

FORUM

REVISITING THE NATIVE LAND QUESTION

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ROBERT McDONALD HAS ASKED me to summarize my recent book, *Remaking Native Space*,¹ and particularly to shorten its final chapter, for discussion in *BC Studies*. In what follows, I attempt to do his bidding.

Most of *Making Native Space* describes the implementation of the reserve system in British Columbia, a system that left Native peoples with more than 1,500 reserves comprising slightly more than one-third of 1 per cent of provincial land held in trust for them by the federal government. *Making Native Space* explores this complex process of dispossession and repossession in too much detail to summarize here, but I can summarize the different sites of power that accomplished it. The *capacity to dispossess* rested on raw firepower authorized, usually, by the administrative superstructure of the state. Gunboats could and did raze coastal villages; a few Native men were conspicuously hanged as examples to others. In the Interior, where gunboats could not operate and settlers were few, the military equation was more balanced. Some chiefs counselled war, while knowing that in the long run, they could not win: it was better, one of them said, to fight than to starve. The *momentum to dispossess* came from capital seeking profits and from settlers seeking livelihoods. Land unencumbered by alien use rights was the means to both these ends. The assault against local custom waged for centuries in Europe (in, for example, struggles over enclosure) reemerged in a racialized colonial setting. An early premier (Walkem) held that Native reserves should be small so that Native people would be forced to enter the industrial workplace, there to become civilized – an agenda that turned over unencumbered land

¹ Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002).

and cheap labour (detached now from land) to capital. Beyond capital, ordinary immigrants, whether farmers, loggers, or shopkeepers, all depended directly or indirectly on the separation of Native peoples from land. The *legitimation of dispossession* lay with a cultural discourse that located civilization and savagery, identified the land uses associated with each, and thought it altruistic to transform the latter into the former. Over the longer term, the *implementation of dispossession* rested with a set of disciplinary technologies among which maps, numbers, and, especially, the common law were essential. From a Native perspective, an even more enveloping discipline may have been imposed by an introduced land system and its associated settlement geography, which, by controlling where they could and could not go, increasingly bounded and channeled their movements.

Native peoples resisted this juggernaut of powers as they could, not always without effect. In the 1870s, and from time to time thereafter, they considered war, hopeless as it seemed. One chief tried kindness (to no avail). Soon after Governor Douglas retired (1864), and as an increasingly parsimonious land system settled around them, Native leaders spoke out on the land question, saying over and over again that they had never ceded their ancestral lands and could not survive on their reserves. The Indian reserve commissioners allocated sites Native peoples particularly favoured – village sites, fishing sites, burial grounds, garden patches – while watching always to protect the property rights of settlers, the forests for industrial logging, almost all agricultural land for immigrant farmers, and (after the early 1880s) fish for the industrial fisheries. Long before 1938, when the BC reserves were officially transferred to Ottawa, Native peoples had been detached from almost all their land, a settler society was firmly in control, and a scatter of tiny Indian reserves represented surviving Native toeholds in ancestral territories.

In these cramped circumstances, Native peoples made do as they could. Essentially, they balanced three scales of economic attachment: the reserve, what remained of a former regional economy, and wage work in the immigrant economy. The reserves (some of them) provided gardens and occasionally a viable farm or two, perhaps a store, perhaps a site from which to pursue the Indian food fishery, but never more than a partial livelihood for most of the people who lived on them. They were too small. Beyond the reserves, elements of the older regional economy of fishing, hunting, and gathering remained, especially in the less resettled parts of the province, but

everywhere they were encroached upon by alien property rights. Increasingly Native people operated in the interstices of rights held by capital and settlers, spaces that sometimes yielded enough to get by but sometimes did not. Beyond the regional economy, and particularly in the early years, when labour was scarce, Native people often found wage work in the resource industries and in transportation. Some of them travelled hundreds of miles to these jobs. Later, as competition for wage work increased, Native workers became less competitive. They were known to be good workers, but employers considered them unreliable. Some of them probably had found it difficult to adjust to the clock-dominated, supervised work routines of industrial capitalism – as had workers entering the factories in late eighteenth-century England – but the great difference between them and the workers with whom they competed was that they were bound by the ties and responsibilities of home in a way that most other workers in early modern British Columbia were not. Chinese labourers worked where they were sent along a coast they did not know, an unencumbered labour force recruited by labour brokers and available as needed. White male loggers moved from camp to camp. Neither of them contended with the seasonal demands of older resource economies that could not be left entirely behind because a capitalist, primary resource economy was inherently unstable, subject to resource depletion, technological change, and fluctuating international prices. A cannery provided work one year and closed the next, a railway required construction workers, then laid them off. The logical entailment of such work – a logic adopted by the floating male labour force in most of the resource industries in early modern British Columbia – was rootlessness. This, however, was not an option for Native people. The capitalist economy was too uncertain, racial barriers too high, and attachments to ancestral lands too strong. Moreover, the reserves and former regional economies usually produced something. And so Native people stayed on the reserves in their ancestral territories, and their lives became a precarious balancing act at the intersection of what the reserves, the regional economy, and wage labour might yield.

This economy of multiple occupations sputtered along. When there was wage work, and when the domestic economies of reserve and region provided food, Native livelihoods could be fairly ample. But when there were no jobs, and when the domestic economy struggled, then Native peoples came close to starvation. Malnutrition and its

consequences were common. Drinking water was often inadequate; sometimes the contents of wells and privies mixed after a spring flood. The problems of sanitation in sedentary populations were suddenly more acute than they were when people had moved seasonally through ample territories. In these circumstances, deaths outnumbered births in most bands. Infant mortality rates were far higher among Native than non-Native populations, as were the rates of tuberculosis and of infectious diseases, such as cholera and typhoid, that were the product of filth. Mary-Ellen Kelm has provided the fullest analysis of Native morbidity and mortality.² It becomes clear that the detachment of Native peoples from their former lands had come close to wiping them out.

In short, two very different stories underlie British Columbia. One is about progress and development, about the creation and achievements of a settler society – a story of which most British Columbians have good reason to be proud. It rests, however, on the other basic story about this place, which is about dispossession, loss, marginalization, and the struggle for survival. Each story is entailed by the other; the second is the obverse of the first. British Columbia is impregnated by these stories, they cannot go away because provincial society is made and remade by them, and the issues they present surface in ever more pressing political and legal forms. The question, for which there is no simple answer, is: how do we live with these conflicting stories so as to bring Native and non-Native British Columbians into a more balanced and respectful relationship? The question is, perhaps, how do we begin to tell another story?

My book, most of which considers the implementation and effects of the reserve system, turns in its final chapter to this question, especially as it bears on issues of land. I argue, basically, that there are two options: a politics of assimilation or a politics of difference. I suggest that, whatever its theoretical attractions, a politics of assimilation, which has been pursued in British Columbia for the last 150 years, has largely failed and that the only realistic option is a politics of difference. I attempt to show that, far from a last resort, a politics of difference is consistent with Canadian experience and presents attractive, principled opportunities. I suggest that if such opportunities are to be realized the return of land (resources) to Native peoples and a considerable measure of Native self-government are

² Mary-Ellen Kelm, *Colonizing Bodies: Aboriginal Health and Healing in British Columbia, 1900-50* (Vancouver: UBC Press, 1998).

necessary preconditions. But I also show that Native policies in British Columbia have always been driven primarily by the values of a settler society – a society that has benefited immeasurably from its acquisition of Native land, has usually viewed Native peoples through pejorative stereotypes, and has never been willing to redress significantly the imbalances associated with its own colonizing encounter. I end somewhat apprehensively – convinced about necessary directions of change yet doubtful about the province's willingness to explore them. Here is the core of that chapter.

At Oxford, 160 years ago, Herman Merivale argued that the interests of Native peoples and settlers were intrinsically opposed and that Native peoples would be exterminated if the two were not shielded from each other.³ He held that the executive (the Colonial Office and its officials in the field) should be positioned between Native people and settler values and colonial legislatures – a scheme tried here and there (in British Columbia under Governor Douglas) but abandoned when the Colonial Office committed itself to responsible government. After Confederation, the Government of Canada replaced the Colonial Office but, itself a settler government at one remove and committed to maintaining a fractious Confederation, the government interceded weakly and erratically over the years in defence of Native peoples in British Columbia. Recently, the enshrinement of Native rights in the Constitution coupled with decisions of the Supreme Court of Canada have come to assume something of the role that Merivale envisaged for the Colonial Office. Native peoples have turned to rights-based arguments because there seemed to be no alternative, and the Supreme Court has found for them (most notably in *Delgamuukw v. R.* [1997]) in qualified ways. Overall, Native peoples have faced the situation against which Merivale had warned – two differently positioned peoples claiming the same land, one of them with the power to support its claims with an accommodating and enforceable land policy.

Much of the massive recent literature on Native issues in British Columbia tends to agree with Merivale and to position the courts and the Constitution as the defenders of Native rights. For example, Patrick Macklem, professor of law at the University of Toronto, argues in a recent book that there is a unique constitutional relationship

³ Herman Merivale, *Lectures on Colonization and Colonies Delivered before the University of Oxford in 1839, 1840 and 1841* (London: Oxford University Press, 1928), lectures 18 and 19.

between Aboriginal peoples and the Canadian state and that this relationship entails the constitutional protection of Aboriginal culture, territory, and sovereignty as well as of the treaty process itself because “treaties establish basic terms and conditions of Aboriginal and non-Aboriginal co-existence.”⁴ There can be no doubt of the recent importance of rights-based arguments and court decisions, but there can also be no doubt that, over the years, the mindset of a settler society has had far more influence on the course of Native policies in British Columbia than has anything else. The Colonial Office was rarely able to enforce land policies that were radically different from the majority opinion in settler colonies. When British Columbia entered Confederation, it rejected Ottawa’s Native land policies, and eventually the Dominion largely went along with policies espoused by the province. Behind provincial policies were the prevailing views of a settler society. The Supreme Court can prod, but rights-based claims, argued through the courts, will probably continue to yield enormous expenses and qualified judgments. The issues will be returned to the lopsided realm of politics and negotiation – about which Merivale was so pessimistic. There may be no getting away from the challenge of thinking from within structures and mentalities associated with colonialism towards ways of surpassing them. In the final analysis, British Columbians of all stripes will have to work this out.

Prevailing settler views of Native peoples have not been difficult to discern. Many settlers would happily have seen Native peoples dead and gone, but the more thoughtful and generous among them usually assumed that people they considered savages should be assimilated into civilized settler society and then, once civilized, admitted to the larger society as full citizens, subject to its laws and responsibilities. Such views drew (usually indirectly) on a rich tradition of liberal political philosophy that considered the individual to be the focus of rights and that was wary of claims for collective or group-differentiated rights. These views have had a convoluted history: a long generation ago, the Co-operative Commonwealth Federation (CCF) supported them; now right-of-centre parties support them. Today the progressive agenda supports cultural difference and usually holds that Native peoples need more land. On the other hand, there is abundant evidence – in the results, for example, of recent elections and of a referendum – that many British Columbians still favour a politics of

⁴ Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001), 5.

assimilation in which Native people would be recognized as full citizens without special rights to land or to anything else. Immigrant settlers (or their ancestors) had no special rights, but they worked hard and have become established Canadians: Native people should do likewise. No special privileges, equal rights for all – a powerful and understandable position.

Yet, whatever their theoretical attraction, there is little evidence that the assimilative policies pursued over the last 150 years have worked. An assimilative barrage has been thrown at Native peoples in the form of missionary teaching, residential schooling, cultural stereotyping, even the reserve system. Native cultures have been hugely altered by it, and approximately one-third of Canadians with some Native ancestry no longer identify themselves as Native. But in relation to the intensity and duration of the campaign to eradicate Nateness, its achievements have been meagre. The number of people who consider themselves Native is growing rapidly – by 22 per cent in Canada between 1996 and 2001. Most Native people have not wanted to be assimilated and, in spite of all the pressures, have not been. Of course, the meaning of Native identity claims is open to question. Native people do not live as their ancestors did, and some probably advance identity claims for political or social reasons (e.g., to advance land and self-government claims). Yet the concept of Native (or Indian or Aboriginal) is as old as is European contact with British Columbia, and the concept of particular local groups reaches back into time immemorial, to the creation accounts and long pre-contact pasts lived in particular places. On this has been superimposed the difficult experience with colonialism and, eventually, lives as now lived. Native peoples are located within distinctive histories and geographies, distinctive institutional arrangements, particular prejudices, the gamut of influences that situate them distinctively in British Columbia. Their identity claims are so grounded. If assimilative policies are vigorously pursued, the Native peoples will resist them with all the weapons at their disposal, and with, in the view of many, the backing of judgments of the Supreme Court and of the Canadian Constitution. The province could well become dysfunctional.

If the prospects for the successful implementation of a politics of assimilation are virtually nil, and if the cost of trying to implement such a politics is likely to be grave social disruption, then – whatever else may be said on the matter – it is simply unrealistic to urge that any one individual in British Columbia should be treated exactly like

any other. Such a goal is a theoretical rather than a practical option. The only real alternative is a politics of difference; that is, policies that respect and support Native distinctiveness. Given the values and benefits associated with successful settler colonialism, many British Columbians will find this an exceedingly difficult commitment. There are, moreover, difficult questions to answer. Are such policies regrettable expedients or do they embody attractive principles and prospects? If a politics of difference extends to one group, then should not the same rights be available to other groups? And if they are, then is not the result a Byzantine patchwork of group rights across the country, one that provides little basis for a manageable Canadian polity or for a sense of common Canadian citizenship? These are basic questions that go to the heart of the nature of Canada, the point where, finally, the Native land question probably turns.

Canada, of course, is an outgrowth of a corner of the British Empire superimposed on the heart of the former French Empire in North America. It has always had, therefore, to deal with difference. During the Confederation debates, John A. Macdonald favoured a unitary state, a vision that foundered on the diverse reality of Canada, and particularly on the cultural distinctiveness of Quebec. The British North America Act did not deal with Native peoples, other than to assign jurisdiction over them. Since Confederation, and particularly in the last thirty-five years, Canada has become home to a multitude of diverse peoples. Multiculturalism has become an interpretive principle of the Charter of Rights and Freedoms, 1982; and the Multicultural Act, 1988, envisaged the "multiculturalizing" of all Canadians. Difference, in short, has a long Canadian history, and it has been seen less as a quality to be boiled away in the melting pot than as an intrinsic part of who we are.

In a country in which the dominant institutions derive from Britain and most people are English-speaking, the issue of difference and of group-differentiated rights bears particularly on those who are not of British ancestry. In short, among the many other cultural groups that make up Canada, are some entitled to special rights and protections? Here I rely on the moral philosopher Will Kymlicka, who argues that the country has a particular responsibility to those who were here, in self-governing societies, before the Canadian state was superimposed on them.⁵ He considers their circumstances different

⁵ Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Toronto: Oxford University Press, 1998).

from those of immigrants who, in making the choice to leave their place of birth, knew that they would enter a different society with different cultural demands and accepted this as a consequence of their decision to emigrate. Kymlicka suggests, therefore, that the descendants of settlers during the French regime and Native peoples – minorities here before the Canadian state was invented – have deeper claims to the protection of difference than does any immigrant group. I agree with him. Others have argued that a society that has become wealthy out of lands taken from Native peoples has a responsibility to return enough of what was taken so that the dispossessed can again live in comfort and dignity. Yet others maintain that Native peoples have a unique legal and constitutional relationship to the Canadian state – a relationship that requires it to afford them special rights and protections.

Canada, in short, has always been a country that has sought to balance individual and group-differentiated rights. Recently, that balance has expanded to include, at one level, multicultural rights and, at another, Native rights. Our laws and Constitution reflect these changes, but beyond the language of rights are the moral foundations upon which this country rests.⁶ The moral foundations have to do with providing respectful support for the underlying differences of which Canada is composed, and there is no more fundamental difference in a society composed overwhelmingly of immigrants and their descendants than that between those who came and those others who were always here.

How, then, to provide for difference; that is, how to begin to undo a long legacy of the very colonialism that has established a flourishing, and in so many respects worthy and enviable, settler society. In British Columbia, as in roughly comparable circumstances around the world, there would seem to be no simple answers.

Over the years, however, the answer coming from Native peoples has been clear and remarkably consistent. They have said that they did not have enough land (resources) and that, because they did not, their own and their childrens' livelihoods and physical survival were at stake. They wanted some of their land back. Implicit in their request was probably an argument for more self-government, although it rarely became explicit until recently. As the Royal Proclamation became known early in the twentieth century, they increasingly

⁶ Samuel V. LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal and Kingston: McGill-Queen's University Press, 1996).

situated the request for land within claims about title. But title claims were a means to another end: the return of some of their land, not any land, but land within the territories of their ancestors. The reserve system had confined but had not relocated them. Their complaints about the loss of their land and their pleas to have some of it returned were not abstract propositions that could be satisfied by any lands or livelihoods. Theirs were territorially bounded demands – combining economic calculus and cultural attachment – for more land within ancestral territories. Even today, when about half the Native people of the province live, severely underemployed, on reserves, and when more would probably return there if livings could be made, there are resources at hand that they cannot use. Quite simply, a politics of difference does not fit spaces that were predicated on a politics of assimilation. The Native prescription for the improvement of their lot is an entirely plausible analysis of the situation.

The return of some land (resources) to Native peoples will be an expensive and politically fraught proposition. Negotiations will be protracted and solutions will vary. Yet, if assimilation is a utopian dream; if, as Canadian courts and the Constitution now hold, Native peoples have a particular claim to the recognition and support of their difference within a country that has always allowed for group-differentiated rights; and if some reallocation of resources is essential to a politics of difference and the cultural well-being of Native peoples; then it is necessary to consider what, and how much, land should be returned to them.

This question will have different answers in different parts of the province, but most of them will involve access to fisheries or forests. Fishing once underlay the economies of most Native peoples in British Columbia, and some half or more of the province's Indian reserves were allocated with fishing in mind. However, as the industrial fishery expanded in the last three decades of the nineteenth century, legal control of the fishery passed to Ottawa. The Native fishery was relegated to a subsistence food fishery at the discretion of the minister of fisheries in Ottawa. Over the years, a network of federal regulation allocated commercial fish stocks, in so doing treating the fishery as an open access resource but managing it in the interests of the industrial fishery and licensing relatively few Native fishers.⁷ As a result, many Native people today live in settlements

⁷ Douglas Harris, *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001).

that once depended on fisheries and on reserves that were allocated to be fishing stations; however, because of one licensing scheme or another, they have access to only a small share of the fisheries at their doorsteps. A similar situation exists in forestry. A policy of excluding commercial timber from the reserves ensured that Native people would participate in industrial forestry as labourers rather than as owners or managers. This has hardly changed, and increased labour competition for a diminishing number of forest industry jobs has curtailed the Native presence in the industry that remains the principal generator of income in many parts of the province. The industry is still at hand. Loaded logging trucks roll past the reserves and many Native people must watch them with foreboding, much as their ancestors watched the coming of preemptors – livelihoods for others, derived from their land, and most of their young unemployed.

There are other ways of opening up livelihoods for Native peoples, but the principal opportunities lie in fishing and forestry. There is no point, however, in underestimating the difficulty of making this reallocation, which will bear directly on many lives and indirectly on everyone in the province, and which will test provincial limits of tolerance, respect, and political feasibility. Whether there will be the political will to do it will depend, ultimately, on the resolve of British Columbians themselves. Even those who reject a politics of assimilation and welcome a politics of difference may raise two related objections to any considerable reallocation of resources. It will be said that resource-based economies are declining, and, therefore, that Native peoples would be offered a losing position in an increasingly high-tech and global economy. An extension of this argument is that the future lies in the cities and, therefore, that energies should be directed there rather than to negotiating expensive and anachronistic reallocations of rural resources.

The argument that the resource industries present Native peoples with a rapidly declining opportunity is not new. More than forty years ago researchers from the University of British Columbia concluded as much and held that the Native future was urban.⁸ Since that time, the resource industries have lost their lustre but still dominate the economy in many parts of the province and generate far more wealth than is needed to sustain the Native population of rural British Columbia. Indeed, the vigour with which some oppose

⁸ Harry B. Hawthorn, C.S. Belshaw, and S.M. Jamieson, *The Indians of British Columbia: A Study of Contemporary Social Adjustment* (Toronto: University of Toronto Press, 1960).

a reallocation of rural resources, and the costs of doing so, is a measure of the continuing value of these resources. With more, and more secure, access to fish and forests; with control of more trap lines; with guiding and ecotourism, with various trades and crafts; and with some jobs elsewhere for a time, the economic future of most local Native communities does not look bleak – as long as they have access to a sufficient resource base. The claim that Native futures are urban depends on the assumption that resources will not be reallocated. Change the allocation, and a different economic calculation emerges.

The Native population of British Columbia has urbanized rapidly over the last forty years and is now approximately half urban. Native birth rates are high, employment opportunities on the reserves are few, and the bright lights are attractive. Native people have migrated to the cities for a great variety of reasons, but underlying all these moves are the simple facts that they could not make a living on the reserves and/or that they sought to escape social pathologies that are the common corollaries of poverty. Yet many urban Natives identify with and return frequently to reserves in tribal territories, to the point that some researchers have described the relationship as a form of commuting. Retaining strong cultural and identity attachments to their reserves, they commonly live their lives in both settings, which, in this sense, are two parts of a single system. Improve one part of the system and the other benefits. Of course, the Native future will be primarily urban if, as now, they are largely cut off from rural resources. But there is another future: reallocated resources, revitalized rural economies, considerably restored rural societies, and changed patterns of migration. More young people will stay on the reserves and more will come back. The cities will not be drained of their Native populations and will remain important loci of Native life, but it will not be axiomatic that the future is only urban. Unwillingness to tackle the allocation of rural resources lay behind the US Bureau of Indian Affairs' 1950s project to urbanize Indian Americans.⁹

My book has only a little to say about Native self-government, the other essential ingredient of a politics of difference, a considerable measure of which is needed for the protection of Native culture and the management of Native land. In the contemporary world, flourishing local cultures require some government protection, which, in British Columbia, neither the federal nor the provincial government is well

⁹ Elaine M. Neils, *Reservation to City: Indian Migration and Federal Relocation* (Chicago: Department of Geography, Research paper no. 131, 1971), 50.

positioned to provide. What they can provide is the legal framework within which local Native governments will be situated and upon which they will depend. Similarly, the Native management of Native land is an essential corollary of a politics of difference; otherwise, Native peoples will be required to follow rules and procedures of land use that are not of their making and may be antithetical to their understandings. There is a case for maintaining provincial or national baselines of environmental protection, but otherwise, the management of Native resources belongs with Native governments. Moreover, as the courts have defined Aboriginal title as a communal property right, the disposal of Aboriginal lands requires a mechanism for communal decision making. Brian Slattery points out that “the need for such a mechanism is one of the cornerstones of the right of self-government.”¹⁰ I do not speculate further on the powers of Native governments, other than to agree with Alan Cairns that small autonomous Native governments are probably neither practical nor politically feasible,¹¹ and with C.E.S. Franks that the issue of sovereignty is probably irrelevant to Native peoples’ economic development or cultural security¹² and that much can be done with an enhanced municipal model of self-government construed less as a “final solution” than as a set of currently feasible improvements to be reassessed in the future.

In sum, Native peoples need more land (resources) so that they can live in dignity and comfort in the territory of their ancestors, and they need a fair measure of local government so that they can protect their cultures and manage their resources – changes about which there is a great deal of public unease and much outright public opposition. In this situation, it may be well to remember that the objective in dealing with the Native land question is not to make a theoretical, symbolic, or constitutional point but, rather, to create conditions in which Native economies can thrive and Native peoples can regain the dignity and cultural confidence that colonialism largely destroyed. Means have to be found to do this alongside a settler society that is here to stay and that is itself a remarkable creation.

¹⁰ Brian Slattery, “The Nature of Aboriginal Title,” in *Beyond the Nass Valley: National Implications of the Supreme Court’s Delgamuukw Decision*, ed. Owen Lippert (Vancouver: The Fraser Institute, 2000), 16.

¹¹ Alan C. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver, UBC Press, 2000).

¹² C. E. S. Franks, “Rights and Self-Government for Canada’s Aboriginal Peoples,” in *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective*, eds. Curtis Cook and Juan D. Lindau (Montreal and Kingston: McGill-Queen’s University Press, 2000).

Settler colonialism is both creative and destructive, and the challenge of the Native land question is to devise means to repair as much of the destruction as possible without unduly weakening the creation, and to do so in ways that have some chance of being politically acceptable.

The treaty process is one way forward, although its apparent finality raises the stakes. Moreover, it shifts negotiations towards a European conception of title and into a categorical register of precise definitions and of meticulously specified rights and exclusions. Native peoples hesitate to agree to extinguish rights, while governments feel that treaties are hardly worthwhile unless they specify rights and extinguishments and, in so doing, achieve final solutions. Yet another lesson of the last 150 years may be that a final solution to the Native land question is not to be found. None of the many efforts to find one has been successful. In this respect, the Native question may be like the Quebec question; that is, an ongoing axis of tension in Canadian life that can be partially addressed constitutionally or politically but, given the country's historical-geographical composition, is inevitably part of what Canada is. That said, there is every reason to achieve a different – if not a final – resolution of the Native land question.

Some would focus change on a symbolic point of departure: the full recognition of Native title, emanating from the Creator, and the recognition of this title as equal, if not superior, to any other title claim.¹³ But symbols foment passions and intensify debates, and I fear that if the revision of Native land policies in British Columbia is dependent upon the recognition of the primacy of Native title, then Native land policies will not soon be revised. The real issues, I think, are more tangible. Native peoples want a good deal of their land back as well as the political means to look after their cultures and to manage their land. Were there the will to do so, these objectives could be largely met without treaties. Native peoples have gone to the courts and have insisted on title and the treaty process because a respectful political dialogue was not open to them; however, the possibility of such a dialogue remains – if the settler society of British Columbia has the will for it.

¹³ E.g., Michael Asch and Norman Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations," in *Aboriginal and Treaty Rights in Canada*, ed. M. Asch (Vancouver: UBC Press, 1997), esp. 214-8.

In the final analysis, neither the Colonial Office, nor the federal government, nor some nefarious provincial politicians drew the reserve map of British Columbia. It was drawn, rather, by the mindset and values of a settler society, and if it is to be significantly redrawn, then that mindset and those values, however prodded by the courts, will have to change. They have, of course, but by how much? The prospect of a postcolonial British Columbia is enticing, but I end *Making Native Space* wondering whether, in any reasonable future, it is within reach.

EDITOR'S NOTE

A number of people from both the Aboriginal and non-Aboriginal communities were invited to participate in this forum on the future of the Native land question in British Columbia. The following responses were received in time for publication in this summer issue.

COMMENTARY

JO-ANNE FISKE

STORIES OF COLONIZATION must necessarily be complex, contested, and controversial in order to successfully challenge taken-for-granted narratives of settler society. Cole Harris sets out such a vision of colonial history in *Remaking Native Space: Colonialism, Resistance, and Reserves in British Columbia* and then seeks to condense and clarify his position in "Revisiting the Native Land Question." Moving from the past as it has been laid out in maps, policies and legislation through the present to the future, he makes a case for embracing a politics of difference. At the heart of his vision for the future lies the assumption that assimilationist politics have not and cannot work, and therefore a progressive future lies in negotiations leading to "a fair measure of local government so that they can protect their cultures and manage their resources" without

treaties and without symbolic gestures fully recognizing Native title “emanating from the Creator.” The greatest obstacle to achieving this position, Harris concedes, lies in the persisting mindset and values of settler society, what Elizabeth Furniss (1999) has labelled our “historic burden.”

However, he says little in his short summation of how a change in mindset and a marshalling of political will might be achieved. And what he does say with respect to the symbolic is unsettling in its apparent simplicity. The as yet to be overcome challenge, I fear, lies in the very realm of the symbolic rather than in pragmatic concessions to a localized government with limited powers.

Harris suggests that there is compelling reason to elide the symbolic realm for “symbols foment passions and intensify debate.” This position overlooks a point relevant to his analysis of the sites of colonial powers of dispossession, in particular legitimation and implementation. To a very large extent, the powers he describes did not and cannot exist outside of the symbolic realm. The history of fisheries legislation that outlawed traditional Aboriginal fishing technology and Aboriginal commercial fisheries is a case in point.

The symbolic lies heavily within the *legitimation of dispossession*. Cultural discourses of civilization and savagery are replete with mobilizing metaphors, literary tropes, and social symbols that underpin the self-serving notions of appropriate resource ownership and exploitation by settler society at the expense of the original owners of the land. Legitimation of the commercial fishery in 1884 at the expense of the Aboriginal fisheries throughout British Columbia, for example, was not a simple matter of merely taking the resource (through the historic creation of the Native “food fishery”) by means of purportedly rational and just legislation; rather, it entailed a more complex process wherein the powers of Parliament, commerce, and media manipulated settlers’ perceptions through engaging them in a discourse of self-righteousness, morality, and law. (Newell 1999; D. Harris 2001). The deplored efficiency of Aboriginal fishing technologies, in particular the use of barricades on rivers, was represented in moral terms; efficiency was doubly marked as both greed and laziness as Aboriginal fishers readily captured thousands of fish in a short time period with greater ease than could be achieved by an ocean fishery of boats and nets. In consequence Aboriginal peoples themselves came to be understood in moralizing terms. This moral suasion was linked to the dominant society’s values of “work” and profit, wherein sub-

sistence activities were not only viewed as having lesser value in the capitalist market but were also condemned for being an impediment to it. The fishing barricade came to symbolize the division between “progressive” and “primitive” societies.

The symbolic power of brute force associated with gunboats, the call for militia to quell Aboriginal protests over the loss of their fishery (most notably at Babine in 1906), and imprisonment of Aboriginal protesters enforced the mindset of the settler society and gave legitimacy to settlers’ assumptions of superiority, paving the way for the *implementation of dispossession* through judicial and legislative powers. Expediency of legislation led to the creation of the food fishery, which restricted Aboriginal fishers to harvesting solely for subsistence, ceremonial, and social uses. In 1992 these restrictions were eased for some coastal First Nations when the Federal Government enacted legislation providing for a short Native-only fishery. The *Aboriginal Fishing Strategy*, which, while falling short of recognizing Aboriginal title, signalled acknowledgment of special rights based on the primacy of Aboriginal occupation and use of the lands and resources in what is now British Columbia as well as conciliation for past privations and wrongs. Those who opposed the Aboriginal commercial fishery have asserted that they are defending Canadian values of individual rights and the democratic foundation of “one law for all.” Over the past decade, opponents of the *Aboriginal Fishing Strategy* have passionately deployed symbolic gestures of equality and federalism in their fight against “racist” divisionary tactics that privilege Aboriginal fishers in defiance of constitutional guarantees.

Constitutional debates between group and individual rights are symbolic of who we are as Canadians, as British Columbians. The compelling passion of rights-based arguments is the glue that holds together our burden of history: it is the very foundation of assimilationist worldviews that unquestionably accept the individualism of Canadian frontier history, the rise of Canadian national identity, and the capitalist market system of private property.

Treaties arising from land claims carry symbolic weight and act as a site of power beyond the boundaries of a specific First Nation or claimed territory. For many Aboriginal people, wherever they reside, treaties convey a sense that the source of power lies in inherent Aboriginal rights as acknowledged in the political realm; from this perspective, treaty making speaks to a rising consciousness of a postcolonial possibility. Treaties speak to identity and to the historic

depth of political struggle. They symbolize the re-emergence of Aboriginal peoples as distinct nations. Through treaty negotiations and legal struggles over fishing and other economic rights, Aboriginal societies seek not only to challenge but also to transcend the legitimation of dispossession through the symbolic legitimation of their occupation and spiritual attachment to the land from whence originates their identity as distinct peoples.

Symbolic gestures embedded in land claims, Aboriginal fishing policies, and treaties do not simply speak to the past and present: they evoke a vision of the future. Treaties embrace nationhood and citizenship, not residency on isolated rural lands. A vibrant economy in rural traditional areas is necessary but, in and of itself, insufficient for sustaining cultural identity.

The complex powers of the symbolic gestures of nationhood lie not only in the questions of the resource economy and land attachments but also in the resilience of urban populations, who seek and produce new expressions of Aboriginal identity just as much as do their rural on-reserve counterparts. Treaties and the legitimation of identity grounded in nationhood need to speak meaningfully to “commuting” to urban areas not only on the part of those who, often in economic desperation, seek marginal jobs in the cities but also on the part of those who are highly educated and who hold positions of power and leadership as lawyers, academics, politicians, and cultural workers.

Benedict Anderson (1992) has argued that nationalism and its symbolism do not take their meaning from cultural continuities but from cultural and social disruption. Colonialism brought social, economic, and cultural disruption on a massive scale, and popular resistance in the dominant society perpetuates the struggle to reclaim what has been lost. New forms of nationalism within the political economic order of Canada have arisen out of these structural processes. They are grounded in pragmatic politics and material conditions but realize their power in the symbolic. Symbolic gestures by Aboriginal political leaders give meaning to the aspirations of Aboriginal peoples, whether these are expressed in the theatre of the courts and legislatures or on the streets in activist protests.

As Cole Harris has recognized, for pragmatic politics to be effective in changing the political economic order of rural communities, what is needed is a new mindset on the part of the dominant and subjected populations, respectively. But a new mindset needs to be articulated

within a new symbolic realm. Symbolic gestures that challenge and transcend the mindset of the dominant population are needed because they alone have the power to evoke a new vision of constitutional democracy, without which new orders of government, however localized, will not be accepted as a meaningful and rightful expression of incorporation within the Canadian political consciousness. If indeed a “fair measure of local government” is the remedy, then it must take its meaning from enduring cultural values. And it must speak on behalf of its constituents regardless of place of residence. For Aboriginal peoples, this meaning rises from Aboriginal knowledge of title “emanating from the Creator” and the rights of first occupation. To deny this quintessential expression of the past, present, and future is to deny meaningful governance grounded in cultural identity. The dominant society needs to do little to sustain its own symbols of rights and identity as they saturate not only the most subtle but also the most aggressive expressions of who we are. They do this through the naming of the land, the celebration of our histories in themed historic sites (such as Fort Langley or the “ghost” town of Barkerville), and slogans of equality and justice based on “one law for all.” In these circumstances, can we reasonably ask Aboriginal peoples to bypass the symbolic when the dominant society does not?

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COMMENTARY

GORDON GIBSON*

IN HIS “REVISITING THE NATIVE LAND QUESTION” in this issue of *BC Studies*, Cole Harris shows a deep respect and sympathy not only for the estate of Native peoples in this province but also for the achievements and merits of the mainstream “settler” society. In my opinion, this balance, which is often lacking in academic (and political) work in this field, gives his approach a realism and acceptability to most people. In the same spirit of respect, I propose to set out areas where I agree with him and then proceed to an analysis that, while directed towards the same hoped for end of harmonious resolution, suggests some different means of getting there.

I begin with the observation that, while we in British Columbia, because of a lack of land treaties,¹ have a much larger issue with the “land question” than does any other part of Canada, at the same time, we have a larger opportunity to create imaginative accommodations. Surely the mere existence of treaties solves little, as an examination of reserve and urban ghettos on the Prairies reveals.

Harris’s insights into the modern treaty process are very valuable. He notes correctly that these “forever solutions” vastly raise the stakes in reaching agreement. Of course treaty content is important in this discussion, and he cautions against importing symbolism for its own sake, warning that this “foments passions and intensifies debate.”

In the same spirit, he warns that mainstream society’s acceptance of the “politics of difference” requires an “exceedingly difficult commitment” in the face of deeply held Canadian notions of equality and citizenship. In this I also agree with him, which is why I will instead propose a politics of “choice” – this being a fundamental change.

Harris agrees with Will Kymlicka that the descendants of earlier immigrant groups (i.e., Native peoples and descendants of the French regime) are entitled to special rights and protections. I disagree on the basis that, whatever history may be, everyone who lived then is dead and today is today. But I accept his underlying point that other Canadians generally have a special sense of obligation to Native

* Gordon Gibson contributes this comment as part of his work as a Senior Fellow in Canadian Studies at the Fraser Institute.

¹ Though there are still major unresolved and mostly unacknowledged problems in the Atlantic, where the “friendship” treaties do not settle land issues. Recently Quebec has made great progress in extending treaty coverage throughout its northern areas.

peoples. And so we should, for our historic laws have led to the situation of today. That special sense of obligation is a necessary ingredient of accommodation. It hardly existed half a century ago, probably peaked in the past decade, and the threads of tolerance are now being worn as contestations continue and solutions elude us. So there is a political clock running here; of course there is also a demographic clock running, which raises the stakes. Perhaps for a while these clocks will cancel each other out.

I agree with Harris that a major allocation of resources will have to be a part of any solution. In any historic understanding of international law, this should not be the case because, fair or unfair, ethical or unethical, the settler appropriation of BC land was clearly a matter of constructive (i.e. *de facto*) conquest. However, the above referenced "sense of obligation," buttressed by *Delgamuukw*, has validated property rights that must be recognized.

I note in passing that these land transfers (or cash transfers, where land is not available) could be quite large. The consensus settlement figure used to be valued overall at ten billion dollars. Current trends suggest at least double that amount, including a significant fraction of the land base of the province.

While perhaps arguing about the numbers, no British Columbian should oppose this recognition of property rights on the grounds that such rights are "race-based." The mainstream society devolves property over time on the basis of heredity. What is the difference here? There is none.

There is of course a major problem hidden in this acceptance of resource transfer. The courts have made it quite clear that Aboriginal title is a communal right, blocking off one private property route to the individual freedoms we take for granted in mainstream society. That will be a knot for the property owners themselves to cut in their own good time (and there are provisions for such in the Nisga'a Treaty, for example).

I would also sound a note of *realpolitik* in this concept of a major allocation of resources. My guess is that the door to this solution, and the extent to which that door may open, will be much greater if the re-allocated lands are transferred in fee simple (albeit communally owned), and are therefore subject to all of the laws and taxes of the province, rather than existing as lands that come under special Native law.

Finally, I agree with Harris's insight (and I hope I am not putting words in his mouth) that the high constitution politics of semi-

sovereign Indian governments are better set aside for now in favour of “an enhanced municipal model of self-government construed less as a ‘final solution’ than as a set of currently feasible improvements to be reassessed in the future.” This issue is a “hot button” for mainstream society, and I think that the quotations from Alan Cairns and C.E.S. Franks are useful in understanding why, in the interest of getting on with everyone’s life, it may best be avoided.

But in that exact context, I move from agreement to caution. Harris concludes his paper by saying that hope for a “respectful dialogue” remains, but there is a condition; namely, whether or not the “settler society” has the will for it. Furthermore, any discussion of this dialogue is incomplete without an explicit reference to the perverse incentives built into what I and others have come to call the “Indian Industry.” This industry is made up of all of those who accept the notion that Native peoples are different from ordinary human beings – not just different as all individuals are different from one another but communally different, in a way that must be supported by laws, organizations, governance practices, and financial incentives that differ from those that apply to mainstream society.

Under its various names, the Department of Indian Affairs has been the bulwark of the Indian Industry for over a century. (It is an interesting thought experiment to consider what the world would look like today if the Canadian Constitution did not contain Section 91[24], its only racist element.) Over that century, the participation of churches in the industry has waxed and waned, and bureaucrats have always been there. But over the past thirty years, there has been a virtual explosion of participation by Native elites, academics, lawyers, and consultants, fuelled by a river of federal cash.

The future of this now very large industry depends on continued problems, not solutions. And it depends in particular upon the continuation and elaboration of a parallel Native society in Canada. It is in this sense an enormously conservative force, and as the sole effective collective voice of Canadian First Nations, a political force of great power. That reality, with all it implies for constraints on new policies that aim to resolve the BC land question or other related matters, should be added to Harris’s analysis. It is not just the “settler society” that must demonstrate the will for a “respectful political dialogue.”

I return now to the two options set up as the only choices near the beginning of the paper; namely, “a politics of assimilation or a politics of difference.” Harris concludes that the policy of assimilation has

largely failed, while the policy of difference is not just a last resort but is redolent with opportunity. I would argue in return that the policy of assimilation often claimed by successive governments was in fact fitfully practised; rather, the dominant policies were *isolation* or *eradication*. This destructive path, pursued with vigour for most of a century (and sporadically before that), has indeed failed and happily so. *Assimilation*, on the other hand, has by now been pretty much accomplished accidentally, in the sense that there is an immense cultural overlap between Native peoples and ordinary Canadians. I am not taking about standards of living, or health, or social welfare – where real and shameful differences still lie – but about cultural matters.

We mostly now speak the mainstream language, and this fact is fundamental. We watch essentially the same television and read the same papers. We drive the same cars and trucks, go to the same fast food places, hope for a good education in mainstream subjects for our kids, abuse the same substances, attend (if at all) the same churches, prefer comfort to poverty, predictability to uncertainty, and so on. Yes, there remain differences, though fewer and fewer for the roughly 50 per cent of Native people now in an urban setting at any given time (which means more than 50 per cent being involved in the “commuting” phenomenon). And, exactly as has been the case in French Canada, as the cultural differences with the rest of North America dramatically shrank, the insistence on the importance of those differences that remain hugely escalated. But claims do not make reality. The reality is that cultural differences are dramatically smaller than they were fifty years ago and are continually shrinking. There is nothing surprising about this; it is a worldwide fact.

Note that this convergence has not occurred as a result of government policy; it has in fact happened in spite of government policy. There is nothing and no one to “blame” here other than the power of new technologies and communications, and the usefulness of new images, ideas, and skills. And in that sense, the convergence is utterly irreversible. To me this suggests another starting point for analysis – not the politics of “difference” but, rather, the “politics of choice.”

If one believes – as I do, with considerable backing from research on the human genome – that Native peoples are just ordinary human beings like the rest of us, then the burden of proof in our civilization falls upon those who would say that the organization of Native lives should be premised on any other basis than that of individual empowerment and individual choice. (Individuals of course may choose,

without external encouragement, to belong to a powerful collective. An example is the Hutterites). That statement of course has implications far beyond the BC land question, but it is inextricably tied to it because the traditional basis for approaching its resolution has been concerned with the buttressing of the collective rather than the individual.² This practice in turn has argued for collectivist approaches and the buttressing of a parallel Native society that offend mainstream notions of governance and equality. One may debate whether this is right or wrong, but in my view, it is a fact, and solutions to the land question that do not offend mainstream values pertaining to individual choice and citizen equality would, I predict, flow far more smoothly than would those that do.

Reliance upon the “politics of difference” gives rise to arguments about what sorts of difference are legitimate, especially when that “difference” is to be formally countenanced and enforced by the affirmative action of the mainstream state. Those arguments are all finessed by the politics of choice and equality, as distinct from state-enforced parallel societies. In other words, if settlements refrain from adding further legal bricks to the already too-high wall of law and financial incentive separating Native peoples from mainstream Canadian society, such settlements will be far easier to reach. For example, the immense controversy surrounding the Nisga’a Treaty would never have occurred had it not constitutionalized the “politics of difference.”

The implications of this analysis suggest that the most rapid and generous land settlements would be achieved by way of non-constitutionalized agreements, modest and delegated self-government arrangements, fee simple property, and the true empowerment of individual Natives so that they could get on with their individual lives. If I read Harris correctly, he has said much the same thing, on the first two points at least. The Indian Industry has always maintained that this is too high a price to pay. Alas, the real losers from settlements deferred are not industry members but ordinary Indian people.

² No one would argue that the empowerment of the individual is not intimately related with his or her adhesion to various collectives. The question is one of primacy, and this may be debated at another time and place.

REPLY

 COLE HARRIS

IT IS THE FORTUNATE AUTHOR who has both the first and the last word, even in the confined precincts of *BC Studies*!

I doubt that Jo-Anne Fiske and I have any real disagreement. She is right, of course, about the power of symbols, and right too that some will have to change if the relationships between Native and non-Native people in British Columbia are to become fairer and more respectful. For settlers in the late nineteenth century, Natives were savages who would either die out or be assimilated into a progressive, civilized society. In chapter 3 of my book, I try to suggest where this construction originated, why it was so pervasively held, and how it functioned as a system of power. When I suggest at the end of the book (and in the précis that introduces this Forum) that the values of a settler society have always driven Native land policies in British Columbia and largely continue to do so, and that real change in Native-non-Native relations is still constrained by them, it is this set of entrenched stereotypes and symbols within which newcomers have understood Native peoples that I have in mind. I could not agree more with Professor Fiske that they need to change. I also agree that, for Native peoples, so long buffeted by these constructions and by the larger colonial barrage (for which their construction as “savage” was a convenient legitimation), symbols of identity and achievement fill intense psychological, cultural, and political needs.

There is, however, another set of symbols that has more to do with the Constitution, the courts, and the law. Its language is subject to precise legal definition but also to no end of public emotion. These symbols – sovereignty, for example – come to the fore in the treaty process and tend, I think, to harden positions and bid up the stakes. Final decisions, with deep ideological and geopolitical overtones to which people react in different ways, are apparently being made. I understand full well why we are in the treaty process, why many Native leaders think there is no alternative to it, and why (in the circumstances) they may be right. But I also suspect that if non-Native British Columbians were prepared to enter into honest, respectful negotiations with Native peoples, and were to accept that negotiations would lead to some real transfer of resources and self-government

rights, a great deal could be accomplished without recourse to the treaty process. The danger inherent in the treaty process is that it entrenches symbolic positions and, after expending much time and money, achieves nothing. The danger of not getting into the treaty process is that a settler society benefiting enormously from the status quo has no incentive to change it. And so, perforce, we may have to deal with the language of rights and constitutional symbols for a good time yet; however, if so, we should remember that the goal is not symbolic victories but vital and confident Native societies within the larger polity of British Columbia. Steps in this direction are useful, while "final solutions to the Native question," which are encouraged by the language of rights and constitutional symbols, and in which so much effort has been invested for so long, are, I think, an illusion.

The extent to which Gordon Gibson and I agree is unexpected and welcome. His background and politics are different from mine, as are many of his arguments, yet on several crucial matters we reach similar conclusions. He accepts that British Columbians have a special obligation to Native peoples and that this entails a major reallocation of resources and an increased level of Native self-government. These conclusions are not trivial. If non-Native British Columbians were prepared to negotiate with Native peoples on these terms, and if both parties accepted (here again we agree) that the goal was to achieve practical, workable improvements rather than final solutions, then a great deal could be accomplished. Over the last years, Gordon Gibson has devoted much energy to Native issues and, to his credit, has seriously listened to Native people. Like others, this engagement has affected him. I am encouraged. When a member of the Fraser Institute argues as he does, the opportunity for real negotiation and real advance on Native issues is less blocked than I had feared.

His position is all the more striking because it sits so uneasily with his ideological commitment to individual rather than to collective rights. There is no doubt about where, in principle, Gordon Gibson stands. He is a classic, *laissez-faire* liberal who, given his druthers, would have no truck with even the qualified, communitarian liberalism of people like Charles Taylor and Will Kymlicka. But, like others before him, he has run into the reality of a country upon which, over the years, it has been impossible to impose an unqualified liberalism. The result is compromise, a position that probably would not withstand tests of logical consistency but that, in the circumstances, offers some hope of expedient, practical accommodations. This, I think, is

basically how Canada has been put together and how, eventually, relations between Native and non-Native people in British Columbia will become fairer than they are.

Gordon Gibson's assertion that, fuelled by federal money, there is an "Indian industry" in Canada that depends on constructions of Native peoples as separate, that thrives on problems, and that would be put out of business by solutions, may be partly right. But, if so, this is a problem for the federal government; it does not, itself, affect the worthiness of Native demands. His views that, fundamentally, all people are much the same and that Natives have been largely assimilated are probably a matter of emphasis. It would be just as easy to say that, although all people share certain characteristics, it is striking how differently they behave and believe; or that, for all the barrage of the civilizing mission and modern technology, it is striking how strong Native identity claims remain. The history of how Native peoples reached the present and of how Gordon Gibson and I have done so are very different (advantage has been overwhelmingly on our side), and I feel these differences and the different cultural assumptions that follow from them whenever I spend time in Native society, even though native people may drive a more modern vehicle and watch far more television than I do. Cultures change, and none of us lives as our near ancestors did. Local languages are certainly under assault, but does this mean that cultures are becoming the same? The evidence, to say the least, is mixed. There are no simple understandings of these complex matters. If we had the wit, he and I could discuss them endlessly, but as we agree that Native peoples warrant special considerations (that include a major reallocation of resources and an enhanced level of self government) – and, in this sense, agree on both a politics of difference and on a basis for negotiating Native issues in British Columbia – we may not need to do so.