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Legal Culture Blindness and Canadian Indian Law

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Summary

This paper explores the special problems that specialists in federal Indian law in the United States face when they attempt to understand the legal position of indigenous peoples in Canada, make comparisons and offer assistance and advice. Although the roots of Canadian Indian law in British Crown policy are similar to those of the United States, the evolution of United States and Canadian Indian law occurred in patterns which were as distinctly different as has been the evolution of each country. Although some comparisons can be made between the two patterns of legal development, especially in the realm of policy changes directed at indigenous populations, the core of each legal relationship is very different, especially as it relates to federalism, the constitutional process and role of the courts, and public land issues. Therefore, while models of Indian legal achievements in one country are often used to induce governmental change in the other, especially in Alaska among the United States and in Canada, generally, advocates and United States specialists must exercise extreme caution to avoid legal culture blindness based on a lack of appreciation of the very different historical development of each nation.

LEGAL CULTURE BLINDNESS AND CANADIAN INDIAN LAW

by

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Although the roots of Canadian Indian law in British Crown policy are similar to those of the United States, the evolution of United States and Canadian Indian law occurred in patterns which were as distinctly different, as has been the evolution of each country.

Although some comparisons can be made between the two patterns of legal development, especially in the realm of policy changes directed at indigenous populations, the core of each legal relationship is very different, especially as it relates to Federalism, the Constitutional process and role of the courts and public land issues.

Therefore, while models of Indian legal achievements in one country are often used to induce governmental change in the other, especially in Alaska among the United States and in Canada, generally, advocates and United States specialists must exercise extreme caution to avoid legal culture blindness based on a lack of appreciation of the very different historical development of each nation.

Preface

Co-panelist Neil C. Skinner's manuscript arrived in Alaska when I was writing my own presentation to this conference. It so clearly and completely provided an assessment of the comparative status of American and Canadian definitions of Indian sovereignty that it caused me to begin again with a paper which, it is hoped, builds upon the knowledge contained in the Skinner manuscript and leads to discussion.

Culture blindness is usually viewed as perceptions of dominant or majority society's members who apply them to minorities of different cultures. In this context, however, the culture in question about which I am writing is the dominant Canadian culture. American Indian law specialists cross national boundaries at their peril. They advise Canadian groups at their peril because Canadian Indian law is as much a product of the historical and political dynamics of Canada as is the American version a product of its own historical and political culture.

Neither version of Indian law is especially appreciative of indigenous culture or the law which emerged therefrom. To the extent that either has acknowledged preexistent aboriginal rights or preexistent authority, it has occurred because it was in the best interest of that federal system.

For purposes of this paper, I will sketch briefly some salient differences between the Indian law of Canada and the United States. Some of these differences appear to me to be more apparent than real. Further, United States Indian law as it has been introduced in Alaska is less different than Canadian Indian law in terms of questions left unresolved. The reason has more to do with the historical flow of events in each country than with the shared climate of Alaska and Canada. I will pose most of the issues not as conclusions but as points of confusion or questions.

Roadblocks to Mutual Understanding

Federal Indian law practitioners in the United States have, on occasion, felt impelled to cross national borders and offer advice to indigenous groups in Canada. Others may have read about current developments in Canadian Indian law or even found available to them the excellent *Canadian Native Law Reporter* in order to discover case reports which might be useful, persuasive citations in ongoing litigation in the United States. If they are lucky enough to overcome the very basic problem of obtaining current legal information, they confront another hurdle: how to relate Canadian legal information to developments in the United States.

Interest among Alaskans has been especially high since the Honorable Thomas Berger chaired the Alaska Native Review Commission. Berger's roundtable sessions on comparative and international Indian law, his 60-plus village hearings and book, *Village Journey*, all suggested that models and approaches in Canada might indeed be preferable to those available in the United States. His commission was a working example of the Canadian approach. Alaska Natives and their legal representatives have had a keen interest in events in Canada, both historical and recent. In fact, among Alaskans, many correctly perceive that many parallel issues affecting indigenous peoples are now tabled in both Alaska, the state, and in Canada generally.

For example, indigenous groups in both places are now hard at work seeking acknowledgment of their indigenous right to be self-governing. In both places groups argue that the right has never been extinguished. Concern for maintenance of hunting and fishing rights, both aboriginally and through legislation and treaties, is high in both places. Groups in each place seek to restructure governmental relationships with state and provincial governments. Land claims agreements have been sought or are being sought in each place with a great deal of concern on the

Canadian side that problems it associates with the original Alaska Native Claims Settlement Act are not repeated.

Yet for all of this apparently mutual desire for transnational legal comparisons, there are problems in translation of developments, problems which make meaningful use of legal information or comprehension of events difficult.

Some of the roadblocks to comprehension are embarrassingly elemental yet no less significant (e.g., parliamentary versus congressional systems). Others are fairly concrete. Still others are judgmental or interpretive. Most require a deeper appreciation of Canadian political and legal culture than most Americans possess.

Here is a list of confusing roadblocks to comprehension for American practitioners.

1. How did Canada and the United States diverge so significantly in their reading of a root British Crown policy, the Royal Proclamation of 1763? To what extent has the Marshall elucidation of the federal-tribal-state relationship taken hold in Canada in the modern era?[1] Will it take hold?

2. Why did treaties not give rise to a judicial reading of sovereignty on the part of the treating parties? Is the better view that whatever the status of tribes who made treaties, later legislative response to indigenous needs had an extinguishing impact on their preexistent governmental authority?

3. How comparable are federal-provincial relationships to federal-state relationships when matters of Indian legal rights are considered? (Hogg, 1985:557-560) How did the protracted historical regional integration affect this subject? How does public land policy affect this subject? How did the Constitution Act of 1982 and the later Meech Lake Accord affect the scope of federal action in the provinces and in the territories?

4. To what extent are the territories in a better or worse position to accomplish advances for aboriginal peoples than the provinces? To what extent does the territorial experience mirror the early and later Alaska experience for Alaska Natives?

5. Does the newly enunciated constitutional position of Canadian indigenous peoples and their existing aboriginal rights and treaties afford them a constitutional position superior to that of American Indian tribes in the United States?

6. Does the relative absence of tribal courts or other instruments of tribal government on Canadian Indian reserves hurt or advance their prospects of self-government when compared with United States Indians and, especially, with Alaska Natives?

7. How are Canadian land claims different from American couterparts given similar economic forces and dissimilar political forces? How comprehensive are these claims likely to be?

8. How did Metis and non-status Indians secure a role in the Indian legal process (and even constitutional entrenchment in the case of the Metis) when detribalized Indians in the United States disappear from the screen when matters of Indian law and policy are considered unless they move back to reservations or enter lengthy processes to secure federal recognition?

Baseline Similarities

British Crown policy rooted in international law and diplomacy set in motion the same policy for dealing with Indian tribes in both countries. That policy specified that the Crown had exclusive authority to extinguish aboriginal title and to receive Indian lands. The policy was rearticulated in early American supreme court cases

establishing in law (if not in fact) what Charles Wilkinson has termed a third order of government with federal, tribal and state components (Wilkinson, 1982).

The momentum of British policy had been dictated by the flow of international events as the Crown sought to form alliances and avoid direct conflict with tribes. The momentum of American policy appears to have dictated by the pressures on the national government to take to itself the national land base and to transform it into new territories and states through a process of guided settlement.

History

In Canada a different momentum appeared, built on different legal premises. Treaties were made, but aboriginal title was neither acknowledged nor extinguished. In the Western provinces this process occurred independently and prior to confederation. Indigenous governments were dealt with but not explicitly acknowledged as possessed of inherent tribal authority.

Clearly the differing pressures for frontier settlement were influential here. So, also, was the time lag on confederation (and ultimate repatriation) of Canada[2].

To my mind, the most significant difference in the development of Indian policy in each country was the difference between public land policy in each place, specifically the ultimate role of federal or state (provincial) government in management of natural resources.

In the United States tribal ownership and governorship of land was useful to the United States in receiving and allocating public lands. In Canada Crown land came to belong to individual provinces subject only to an Indian interest in land. Only in the territories did there appear to be a situation relatively parallel to the American situation and one especially parallel to Alaska. There governance was primarily out of Ottawa and there land remained Crown land in the Crown.

Government

The Canadian government employed the Indian Act to establish delegated and municipal-type governments on Indian reserves. Although the Act has been amended in modern times to allow for more Indian autonomy, it is clearly not based upon any premise of preexistent tribal sovereignty. Provincial law applies where not displaced or contrary to treaty rights or provisions of the Indian Act. To the contrary in the United States, it is left to the Congress to remove from tribes their powers of self-government or to delegate new ones. State jurisdiction is subject to this infringement and preemptive process.

The building blocks of federal Indian law in the United States, established early in its history, include aboriginal title, inherent right to self-government and the established place of Indian tribes in the American system as domestic dependent nations subject to the ultimate will of Congress (Skinner, 1989:5-10). Canadian jurisprudence began a process of discovery of these elements in the twentieth century, again with the primary focus on the still federal territories and western provinces where the position was that Indian claims were an exclusively federal responsibility.

Alaska in the United States remained a domain where these Indian rights were less clearly articulated by the Congress and the courts. No treaties had been signed. It remained for cases after the Alaska Native Claims Settlement Act of 1971 to confirm that an aboriginal title had in fact been extinguished to land as well as hunting and fishing rights. The scope and jurisdiction of indigenous government remains a matter of litigation. Alaska Natives have developed their strongest and most successful arguments where Congress has explicitly granted legislative exceptions and preferences to Natives and their communities (Conn, 1987). Yet the picture is so unclear that federal courts are now requesting that Alaska Native villages prove their historical and continuing tribal existence as a prelude to

confirmation of their tribal authority, a judicial test never employed where Congress has explicitly recognized a predominantly Indian (or "Native") group. So in Alaska as in Canada there has been a severence of discovered and extinguished aboriginal land title from acknowledgment of inherent tribal organizations.

Treaties

Both nations pursued treaty policies. Treaties continued to be the mainstay of Indian policy in Canada well beyond the Congressional cutoff date in 1871. Both countries left most Northern peoples without treaties perhaps bcause no state, provincial or settlement pressure for public land control existed. Breakdowns in implementation of treaties generated a claims process in the United States and a land claims process in Canada. In the former monetary awards were the usual outcome. In the latter a combination of land and monetary awards appears more typical.

American lawyers are bemused by the fact that this attenuated treaty process did not confirm a preexistent governmental status on tribes.

Courts have long held that Congress can unilaterally extinguish treaty rights subject only to Fifth Amendment claims. Treaty rights have been abrogated in Canada through general and specific legislation. Yet this process may well be suspended by the entrenchment of treaties within the Canadian constitution.

Courts in both countries appear to apply sympathetic rules of construction to Indian litigants when treaties are interpreted or weighed against legislation which may override them.

Aboriginal Title

The often-related struggle of Canadian indigenous people to confirm in the court that they were possessed of aboriginal title, which may or may not have been extinguished, occupies much of the Canadian Indian law literature. It is also the focal point of current litigation in British Columbia and elsewhere.

Whether indigenous people enjoy traditional or common law rights to their land matters to Indian advocates. As Bryan Keon-Cohen and Bradford Morse put it:

> The answer provided by the courts is critical: it makes the difference between asserting and protecting "land rights" as a legal right and, if appropriate, demanding compensation for dispossession (USA), or having to accept such rights as are offered by government with no ability to protect them (Canada and Australia).

(Keon-Cohen and Morse, 1984:74-98 at 83.)

Because aboriginal title once discovered or suggested places some burden on the federal government to protect it and to extinguish it so that the Indian interest is removed, it is a powerful lever on the legal and political process. The Canadian Berger inquiry cast such a shadow on the Northern gasline route[3]. The Malouf interim injunction placed such a burden on the James Bay hydroelectric project. The Minto injunction against construction of the Alyeska TransAlaska Pipeline had a similar impact. In each case, the possibility of protracted legal arguments caused negotiations to grind forward sufficient to resolve the claims enunciated (or, as in the case of the Canadian gas line, gave its opponents the edge necessary to cancel the project). This suggests that a preliminary demonstration of legal rights coupled with good reasons to move to rapid settlement of those rights, such as major developmental

projects, facilitate negotiations in each country, drawing into those negotiations reluctant provinces (or states) as well as the federal government.

Canadian indigenous organizations have sought to negotiate an entrenchment of their rights into their written Canadian constitution. They secured seats at the negotiation sessions. Yet they did not secure explicit acknowledgment of aboriginal rights of self-government. Instead, they secured entrenchment of aboriginal rights left undefined as well as treaty and land claims rights. They also secured constitutional acknowledgment of each aboriginal group, including the Metis who are without recognized treaties or land base.

The Constitutional Question

Section 35(1) of the Constitution Act, 1982, provides that "the existing aboriginal and treaty rights are hereby recognized and affirmed. Aboriginal peoples are specifically identified as 'Indian, Inuit and Metis peoples of Canada.'"

To this was added "(3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land rights agreements or may be so acquired."

Section 25 of the Constitution Act provides that the "guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:

a. any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

b. any rights or freedoms that (may have been acquired by the original peoples by way of land claims settlements) 'that now exist by way of land claims agreements or may be so acquired.'"

To an outsider, this expression of aboriginal rights as a kind of higher law is remarkable and enviable. Yet the meaning of these provisions and specifically the manner in which Canada's high court will undertake its constitutional interpretation of them when confronted with claims of aboriginal rights or rights case in treaties or claims settlements which are in conflict with past or future statutory law remains the subject of intense debate (See Pentney, 1987).

This debate was anticipated by provinces when the Section 35 was withdrawn and resubmitted with *"existing"* included. It was anticipated when the March 16, 1983 amendments included entrenchment of *future* land claims agreements. What rights are constitutional and not subject to unilateral limitation by federal or provincial legislatures?

Many analyses have been done by legal scholars in Canada. Slattery (1985) suggests that Section 35 will protect both rights ascertained on its date of passage and rights acquired through modern land claims settlement (1985:127). Aboriginal rights may evolve or be modified through explicit agreement (*Id.*).

Such an interpretation would offer a marked improvement over United States Indian law where unilateral modification of preexisting rights can be accomplished by the Congress under its constitutional plenary authority.

Yet there is another aspect of this constitutional entrenchment which bodes less well for Canadian aboriginals. The rights protected must have an existing basis and have not previously been extinguished by operation of Canadian law.

The core of future litigation in Canada will be the extent to which previously enacted statutes have modified what advocates for aboriginal peoples term "existing rights." Here distinctions will likely be drawn between reasonable efforts at

government regulation and specific attempts to suppress Native rights. Mere failure to implement or observe a right may not be viewed as its extinguishment.

What statutes passed to fulfill the Crown's trust responsibility as enunciated preliminarily in *Guerin* (Skinner, 1989:12-13) effectively extinguished aboriginal rights.[4] Specifically, did the Indian Act with its Section 88 proviso that permits provincial laws of general application to apply to Indians effectively extinguish existing rights of aboriginal self-government? Or could advocates now argue that at least some of these acts have a specially severe effect on Indians by impairing their status or capacity? (*See Kruger and Manuel v. The Queen* (1978) S.C.R. 104, 110.)

The picture that emerges is one of confusion and expectation. As with the matter of land rights and aboriginal title, the potential for a high court reading which negates an existing or future statute as unconstitutional is balanced by another possibility: that the high court will review the comprehensive legislative field which the federal government and provinces have constructed as entirely appropriate under its earlier authority (Sec. 91(24) of the Constitution Act, 1867), appropriate to the status of dependency of aboriginal peoples and Crown responsibility.

The uncertainby drives both aboriginal groups and government officials toward negotiation since most commentators continue to view the historical process of voluntary cession of rights, even constitutionally entrenched, as appropriate. One can further assume that future litigation will focus on the content of that negotiation and the adequacy of representation of aboriginal peoples. This latter element can be confusing for non-status Indians and for Metis who are constitutionally acknowledged as aboriginal peoples (See Morse and Groves, 1986:139-167).

Alaska Natives have sought a resolution of remaining indigenous rights questions from the Congress. While the Congress has amended their land claims settlement act to protect undeveloped land from a wide variety of legal consequences

which have historically diminished tribal land bases in the lower 48, the same 1988 amendment professed absolute neutrality on matters of critical importance to Natives, especially the scope and authority of tribal jurisdiction.

Tribal Self-Government

Skinner has written about the first major difference between U.S. and Canadian Indian policy. From an early moment American courts have acknowledged an inherent right of self-government on the part of American tribes such that these tribes could be said to hold aboriginal title to their lands, cede that title unilaterally to the federal government and handle other matters of civil and criminal authority not removed explicitly or by implication by the American Congress. Canadian Indian law did not confirm an aboriginal right to self-government in the groups whose aboriginal title it extinguished and in the tribes with which it treated, even when it was a prerequisite to a finding of aboriginal title. (*See Hamlet of Baker Lake v. Minister of Indian Affairs* (1979), 107 D.L.R (3d) 513.)

Until the last decade its high court interpreted Indian rights as rooted in their articulation through the Royal Proclamation of 1763 and the Constitution Act of 1867 which gave the federal government jurisdiction over "Indians and Lands reserved for Indians." The Indian Act defined membership, and a municipal-style reserve regime allowing provincial law to fill in all areas not governed by parliament.

As stated, treaty-making continued in Canada far beyond the 1871 end of treaty-making in the United States. The logic of treaty-making – that it occurs between sovereigns – was not fully appreciated in Canadian courts. The doctrine that treaty rights could not be in and of themselves made subject to assertion without parliamentary implementation and could, in fact, be overridden by general legislation held sway until recent years.

However, the demise of this point of view with an increasing judicial eye toward specific extinguishment of treaty rights and implied Native rights by legislation has occurred in Canada when a new opportunity for discovery of unextinguished aboriginal rights emerged with the Constitutional Amendment Proclamation of 1984.

Section 35 of the Constitutional Act entrenches existing aboriginal and treaty rights. Section 25 protects indigenous rights against the general provisions of the Aboriginal Rights and Freedoms. But with the failure of indigenous peoples to secure further amendments or entrenchment of aboriginal rights to self-government through direct participation in a series of First Minister's Conferences on aboriginal constitutional issues, questions remain. They include the extent to which past federal or even provincial legislative override has extinguished historical aboriginal rights including that of self-government. Further, if past or future land claims agreements are afforded constitutional status and superiority over mere legislation, will they include rights of self-government at least related to management of the land?

The struggle for aboriginal self-government in Canada began without an articulated governmental theory of domestic dependent sovereignty. Yet in the late twentieth century, one could argue that its legal prospects are bright and even brighter than those of United States Indian tribes. Policy shifts toward acknowledgment of self-determination have been accompanied by favorable decisions related to aboriginal land title, premised upon indigenous groups engaged in governmental control of their territory. Amendments to the Indian Act have strengthened group control over membership. The Penner commission called for the right of tribes to negotiate with federal and provincial governments over further powers of self-government and this formula found its way into legislation

implementing the James Bay Agreement and calls for comprehensive land claims settlements.

While the basic rearrangement of power between the federal and provincial governments has momentarily derailed original constitutional strategies of territorial groups, the path toward negotiation of complementary powers of self-government seems to have been opened.

To American Indian law lawyers, the level of governing authority of Indian Act bands may seem on its fact embarrassingly inferior to that of American Indian tribes. Such an analysis that compares that nation's current posture with an ideal vision of tribal sovereignty in the United States is unfair. Case law in the United States has long confirmed the capacity of the Congress to unilaterally remove tribal authority and to give it over to either itself or to the surrounding states. There has been some reluctance on the court's part to infer from acts of Congress a desire to limit tribal authority within established reservation boundaries. However, in other areas of tribal law enforcement over non-Indians, in criminal cases or where (as in liquor regulation) white protection has been a paternalistic mainstay of state and federal policies, the court has suggested that the flow of historical events has sharply diminished the potential operation of tribal governments unless Congress confirms this authority or delegates it to them anew because of their dependent status.

Indian groups on both sides of the border decry tribal sovereignty when it is based upon municipal powers of government delegated from a second sovereign. If delegated through statute, it can be removed or revised and is not inherent. Yet as a practical matter, most tribal sovereignty in the United States is entirely dependent on subject-specific legislation and external federal subsidies.

The recent reductions in appropriations through the Indian Self-determination Act and the policy base upon which the Act was constructed are more suggestive of a

Canadian model of delegation (or devaluation) of responsibility than the professed American legal model. Indian self-determination required administration of programs by Indians on the terms established by the federal government. It created for many tribes a shadow Bureau of Indian Affairs, a rather classic pattern of colonial devolution or indirect rule. Appropriations and strings attached to those appropriations have made a mockery of tribal self-government.

In both Canada and in the United States it is likely that statutorily defined and negotiated realms of autonomy for indigenous groups will be the norm and not the exception. For the practitioner, then, the issue becomes one of deciding in which country would one desire to be carrying out negotiations. Canadian court cases now seem to be moving toward recognition of unextinguished aboriginal title even in the most adamantly hostile Western provinces. Tripartite negotiations within the provinces and bilateral territorial negotiations (with strong provincial presence, thanks to Meech Lake) seems to be the anticipated norm. In the United States the process of developing tribal-state compacts as a furtherance of tribal government is active in certain areas (child welfare and environment) but less active in most others. Tribes defer from using taxing authority, authority they possess on paper, because of the likely impact on reservation development and a fundamental scarcity of legal resources to meet state or corporate challenges.

Land Claims

Modern land claims in Canada are strikingly different from the Alaska Settlement, at least at first blush. Land title is communal and protected. Critical attention is paid to traditional hunting and fishing grounds. Some legal authority to continue use of these grounds is usually included in settlements. Subsurface estates may be retained by the Crown.

Settlements may be constitutionally entrenched although the question is still debated as to whether or not amendments to the settlement are legislative or require constitutional amendment.

Differences in many settlements also appear. Settlements with the Crown within provinces were not easily made from Crown land because public land is held by the provinces. Unless there is some duality of interests between provinces and the Crown, the Crown must carry on separate negotiations with provinces to free up settlement land bases other than reserves (Hogg, 1985:555).

Territories and Self-Government: Comprehensive Claims

Negotiations with indigenous groups in the Northwest territory were, for a time, relatively free of provincial interference. Land claims settlements were coupled with political aspirations of the Dene and Inuit peoples. Both anticipated that they would emerge as indigenous provinces capable of territorial control and self-governing authority. Indian and Eskimo peoples assumed that after some trade off of the resource wealth to the provinces, they could protect their voting power with durational residency requirements.

These heady aspirations flowed from expectations that their secured right of involvement in constitutional negotiations would lead to further entrenchment of land rights including powers of self-government. Dene and Inuit were also optimistic because of the limited veto power of the antagonistic Western provinces.

The Meech Lake Accord of 1987 and Constitution Amendment, 1987, had many impacts on Canadian federalism. Yet the most significant was the shift in veto power accorded to single provinces, on admission of new provinces. This, coupled with the end of the mandated constitutional discussions, suggests that the balance of power has shifted away from heady territorial aspirations of land with self-government.

The recent land claims agreement in the territory which protected Crown subsoil interests to mineral resources and spoke of future discussions on government are indicative of this weakening of the indigenous position.

Self-government on Indian reserves has always been marked by severe constraints. Provincial civil and criminal law applied unless Crown legislation overrode it, a near reversal of the judicial doctrine impacting Indian reservations in the United States. Agreements struck in recent years with Indian bands granted them municipal or delegated tribal authority. A question left for the courts is the extent to which indigenous groups have indigenous or inherent authority and the futher extent to which that power has been extinguished by the Indian Act and other legislative accords between the Crown and the Provinces.

Evaluation of Comparisons – Which Comparisons?

First it must be made clear that the comparisons made here are not between two models, but three or even four. Alaska Natives signed no treaties. Congress had banned treaties with Indians four years after the Alaska purchase. That Alaska remained a federal territory gave the federal government enormous leverage over definition of Indian land, government and resources at least until statehood in 1959 and even later due to the large federal land base in the state and the state's desire to have land rights resolved so that it could select its own share of that land base and manage resouces on all public lands.

Land settlements in Alaska were defined and redefined with issues of tribal self-governmental authority explicitly left for judicial determination. Aboriginal hunting and fishing rights were extinguished and replaced with statutory schemes that provided for rural preferences as a condition of state public land management.

The Alaska situation is, then, less clearly defined than that of the rest of the United States when Indian law is concerned. Part of the reason is the long territorial history of the place and the continuing hold by the United States over much of Alaska land and resources. One is tempted to set the Alaska scenario up as at least a third model just as one is tempted to see in Canada two models, a provincial and a territorial model.

While there are explicit differences in the black letter doctrine of Canadian Indian law and United States Indian law, when one examines the disputes in each place, it may be fair to say that the differences are more apparent than real.

In both places the role of provinces and states in asserting their authority over indigenous people is strong. This strength is clear in Canada, obviated only by the entrenchment of existing aboriginal rights treaties and land claims agreements. In the case of organized states in the United States it is officially weak, subject to the whims of Congressional edict. Yet some would argue that the evolving judicial doctrine which once was prepared to view Native sovereignty as the rule with selective exceptions carved out by Congress, has now become reluctant to read into inherent sovereignty new forms of governmental authority unless explicitly recognized (and delegated) by acts of Congress. There seems to have emerged a presumption that state legal authority has been granted over Indian tribes where Congress has not acted. Put another way, tribes in the United States and Alaska seek support for Congressional acknowledgment of their authority which, to Canadian eyes, might seem to be no more than delegated authority.

Land claims models in the lower 48 embody the concept of trust responsibility by the federal government to a communal title. Although shifts in policy under the mandate of self-determination seem to have given tribes effective control and protection of their land, tribal exploitation of resources has been fraught with

unfairly negotiated contracts and scant rewards. Leasing policies and other federally manged programs have left indigenous groups impoverished, their land strip-mined and valueless.

While the Alaska Native Claims Settlement Act did not create tribal land bases but corporate land holdings, amendments to the Act have added many legal protections to the undeveloped land base. Ownership of the corporations will not shift until stockholders vote to alienate their stock (with certain geographic exceptions).

As I ponder the differences in legal reference frames I am struck by the impact of nonlegal forces which tend to make the Canadian and (at least) Alaskan models very similar.

Neither model protects indigenous groups from competing economic forces which favor limited indigenous control of resources unless the indigenous groups are prepared to cooperate in resource development. Indigenous groups in both places must be prepared to broker their control over resources, be it absolute or secondary, to receive or retain access to subsistence resources and local political control. Whether that political authority is viewed as inherent or delegated, it is extremely limited and in no sense of the word co-equal with provincial or state authority, especially as it impacts non-group members.

The fulcrum of Indian policy in both countries appears to be the struggle between states and provinces with the federal government over natural resources. States and provinces are prepared to allow relative indigenous autonomy when the federal government foots the bill and when their own access to public resources development is enhanced.

The importance of constitutional entrenchment of existing aboriginal rights is perhaps the high water mark of Canadian indigenous rights, and inherent tribal authority over a tribal land base, the high water mark of United States Indian policy. Each pales when the conceptual rights are played off against the struggle between federal and provincial forces for power. The indigenous groups can become co-actors only to the extent they can leverage some authority from either side; their power is derivative of two other powerful actors and not co-equal.

None of this suggests that indigenous groups are non-players. The skill that their advocates can employ to manipulate the ongoing struggles between provinces and the federal government will determine the relative strength of Indian rights in each place.

The key to success in crossing national boundaries as an actor in matters of indigenous rights may be less an appreciation of black letter law on the other side (or comparative Indian law) than an appreciation of the role of law within the political process on the other side or, more broadly, the power relationship[5] between provinces and Ottawa or the states and Washington, D.C..

Thus, the American lawyer who advises Canadian groups to press for inherent sovereignty or the Canadian jurist who presses for change through a commission because each strategy has worked in his Native land, may be ignoring the political landscape in which he is working – to the detriment of his Native client.

Footnotes

1. Slattery (1985) writes:

   What we lack is a proper understanding of when and how the native peoples of Canada were won to the allegiance of the crown and what effect this process had on their original land rights, customary laws, and systems of government. Did the crown gain sovereignty over Canada with or without the consent of the aboriginal peoples? On what terms was it achieved? Did native groups come to occupy the same status as other Canadian subjects, or did they have some special relationship with the crown? It is a remarkable fact that coherent answers to these questions cannot be found in standard treatises on Canadian constitutional law and history, or even in more specialized works. (at 116)

2. At Confederation the federal government was granted in s91(24) of the British North America Act (now the Constitution Act 1867) exclusive jurisdiction over 'Indians, and Lands reserved for Indians,' with the original four provinces receiving control over natural resources, property and civil rights subject to the burden of aboriginal title where it continued to exist. The Prairie provinces received control over natural resources only in 1930, while the remainder were former colonies of Great Britain which entered Canada after 1867 after negotiating their own terms of union. With the expansion of Canada west and northward, Indian treaties were obtained and a series of Indian Acts were developed, both largely on models elaborated in the Canadas (Quebec and Ontario) in the 1850s. Thus the conditions and objectives that obtained in central Canada were tranferred to the national level.
   (Morse and Groves, 1987, at 142-143.)

3. See Thomas Berger, Northern Frontier, Northern Homeland, The Report of the Mackenzie Valley Pipeline Inquiry (1977).

4. *Guerin v. R* (1985) 13 DLR (4th) 390,400. Sanders (1987) writes on *Guerin* (at 186)):

   The fiduciary obligation of the Government of Canada arose because of the pre-existing Indian rights. Indian rights and the Crown's fiduciary obligation were confirmed, not created, by the provisions of the Royal Proclamation of 1763 and the Indian Act.

   Remarkable as it may seem, the *Guerin* decision is the first clear Canadian decision that Indian rights arise out of the pre-existing indigenous legal order, and not from some common law doctrine of aboriginal title or by virtue of an affirming action by the colonial legal system.

Bibliography

Canada, Government of
1987 *Strengthening the Canadian Federation, The Constitution Amendment, 1987*. Ottawa: Government Printing Office.

Case, David
1984 *Alaska Natives and American Laws*. Fairbanks: University of Alaska Press.

Conn, Stephen
1987 "Aboriginal Rights in Alaska," in *2 Law and Anthropology*. Wein, Austria: VWGO-Verlaq, 73-91.

Conn, Stephen and Bart Garber
1981 *Moment of Truth: The Special Relationship of the Federal Government to Alaska Natives and Their Tribes – Update and Analysis*. Anchorage: Justice Center.

Hogg, Peter W.
1985 *Constitutional Law of Canada, 2d ed*. Toronto: Carswell Co., Limited.

Keon-Cohen and Bradford Morse
1984 "Indigenous Land Rights in Australia and Canada," in Peter Hanks and Bryan Keon-Cohen *eds. Aborigines and the Law*. Sydney, London and Boston: George Allen and Unwin, 74-102.

Morse, Bradford W. and Robert K. Groves
1987 "Canada's Forgotten Peoples: The Aboriginal Rights of Metis and Status Indians" in *2 Law and Anthropology*. Wein, Austria: VWGO-Verlaq, 139-167.

Pentney, William F.
1987 *The Aboriginal Rights Provisions in the Constitution Act, 1982*. Saskatoon, Saskatchewan: University of Saskatchewan, Native Law Centre.

Sanders, Douglas
1987 "Aboriginal Rights in Canada: An Overview" in *2 Law and Anthropology*. Wein, Austria: VWGO-Verlaq, 177-194.

Skinner, Neil C.
1989 "Foundations of Aboriginal Sovereignty in North America, A Comparative Review." Unpublished paper.

Slattery, Brian
1985 "The Hidden Constitution: Aboriginal Rights in Canada," in Menno Boldt and J. Anthony Long *eds. The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*. Toronto: University of Toronto Press, 114-138.

United States
(1987) Alaska Native Claims Amendments of 1987. Pub L 100-241 (3 Feb 1988).

(1980) Alaska National Interest Lands Conservation Act. Pub L 96-497 (2 Dec 1980) 94 Stat 2422, 16 USC Sec 3111 et seq.

(1978) Indian Child Welfare Act, Pub L 95-608 (codified in scattered sections of 25 USC) (Supp. 1980).

(1975) Indian Self-Determination and Education Act of 1975, Pub L No. 93-638, 88 Stat 2203, codified at 25 USC, Sec 450-n, 455-458-e, and elsewhere in Titles 25, 42 and 50, USC App.

(1974) Indian Financing Act of 1974. Act of 12 April 1974, Pub L No. 93-262, 88 Stat 77, 25 USCA 1451 et seq.

(1971) Alaska Native Claims Settlement Act. Pub L 92-203, 85 Stat 689, 43 USC 1601-28 (18 Dec 1971) (Supp. 1981).

(1958) Alaska Statehood Act, PL 85-508, 72 Stat 339 (1958).

(1934) (1936) Indian Reorganization Act of 1934 (extended to Alaska in 1936), Act of 18 June 1934, 48 Stat 984, codified as amended 25 USC Sec 461-79 (Supp. 1980).

Wilkinson, Charles
1982) "Basic Doctrines of American Indian Law" in Lawrence French *ed. Indians and Criminal Justice.* Towana, New Jersey: Allanheld, Osmun and Co, 75-91.