COMMENTARY

THE POLITICS OF AGGRESSION[1]: INDIAN TERMINATION IN THE 1980s

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INTRODUCTION

For many generations, much like besieged garrisons, the First Nations of Canada have been under constant and unrelenting pressure to surrender their lands and identity.

The high expectations that were fostered by the recommendations of the Special Parliamentary Committee on Indian Self-Government,[2] and by subsequent federal promises and professions of good faith, have come to naught. What has been reaffirmed instead, in the name of constitutional reform and Indian self-government, is a time-worn termination strategy which, if successful, will spell the end to the existence of most First Nations within a generation.

For Indian Nations today, therefore, the salient and most important issue, is survival.

This paper addresses the issue of survival in contemporary terms because Ottawa's long sustained war of conquest is being practiced with a number of new weapons. These include "divide and conquer" stratagems, and a new form of double-talk which serves to disguise termination objectives as "self-government," etc. The expectation in Ottawa is that those among the First Nations who are most vulnerable to pressures, trade-offs, and unfounded assurances will lead the way and set the precedents by legitimizing a termination policy in legal and constitutional terms.

INDIAN TERMINATION

It is significant that during most exchanges between federal officials and Indian spokespersons, one rarely hears even a passing reference to termination. As a subject for debate, the concept received its last major attention following the announcement of the federal governments' "White Paper" proposal in 1969.[3] The apparent disappearance of "termination" from the vocabulary of First Nations reflects perhaps the lengths to which federal authorities have gone to hide the true intent of their policies and actions.

The concept of "termination" originated in the United States. It became the label which described recurring attempts in that country to extinguish aboriginal and treaty rights and shift jurisdiction and responsibility for Indians and their lands to state governments. One of the important motives which generated a termination policy was recurring concern in Congress that the costs of Indian administration and programs were too high and too visible. Congress believed that such costs could be reduced by making Indians less dependent of the federal budget. Congress also thought that Indian costs would be less a target for critics if these were submerged in the budgets of various state governments. The last major termination initiative in the United States took place from 1954-1960, though efforts to sustain this policy have not ceased even today.

In 1953, the 83rd Congress adopted a policy of "terminating as fast as possible" the special relationship between American Indians and the federal government. By 1960, numerous laws and amendments were passed by Congress, and various strategies were applied, to terminate the special status of as many

Indian communities and tribal groups as possible. Few, if any, of these Indian groups were informed about the implications of the termination policy or realized what the results would be until it was too late.

The subterfuge used in the United States was to represent termination as a plan to offer Indian people "full citizenship rights." In other instances, government agents persuaded Indians to accept termination by submitting them to unbearable budgeting and administrative pressures, as well as promises and outright lies. Frequently, Indians in the USA who believed that they had successfully negotiated special assistance to develop their resources, or a claims settlement agreement, found out later that a termination rider had been attached to these deals.

In almost every case, termination objectives were realized in the United States by misrepresenting them as "forest management schemes," "economic development plans," "self-determination," etc.

During the period 1954 to 1960, sixty-one communities and tribal groups were terminated in the United States. Termination proved to be a potent weapon against Indian people in a modern war of conquest.

One typical feature of the USA termination policy was a requirement that the inalienable nature of Indian lands be transformed into fee-simple title. Indians in the USA frequently were pressured into accepting fee-simple title with arguments that full Indian ownership of such lands would be legally confirmed, and that new opportunities would be created by means of such title for economic development and employment. In fact, what "fee-simple" means is that Indian lands cease to be protected as the traditional territory of an Indian Nation.

In Canada, fee-simple involves affirming an underlying provincial title and breaking-up Indian lands into parcels which are owned outright by individuals or corporations. These owners in turn have the right under fee-simple title to dispose of the land in any way they see fit--including sale to non-Indian interests. Such transactions occur within the framework of provincial laws and jurisdiction.

In the USA, fee-simple title which resulted from termination policies led to the permanent loss of several million acres of Indian land. The transfer of program responsibilities and legislative authority to State governments had a devastating impact on Indian people in the United States. Destructive State laws were imposed on terminated Indian communities against their will. These had the effect of wiping out tribal customs, local community and family control, traditional adoption practices and ultimately, all sense of tribal identity. State governments accelerated this process of assimilation by taking control and regulating school curricula, teacher employment, social and recreational programs and most other aspects of Indian social and economic life.

Fee-simple arrangements can work on Indian land only if the underlying title remains inalienable. This would require that the concept of "aboriginal title" be recognized and that such title ensure that Indian lands remain under the jurisdiction and control of Indian governments, regardless of who owned any given parcel under fee-simple title. Without the protection of an underlying aboriginal title, fee-simple becomes a way of destroying the land base of Indian nations, and ensuring that an Indian jurisdiction becomes impossible in the future.

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TERMINATION POLICIES IN CANADA

In Canada, termination policies have paralleled those in the USA and, in some respects, have been more persistent. As early as 1859, the professed aim of Indian administration was asserted to be "the gradual removal of all legal distinctions between Indians and her Majesty's other Canadian subjects ..." A determined drive to municipalize Indian communities started in 1868, just a year after Confederation. This objective found its full expression in the Indian Advancement Act of 1884 which undertook to confer "certain privileges on the more advanced Bands of Indians of Canada with a view to training them for the exercise of municipal powers."[4]

The "White Paper" of 1969 surfaced from the government of the day as a frankly articulated termination policy. The intention was to terminate all First Nations quickly and with finality by means of administrative and legislative action, by amending the constitution and by establishing full provincial jurisdiction over Indian communities.

After the First Nations mobilized effectively to block Ottawa's 1969 initiative, the federal government was compelled to resume its former incremental approach to termination. This entailed adopting a "Band by Band" approach to termination, while avoiding substantive negotiations with regional or national Indian organizations. Selected Bands and tribal groups were pressured and encouraged to build program and funding linkages with provinces and even to accept provincial jurisdiction for various purposes. Federal authorities believed that such linkages would get such Indian groups accustomed to provincial jurisdiction and more amenable to full termination down the line. Termination and extinguishment features became integral parts of comprehensive claims

negotiations and settlements. The so-called "devolution" program also became a way of "training ... for the exercise of municipal powers" (in the words of the 1884 policy statements).

The devolution of "municipal powers" to Indian communities, in the context of federal policies, has always meant a process of getting such communities ready for full municipal status under provincial jurisdiction. This objective is identical to the type of termination practiced in the USA between 1953 and 1960.

Although earlier enfranchisement policies claimed many Indian people, and even whole communities, most First Nations have managed to resist the blandishments of termination via the municipal route. It is only in the past ten years that Ottawa has succeeded in effecting this form of termination on several Indian groups by means of comprehensive claims settlements and special legislation.

CURRENT TERMINATION INITIATIVES

The federal government is poised again, as it was in 1969, to bring its long-standing and sustained termination policy to fruition.

As was the case in the United States, the federal government has adopted the tactics of misrepresentation and disguise to attain its objective. "Municipalization" is referred to as "self-government," and proposed constitutional amendments that are designed to legitimize a termination policy are described as a "constitutional entrenchment of self-government."

Ottawa believes that the First Nations will not see through the smoke screen until it is too late. The federal assumption is that, in any case, a united opposition by First Nations will be difficult to mobilize to effectively challenge its plans.

The main building-block of Ottawa's current termination policy and related stratagems can be summarized as follows:

(i) Nielsen Task Force Recommendation:

This controversial report was leaked in April 1985 while it was en route to Cabinet. Severe criticism of the report's recommendations brought reassurances from the Prime Minister that it did not reflect government policy. Nevertheless, the Nielsen recommendations did finally get to Cabinet later that same year and have shaped and given direction to subsequent Indian Affairs policy deliberation and decision.

Among the more significant policy guidelines that are being implemented as a result of the Nielsen recommendations are requirements that all future Indian Affairs initiatives adhere to a rigid cost control strategy. This means that such costs are to be phased into provincial appropriations wherever possible or devolved to Indian communities within fixed budgeting ceilings. The implication in the latter arrangement is that Indians will be pressured to look to provinces if they want to exceed these funding limits.

Reinforcement for the Nielsen recommendations has come from the Justice Department which has maintained its traditional position that there is no constitutional or legal basis for Indian self-government as an aboriginal or treaty right. This legal view, together with Nielsen's formula for cost control, have shaped federal self-government policy, its constitutional amendment strategy, as well as such other related

policies as the recent comprehensive land claims settlement announcement.

In short, current federal Indian Affairs policies are founded on much the same concerns and rationale that launched the termination initiatives of the United States Congress in 1954. These parallels become more evident if one examines closely the building blocks and stratagems that characterize Ottawa's ongoing policy initiatives.

(ii) The Federal "Two-Track" Policy

This policy was approved by Cabinet in November 1985 and was referred to by Indian Affairs Minister Bill McKnight as one of the elements that has been incorporated in the recently announced comprehensive claims policy.

The "two-track" policy, as it is known among federal officials, is a coordinated termination strategy which is supposed to come to fruition at the constitutional conference in the spring of 1987. It is concerned primarily with two areas: Indian self-government, and the constitutional process.

The First Nations' view self-government as an aboriginal and treaty right which should provide for a range of powers that are constitutionally defined and protected. Such a constitutional entrenchment of First Nations' sovereignty is the only way that Indian governments can be established as full partners within Canadian confederation. The alternative is to accept delegated powers

and to function under the control of a constitutionally based government (that is, a province). Most First Nations have found this latter option to be unacceptable because, as in the United States, it results in termination with all its evil consequences.

Without admitting publicly what it is doing, the federal government in fact has recast the First Nations' concept of self-government in the termination mold. The self-government policy to which the Indian Affairs Minister refers, sanctions the creation of Indian municipalities, the affirmation of provincial title over Indian lands, the break-up of such lands into fee-simple holdings, and a phased shift of jurisdiction from the Federal Crown to provinces.

The aim of the so-called "two-track" policy is to get a number of Indian bands and tribal groups launched on the road to municipal status and termination before the First Ministers' conference takes place this spring. The new "Self-government Sector" of the Department of Indian Affairs is now actively engaged in promoting this development. Once a number of Indian communities commit themselves to municipal status, Ottawa can use them as tangible precedents, and represent them as a consensus with Indian people about the nature of Indian "self-government." This definition, then, is expected to facilitate an understanding with provinces and produce the kind of constitutional amendments that will authorize the federal government to pursue a termination policy on an even larger scale.

The "self-government" aspect of the "two-track" policy was confirmed as a termination stratagem by Bill McKnight during an interview on November 21, 1986 with Jonathan Manthorpe of Southam News. The Minister stated:

> The Indian leadership doesn't like comparison with municipal government but, without saying a word, I think that within the existing Constitutional framework of Canada, that is what we're talking about.

The self-government policy approved in November 1985 identifies the constitutional process as the second major thrust of the "two-track" policy. Federal constitutional strategy seeks to produce amendments that, in effect, legitimize the municipal models that have already been developed and which give Ottawa a constitutional mandate to impose the same result on other First Nations by persuasion, pressure, manipulation or even unilateral legislation if all else fails. In other words, for the first time, the federal agreement would have constitutional authority to implement a full-scale and accelerated termination policy.

The mechanisms for getting a constitutional mandate for termination are represented in proposed amendments which appear innocuous on the surface. These are:

> --the inclusion of a general amendment in the constitution which merely recognizes the principle that Indians have a right to self-government.
>
> --a second amendment which commits the federal government to negotiate self-government arrangements of an unspecified nature.

The hypocrisy and misrepresentation that are inherent in these proposed amendments become clear when placed in the context of Ottawa's interpretation of Section 35 of the Constitution and its definition of Indian self-government.[5] The view of the Justice Department, which shapes federal policies, is that Section 35 does not offer any constitutional protection to aboriginal and treaty rights until such time as these are defined. For example, in advising the

government on the constitutional implications of extinguishing the Nishga claim in British Columbia, the Justice Department noted that:

> This proposal contemplates effectively extinguishing Nishga claims to aboriginal land title and rights, and replacing them with rights defined upon final settlement being implemented. Such settlements are contemplated in Section 25 of the Constitution and the extinguishment of aboriginal rights is consistent with Section 35.

In short, the federal view is that Section 35 of the Constitution as written is an empty box. Given the right sort of general amendments, along the lines that are currently being advanced by Ottawa, the box will remain empty. What the amendments will do, however, will be to facilitate the imposition of Ottawa's definition of self-government on the First Nations.

A constitutional provision that requires Ottawa to "negotiate" self-government is no safeguard to First Nations. The experience in the United States illustrates that pressures, trickery, lies, and misrepresentation can masquerade as "negotiation." A constitutional commitment by Ottawa to negotiate self-government arrangements is much like giving an elephant permission to dance the polka among the chickens.

COMPREHENSIVE CLAIMS POLICY

An analysis of the most recent federal policy announcement on comprehensive claims confirms that it retains the same termination features that characterize Ottawa's self-government strategy. The comprehensive claims policy has been misrepresented as a new approach that was shaped in some measure by the Coolican recommendations.[6] The truth is that all of Coolican's recommendations were rejected wherever they contradicted the termination

objective of the federal government. What has emerged as a result is essentially the same policy that has been in effect since 1973. Thus:

--extinguishment of aboriginal title to Indian lands remains the core feature of the policy (extinguishment is now called establishing "clarity and certainty").

--a funding ceiling is maintained which limits the number of claims that can be accepted to six in any given year (and only one at a time in B.C.).

--self-government can be negotiated as part of a comprehensive claims settlement but it has to be consistent with federal policy as approved in November 1985 (i.e. municipal forms that can be phased in in time under provincial jurisdiction).

--framework agreements to be developed to define scope, funding, timing, etc., for negotiations. (This mechanism ensures that negotiations adhere to Ottawa's policies and agendas).

--Indian participation to be permitted on public boards and advisory groups. (This is not new because these provisions were included as early as 1975 in the James Bay Agreement).

--Resource revenue sharing to be available on certain Indian lands at a percentage and for a length of time to be determined by Ottawa. (This is the only provision that is slightly modified. It means that Ottawa enters into negotiations on the assumption that it owns the resources on Indian lands and that it is prepared to pay a percentage of the compensation in the form of revenue sharing, given an appropriate offset in cash settlement. This arrangement benefits Ottawa because it permits compensation to be paid over time, and reduces the need for larger lump-sum payments).

CONCLUSION

Federal authorities appear to have learned little from past history, or from their neighbors south of the border. The present government in Ottawa is clearly committed to renewed termination objectives. Instead of identifying these objectives for what they are, Ottawa has hidden them behind a smoke-screen of rhetoric that is intended to pacify and mislead First Nations and the general public.

Termination today is a three-pronged assault that aims "to get the federal government out of the Indian business." Self-government, the ongoing constitutional process, and comprehensive claims settlements have all come to represent processes and outcomes which are consistent with termination. Other related activities of the Department of Indian Affairs, including devolution practices, block funding, economic development initiatives and program delivery arrangements are being applied to confer "certain privileges on the more advanced Bands of Indians of Canada with a view to training them for the exercise of municipal powers" (in the words of 1884 Indian Advancement Act).

After more than one hundred years, Ottawa is still spinning its wheels in the same old rut.

NOTES

[1]This commentary is an excerpt from a paper by Walter Rudnicki, entitled "Reveille for First Nations: The Politics of Aggression and Defence," 15 January 1987. Readers will note that the paper was written prior to the March 1987 Constitutional Conference.

[2]Keith Penner (Chairman), Report of the Special Committee on Indian Self-Government in Canada. House of Commons Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings, Oct. 12 and 20, 1983, Issue No. 40.

[3]Canada Department of Indian Affairs and Northern Development. Statement of the Government of Canada on Indian Policy 1969. Ottawa: Queen's Printer, 1969.

[4]Indian Advancement Act, SC 1884, C.28.

[5]Section 35(1) states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Constitution Act, 1982, C.11, Schedule B.

[6]Canada. Task Force to Review Comprehensive Claims Policy 1985. Living Treaties: Lasting Agreements. Report of the Task Force to Review Comprehensive Claims Policy. Ottawa: Department of Indian Affairs and Northern Development.