, this is not called a bargain. It is called robbery.

Treaty 9 covers the enormous expanse of Northern Ontario. 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 agreed to.

Here's how negotiations for Treaty 9 worked: The terms of the treaty were predrafted, 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 forty thousand Aboriginal people. There are very real, troubling, and unanswered questions about what was actually agreed upon.

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 it, in exchange for which they would get, depending on the treaty, either four dollars or five 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, and the indigenous people must have known that when they signed.

The Aboriginal view was that the treaties were about sharing land, protection, and peace, as well as a promise of undiminished hunting and harvesting. Oral history as it has been passed down in Aboriginal communities does not conform to the Crown's view of treaties. There is also no evidence from notes taken by the commissioners or their staff that either the Aboriginals' surrender of the land or the restrictions on hunting and harvesting were ever discussed or 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."

When Scott says that "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?

Today, looking back at historic treaties, there are a few ways they can be understood. Tom Flanagan, a long-time advisor to the Reform and Conservative parties, has said that "the deal is the deal." The wording of the treaties has to be seen as definitive. This is not simply his view but the argument that both the federal and provincial governments make in court. The trouble with this argument is its sheer implausibility.

The better option is to recognize that the deal, as interpreted by the Crown, is simply 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 more than 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 few pieces of land that are five miles by five miles and a few dollars a year, and you promise to let me hunt and fish without interruption unless you decide otherwise, and to "take care of me." To put it in terms of a real estate transaction, it's preposterous. It doesn't make any sense.

This means we have to look carefully at 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 should 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. Only by having these discussions with Aboriginal people about the past can we have meaningful discourse with them in the present.

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. This needs to change.

In the summer of 1992, all of 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 that same year. We all know that this series of proposed amendments to the Constitution—including Senate reform—was defeated in a national referendum.

To put matters of dignity in blunt economic terms: healthier communities cost less to taxpayers.

But surely it can be argued that if self-government and new governance arrangements with all First Nations made sense to governments twenty-three years ago, it is about time we made progress today. The status quo is unacceptable, and it is costly. Whatever money the province may feel 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, a bogeyman that is actually the opposite of the truth. 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. And without it, progress for everyone will be delayed.

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 paternalism of the past, the remnants of colonialism that are still part of Canada's laws and bureaucratic structures need to go.

The worse this gap gets, the more the governments of Canada, Ontario, Saskatchewan, Alberta, and Manitoba should be shamed into action. The status quo is certain to lead to more blockades and civil

disobedience unless the provinces come to the table. Since the *Calder* case forty 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. 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.

The paternalism of the past, the remnants of colonialism that are still part of Canada's laws and bureaucratic structures need to go. The model we have is broken. The federal department of Aboriginal affairs has to be taken apart, the Indian Act should be repealed, replaced by self-government agreements that go beyond the current reserve structure. This is an agenda that was set out years ago and has been sidelined by prevarication and a misplaced appeal to populism.

When high school dropout rates are what they are, when there is such a gap in health, in income, in life expectancy, in housing, in economic development, we need the courage to say the current model is broken and needs to be fixed.

When young girls and boys are taking their lives because they see no hope it is not just an issue of jobs and governance. It is a deep crisis of the spirit. It is a cry of the heart and the soul. None of us can be indifferent to that cry, none of us can turn away from the abuse and addiction that have been allowed to swallow up too many.

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The need for recognition, for change, is the human rights challenge of our time in Canada. There was a

time when many Canadians could turn away from these issues because they were far away, away from the centres of population, away from awareness. This is no longer true. The great movement from reserve to city is well under way—what was "out there" is now "in here," and the issues and challenges have to be dealt with and faced head-on.

When Chief Justice Marshall of the U.S. Supreme Court presided over a majority decision that insisted that only the national government could make decisions on Indian affairs, President Andrew Jackson famously remarked, "John Marshall has made his decision; now let him enforce it. . . . Build a fire under them. When it gets hot enough, they'll go." And that's exactly what happened as the Cherokee Nation, like the Choctaws and Seminoles before them, were forcibly removed from their homes and driven down what became known as the Trail of Tears to Indian Territory.

It is a truly shameful episode in modern history, but it is Andrew Jackson's comment that drives home the dilemma that is faced even today. Since the early 1970s the First Nations, Inuit, and Métis people have been winning substantial and important legal battles. What is deeply troubling is the gap between the court decisions and the willingness of both provincial and federal governments to enforce and follow those decisions.

As Murray Sinclair, the chairman of the Truth and Reconciliation Commission, put it so succinctly when he quoted the aphorism, "The truth will set you free, but first it will piss you off."

The dilemma remains that the majority of Canadians, and the parties that strive to represent them in Parliament, think about these issues as little as they have to. They will not be front and centre in any election campaign, and these relationships are as subject to misunderstanding, stereotype, and sheer ignorance as any public policy in the country.

The reason for the lack of leadership is not hard to figure out—it has everything to do with a read of public opinion itself. A majority of Canadians do not see these issues as a priority.

But the issues will not go away or get any easier as time goes on. As mentioned, the indigenous population is the fastest growing in the country, and it will become an increasing factor in the urban communities where most Canadians live. And resource development is now extending deep into the traditional territory of people who have strong views about their own jurisdiction, rights, and needs. Governments and companies ignore these realities at their peril.

Some governments and premiers understand this, and some not so much. But if the insistence of our constitutional law that accommodations must be reached is not matched by serious political action, the result will not be a trail of tears. It will be a series of confrontations, large and small, that in themselves will require a response. The purely majoritarian theory of democracy is not good enough. A richer view of constitutional democracy is required. But that in itself is a challenge, to which I now turn.