

Rights and Wrongs

Finding a Just Middle Ground in Land Claim Disputes

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Introduction

It is hard to recall a single case where native people in Canada have won much of lasting value unless, or until, they got in someone's way. Given the adversarial nature of court proceedings where someone wins and someone else loses, it is also hard to envisage any court ever finding an all-round satisfactory solution to a native rights or land claim case. So the best possible result in the Maritimes of the *Delgamuukw* ruling may well be that it helps put Mi'kmaq and Malecite people squarely in someone's way. The ruling has added one more arrow to natives' quiver of legal tools by giving their oral history the same weight as the written accounts of Europeans and their descendents. It may, at long last, give focus to negotiations for a just and rational redress of inequities.

Critics of the *Delgamuukw* ruling argue that oral history is fraught with opportunities to stray from the facts, perhaps particularly so in the North American native tradition where facts and myths are sometimes strung into seamless stories. These stories often put little emphasis on chronology, the single most important element of histories recorded in the European tradition. In such circumstances, it's easy to fear that the result will be inaccurate.

But it's naïve to believe that written history is necessarily any more correct. At best, accounts recorded at the time that events were unfolding can be expected to reflect the big picture no more accurately than newspaper accounts of today. At worst, they may be seriously skewed by deliberate manipulation, ignorance or prejudice. And the fact that historic accounts are interpreted in different ways by today's scholars, all of them claiming great objectivity, speaks for itself. Do not expect to find revealed truth on the lips or in the books of any group of self-interested people.

Patricia Olive Dickason, a Canadian historian who made her mark in recent decades by being one of the first academics to seriously consider native views of past events, has written about and discussed with the author of this paper the distortions that arise when only the victors get to record history. The victorious invariably cast themselves as the heroes of the piece.

Even today, in an era where the vanquished at last finding their voice, the real story may remain elusive. While a new breed of native historians may be quite properly at odds with Euro-centric views, Dr. Dickason believes they may come no closer to objective truth.

The first volume of the *Royal Commission on Aboriginal Peoples* deals extensively with the unreliability of the written record. For example, in relation to some of the earlier treaties, which it found fraught with ambiguities and unresolved paradoxes, it says:

There is clear evidence that, at least at times, more got written down than was ever discussed with the aboriginals. And in some cases France talked about sovereignty only in discourse intended for the ears of competing European nations, never with natives who would have thrown them out.

So the prospect of the courts giving equal weight to competing versions of history need not be disturbing, providing they have the wisdom not to give total weight to any one account.

Indisputable marginalization

There are, however, some historical and modern-day facts that are beyond dispute—the well-documented marginalization of many natives and their communities. And these inequalities have a longer history in the Maritimes, one of the first parts of Canada to be settled by Europeans and their descendents, than in many other regions. Natives have been confined to ever-shrinking reserves on generally unproductive land from the time of the first extensive European settlement following the American Revolution. Their specific woes may have changed, but

their general plight has not been alleviated by the superficially generous federal policies of recent decades.

In general, native people who leave the reserve seem to integrate a little better into the Maritimes' mixed communities, which have none of the native ghettos that characterize many Western Canadian cities. But those who remain on reserves may be a little worse off, particularly when it comes to welfare and unemployment. The *Royal Commission on Aboriginal Peoples* found welfare rates on Maritime reserves to be the highest in the land—77 percent of reserve residents are on assistance at some point in any given year. Other indicators of Canada-wide dysfunction that are scattered throughout the five-volume report, or recorded elsewhere, are more or less indicative of the situation in the Maritimes:

- Indians live, on average, eight years less than other Canadians do, and it's twice as common for their babies to die.
- Indians get sick more often than other people do; they're three times more apt to be injured in a car crash; one-and-a-half times more likely to be injured in a fall.
- They are eight times more susceptible to dying in a fire; six or seven times more likely to drown. They are three times more likely to kill themselves; six times more likely to be killed by someone else. They're seven times more likely to be poisoned.
- 10 percent of Canadian natives live in homes without piped water—90 times the national rate. Their houses may often be inadequate, but each is home to 30 percent more people than average.
- The total amount of land set aside for Indians in Canada is less than the Navaho own in Arizona.
- 73 percent of native people say alcohol abuse is hurting their people; 59 percent say drug abuse; 44 percent say family violence; 34 percent say suicide; 29 percent say sexual abuse; 16 percent say rape.
- Cases of abuse against women and against elders—people barging in and demanding money, for example—were not seen as problems in the past but have increased sharply, perhaps because of more frequent reporting. In the words of the Royal Commission report: "Indian men, unemployed and idle, are constantly humiliated by having their families supported by the welfare system. The little work that does exist on many native reserves . . . is often awarded to women. A power struggle ensues when the native woman is the breadwinner, and the exercise of violence and intimidation may be the last resort of the down-trodden warrior."

- Only 31 percent of working-age Indians are employed. (The official unemployment rate makes the picture look a little better, but only because so many don't try to find work.)
- 65 percent of all working residents on reserves earn less than \$10,000 a year. And less than two percent of all Indians, one-ninth of the national average, have incomes of more than \$40,000. Overall, paycheques for Indians average about half as much as their non-native neighbours.
- Only 0.6 percent of all natives have university degrees, compared with 4.4 percent for all Canadians.
- Native women are better educated than the men are, but no more likely to find work. And less than 16 percent of them earn \$20,000 a year or more, compared with almost 35 percent of their non-Aboriginal sisters.
- Only 1,015 Indians in Atlantic Canada, or eight percent, own businesses—the second-lowest percentage in Canada. And virtually all native businesses in the region are tiny: 34 percent have no employees and another 54 percent have fewer than five.

Reasons for these dysfunctions can be, and have been, debated endlessly. Theories include the view that many individuals, often tempted by perverse policies into unwise choices, are authors of their own fate because they fail to pursue the opportunities that could be open to them as Canadians. That may or may not be so. While we ought to examine the pathologies of dependence when considering policy approaches, the reasons do not matter when we are assessing the high cost of this dependence and dysfunction, not only to the natives on Maritime reserves but also to the broader communities that pay for their myriad social programs.

Likewise, the reasons—failure to pursue job opportunities, racism, indifference and ignorance, or lack of opportunity—do not much matter when we examine the indisputable fact that native people, especially those who live on reserves, have long been excluded from the broader economy throughout the Maritimes.

This reality was underlined in conversation two years ago with Pat Francis, a new, young and progressive chief of the 350-member Woodstock reserve in the St. John River Valley. As is the case on almost all Maritime reserves, the Chief could count on his fingers the number of band members who had jobs off the reserve. One of his responses to the resulting problem of massive unemployment was to first write to, then have an employee visit, more than 60 non-native businesses. Each

business was offered a free native employee—the band would pay the full cost of the informal apprenticeship—for a period of several months. The idea was that if the employee developed the skills needed and proved valuable, a job offer would follow. The exercise resulted in just one employer agreeing to try the experiment. Subsequently, one native woman was hired as a part-time waitress.

To those of us who believe that prosperity is not a zero-sum game—that wealthy and productive neighbours can enhance each other's earning power—this situation is counter-productive. Not to mention the human cost of miring thousands of people in dependence, and the ever-growing price tag for largely ineffective social services.

Little recent progress

Various native groups and leaders in the Maritimes have gone through the motions of making land claims in recent years. Aside from a few specific claims intended to recover compensation for fairly small patches of reserve land that can be proven to have been improperly appropriated by others, none have gone very far. None have had the backing of all Maritime natives and native groups, or even all in any one province. The provincial governments have, with only some very recent exceptions, shown little or no interest whatever in native issues and claims. And the federal government has not deigned that any of the claims to date were appropriate to be brought “to the table” for serious negotiation.

In scores of formal interviews and informal conversations with natives across New Brunswick, some of them senior leaders of groups that purport to have the authority to speak for all, I have heard a wide variety of land claim proposals. Frankly, some of them sound like pie-in-the-sky. Compared to cases that have been settled in other parts of the country, they seem to have little chance of succeeding in court, and no chance at all in negotiations. Claims include demands that the province's 8,000 or so native people be granted title to all of the land in New Brunswick; entitlement to 25 percent of all revenue from resource harvesting in the province; and the right to extract rent from non-native inhabitants.

Though no court precedent exists in the region, Maritime natives do have reason to hope they can establish a legal basis that their case is somewhat analogous to the situation in British Columbia—that they have never signed a treaty giving up their right to the land. A lower court in New Brunswick actually ruled in 1997 that this was the case. This judgment was thrown out on appeal, but only on the basis that the judge had weighed factors from his own knowledge and research rather than on the facts that were put before him. But the ruling, overturned or not, has dramatically changed the dynamics of the relationship

between natives and non-natives in the province, and indeed throughout the Maritimes and parts of Quebec.

The case involved the right of natives to harvest wood from Crown land. During the several months between the ruling and the appeal, hundreds of native people took to the woods with their chainsaws. Despite the appeal court ruling, they continued to cut down trees.

Significantly, the provincial government and the huge New Brunswick forest industry began to take native issues and native claims more seriously. Several interim agreements have been reached with almost every band in the province, each allowing native people to harvest and sell specified amounts of wood. And the province appointed two respected jurists to study the situation and report back with recommendations for longer-term action.

The interim logging agreements are unsatisfactory to most natives, who believe they should have greater access to wood, as well as to the forest industry, which is worried about any cutting that does not fit within carefully drafted long-range plans. New Brunswick's forests are already logged to the limit, right to the edge of unsustainability. There is simply no room for additional cutters who aren't integrated into existing forest management plans.

The presence of native people in the woods and the very real threat that the court might grant them the right to stay—a threat that may be intensified by the *Delgamuukw* decision—places natives in someone's way, perhaps for the first time since the Malecite people sided with George Washington. They are in the way of the provincial government and logging interests like the influential Irving family of Saint John. And both the industry and the government are showing unprecedented willingness to talk with them.

Natives across provincial borders in parts of Quebec and Nova Scotia are also taking to Crown land with their chainsaws, although the activity is at this point on a smaller scale. But the Nova Scotia government, in particular, seems to be taking notice.

The talks taking place are neither comprehensive nor particularly well advanced. But they ought to be welcomed as the first attempts in modern memory to bring Maritime native people into the broader economy.

It seems clear from even a casual survey of the geography and settlement patterns of the Maritimes that it is politically impossible to turn over huge swaths of territory to a group of people out-numbered more than 100-to-1 by their non-native neighbours. The region is simply too densely populated. And even the more militant among Maritime natives concede that their neighbours are here to stay.

There are relatively large blocks of unsettled forestland in both New Brunswick and Nova Scotia. All of them are privately owned, designated as protected land, or leased by the Crown to forestry companies. The fishery is equally crowded with fewer geographic set-asides, but with quotas pushing the boundaries of sustainability and fully exploited by individual fishermen and fishing companies that have a legal right to do so.

If some form of involvement in the region's resource industries is the favoured way to give native people some access to an economy beyond their small and sparsely endowed reserves, then some form of co-management strategy seems to be the most practical answer. Co-management has proved effective in other parts of Canada, nowhere more so than in northwestern Saskatchewan, where the Meadow Lake Tribal Council is involved in the hugely successful management of 2.2 million hectares of Crown forest land.

Some reserves are making strides by adapting what is seen as a traditional approach of communal management to modern industries. The Conne River band of southern Newfoundland, for example, has virtually eradicated unemployment in an area traditionally starved for jobs. Band-owned enterprises include traditional trapping and crafts; out-fitting and eco-tourism; retailing; logging and milling; aquaculture and farming; and providing Internet and cable television service well beyond the boundaries of the reserve.

While this experiment is successful, it is also quite new. Given the widespread failure of communitarian economic management in many parts of the world, however, the jury is out as to how long it can continue to prosper.

The Meadow Lake model is an illustration of a graceful transition from community ownership to entrepreneurial individualism. It was designed from the outset to be what organizers call "a self-destructing co-operative." In communities with no tradition of entrepreneurship and where virtually no one had money to invest, the tribal council kick-started what has grown into a huge and environmentally friendly logging industry by buying all of the equipment needed and training people to operate it. But, as fast as skills were sufficiently developed and financing could be arranged, individual components of the operation were sold off to scores of different owners.

The centrepiece of the project was a deal between the tribal council and about 100 non-native employees to buy a money-losing, Crown-owned sawmill. The province was eager to sell, and the band exploited that eagerness by leveraging a co-management agreement for the 2.2 million hectares of land. Since that time, they have brought in a new

partner—a company that built and operates Saskatchewan’s first hardwood pulp mill. They have dramatically improved cutting practices, implemented widespread reforestation, and fostered the development of dozens of small mobile sawmills. When I visited the area two years ago, they had increased native employment on the land 25-fold and non-native employment three-fold, in less than a decade.

The area of northwestern Saskatchewan is less densely populated than any part of the Maritimes. But there are many parallels between the two regions. The Saskatchewan area is home to about the same number of native people from two different First Nations—Cree and Dene—echoing the Mi’kmaq-Mallicite mixes in the East. Nearly a dozen native communities in both regions are widely scattered. The resource that is the basis of newfound prosperity in each area is widespread, but not particularly rich.

The biggest difference I observed was leadership. The Saskatchewan group, though divided at times by racial and political differences, has been able to come together to accomplish mutual goals. That has yet to happen on a large and sustained scale in the Maritimes.

But recent developments in the courts and on the land have created a climate in which Maritime governments and big industry are ready, perhaps even eager, to talk, given the high cost of depending on an uncertain wood supply. Although Maritime resources, especially wood and fish, are already fully exploited from a conventional harvesting perspective, the industries potentially have a long way to go in creating more wealth through adding value to the products they ship. I am confident that, if native people can find the right leadership and rally behind it and if both sides can avoid intractable confrontation, some mutually beneficial and satisfactory deals can be struck.

But that is not an outcome I expect if the big questions—rights to the land and access to economic activity—are settled in court.