

Canada's Governance of Aboriginal Peoples: Is it ethical?

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Introduction

In the context of claiming that Canada is unjust, I have been able to confirm what you likely believe, namely, non-Aboriginal Canadians typically believe that Canada is a just nation. My colleagues, students, family, friends and acquaintances all assure me that while not perfectly just, Canada is very just. The overall response could be summed up as follows: "Sandra, to call Canada unjust is to greatly exaggerate the "Aboriginal problem" and to be too emotionally involved in your research." If the latter means that my sense of justice has not been quiet much since the primary project on my research agenda became the question "Are Aboriginal peoples treated justly in Canada?" then, yes. I am emotionally involved in my research. However, since Plato located a sense of justice in spirit, an irrational component of the soul, the Western philosophical tradition has recognized this moral sentiment. Plato claims the spirited, part, the naturally ally of reason, when a man believes himself wronged is "...boiling and angry, fighting for what he believes to be just." (*Republic*, 440d) In very small children, the sense of justice is probably self-directed. However, with reason's guidance, moral anger is one's response to others being harmed. As I put before you the injustice experienced by Aboriginal people, that is, the harm that Canada's non-Aboriginal governments impose on them, I anticipate that you will have many opportunities to verify Socrates' claim that a sense of justice is part of what we are as human beings. By the end of the paper, I anticipate your reason and your sense of justice will agree that Canada is an unjust nation.

In order to demonstrate that Canada is a just society, I display some components of the systemic injustice experienced by Aboriginal people. One of the advantages of this 'naming the injustice' approach is that it provides the appropriate starting point for any Aboriginal-non-Aboriginal dialogue aiming to work out a just relationship between Aboriginal and non-Aboriginal governments. The federal, provincial and municipal governments, and even some political scientists, have misunderstood and mislabelled the issue they are responding to in their efforts to assist Canada's Aboriginal people. They consistently speak of "the Aboriginal problem." I demonstrate here that Aboriginal people are not the problem. Non-Aboriginal governments in their policies and their actions (commissions and omissions) are the problem. They create an Aboriginal reality riddled with injustices and speak of an Aboriginal problem. By putting the injustices on the table, the discovery of their content and scope compels non-Aboriginal governments to replace efforts to solve 'the Aboriginal problem' with solutions to 'the non-Aboriginal problem.' It is clear that until non-Aboriginal governments recognize the problem is in the injustice inherent in their policies, in their actions and in their inaction, the injustice experienced by Aboriginal people will not only persist, it will keep growing, and growing. It will not just go away.

The Case for Systemic Injustice

The argument of this paper is based upon fundamental justice principles, most of which have been part of the dominant Western philosophical tradition since the time of contact. Nothing in my argument presupposes seeing the world or the actions of non-Aboriginal governments through an 'Aboriginal lens.' The justice judgements upon which I justify the claim that Canada is unjust do not employ an Aboriginal axiology. It might be that an Aboriginal axiology would arrive at similar conclusions. However, this paper aims to demonstrate to non-Aboriginal people that their fundamental justice principles, the principles linked to their sense of justice, assess Aboriginal reality as profoundly unjust. The following justice principles are employed:

1. The rights of nations, including indigenous peoples, to be self governing. (Recognized at the time of first encounters and treaties.)
2. The justice requirement to keep promises presupposed in treaty-making.
3. Justice's requirement that an owner transfer ownership rights in order for someone to acquire rights to that which is owned.
4. Justice's requirement that one consent to be ruled.
5. Justice's requirement to respect human rights, in particular, the rights to life, liberty and property.
6. The right to preserve one's culture and practice one's religion.
7. The rights of parents to oversee their children's education and the rights of families to remain intact.

These principles represent components of the concept of justice which would have provided the moral landscape for non-Aboriginal interaction with Aboriginal people.

Applying these principles to Aboriginal reality, I demonstrate that as nations and as individuals, Aboriginal people are encased in an institutional structure rife with systemic injustice. While it is unlikely that many protest the claim that Aboriginal people have been treated unjustly by Canada's governments, naming the injustices is necessary to establish (1) the injustice is systemic and (2) the extent of the injustice. Only in the naming can we discover the depth and breadth of the injustice. And, it is the depth and breadth of the injustice that makes the assertion "Canada is unjust." true. Obviously a country can be just, without being perfectly just. However, when one comprehends the extent of the injustice which non-Aboriginal governments have built into the institutional structure within which Aboriginal people live, one recognizes that Harold Carinal's book *The Unjust Society: The Tragedy of Canada's Indians* contains the appropriate justice assessment of Canada. Non-Aboriginal Canadians will love Canada as much after the discovery; but, we cannot proudly proclaim to ourselves or the world "Canada is a just society."

The following table categorizes some of the most significant the injustices experienced by Aboriginal people.

Moral injustices experienced by Aboriginal peoples and persons
1. Violation of the right to sovereignty.
2. Wrongfully taking Aboriginal lands.
3. Unjust treaty processes.
4. Unjust treaty content.
5. Treaty violations and treaty promises unkept.
6. The Indian Act's paternalism, violation of Aboriginal right to self-determination and human rights.
7. The Federal government's transfer of Crown land to the provinces.
8. Cultural genocide (social, political, and economical)
9. Assimilation policy and actions. [Imposing Christianity, Indian Act, Compulsory Canadian citizenship, Residential schools, The White Paper (Jean Cretien), The First Nations Governance Act (Robert Nault)]
10. Parliament's response to Royal Commissions on Aboriginal people.

It is important to note that the injustices are not past injustices. Many injustices have their origins in historical events. However, they exist as ongoing injustices in the lives of Aboriginal people, and will be part of non-Aboriginal unjust treatment of Aboriginal people until non-Aboriginal governments stop their activity and inactivity and change/replace unjust laws and policies. Separate books have been written about the injustices enumerated above. This paper cannot provide a full disclosure of even one of them. I briefly examine below the first five listed in the table. Although the injustice picture remains incomplete, it suffices to demonstrate the seriousness of the injustices daily experienced by Aboriginal people and the systemic nature of the injustice.

The violation of the inherent right of Aboriginal peoples to be self determining

Aboriginal and non-Aboriginal political leaders and scholars maintain that Canada's Aboriginal peoples were sovereign and occupied territories. In the words of Georges Erasmus and Joe Saunders "It is a matter of historical record that before the arrival of Europeans, these First Nations possessed and exercised absolute sovereignty over what is now called the North American continent... It was not possible to find "empty" land in the Americas. All the land was being used by the First Nations."¹ Canada's Supreme Court has affirmed pre-contact Aboriginal

¹Georges Erasmus and Joe Saunders, ""Canadian History: An Aboriginal Perspective," in *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*. Eds. John Bird, Lorraine Land and Murray Macadam, (Toronto: Irwin Publishing), 3.

sovereignty and explicitly tied its decision with the natural rights argument employed in the Marshall decision in the US Supreme Court. So, there is general, though not complete, agreement that neither the doctrine of discovery or terra nullius justified Britain or France claiming sovereignty over Aboriginal peoples and territory. However, the extent to which Aboriginal peoples today retain their sovereign is a matter of debate. While non-Aboriginal governments in Canada may agree with Erasmus and Saunders and other Aboriginal leaders that First Nations did not "...perceive the treaties as surrender of sovereignty." they presume in word and deed that Aboriginal sovereignty has been surrendered. The federal government in its dealings with Aboriginal peoples presumes that non-Aboriginal sovereignty is the only sovereignty existent in Canada. Hence, it is against the backdrop of non-Aboriginal sovereignty that Aboriginal self governance, not Aboriginal sovereignty, is to be understood and implemented.

Neither the Royal Proclamation of 1763, which presumes sovereignty while recognizing Aboriginal land rights, nor earlier or subsequent declarations of Crown sovereignty over Canada's Aboriginal peoples have the moral power to create non-Aboriginal sovereignty. The existence of sovereign nations in the territory over which they claim sovereignty makes such proclamations legally invalid as well as morally unjust.² So, unless the federal government comes by the sovereign authority it exercises over Aboriginal peoples by some means containing Aboriginal peoples' consent to be governed, the federal government does not possess the right to this authority.

Treaties would seem to be the only source by which the federal government could have gotten Aboriginal consent to be governed. Unfortunately treaties do not provide an uncontested answer to the justice question. There is an Aboriginal and non-Aboriginal perspective on the treaties. For their part, Aboriginal peoples consistently maintain that treaties established a peaceful relationship between nations, created responsibilities for both parties and protected rather than extinguished Aboriginal sovereignty. Their inherent right to self determination existed prior to and subsequent to any treaty. Therefore, the federal government's actions are unjust when it exercises sovereignty over Aboriginal peoples. In particular, Parliament's legislation which purports to structure Aboriginal governments is in violation of their inherent right to self-government. The federal government's interpretation of the treaties, namely that they presume and further establish Crown sovereignty, is consistent with the Indian Act's constraints on Aboriginal sovereignty and also with Robert Nault's proposed changes to the Indian Act. If only non-Aboriginal sovereignty is presumed to exist, Aboriginal sovereignty cannot be violated. So we have a standoff, in need of an adjudicator.

² "The Royal Proclamation was uniquely framed to dispossess Indians of their sovereignty and lands. Even by the then prevailing principles that governed European domestic and international relations, the British Crown's assertion of sovereignty over indigenous peoples and proprietary title to their lands represented a corruption of justice. Under then-existing international law, 'first discovery' entitled a state to declare sovereignty over and to claim title to only unoccupied territory. The British Crown knew North America was not occupied. Thus, the Crown knowingly violated two of the prevailing European principles of international law: it declared sovereignty over Indians and claimed title to their lands." Menno Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993), 3.

Moral justice seems to be onside with Aboriginal peoples. If the right to sovereignty is an inherent right, as seems to be generally acknowledged, then pronouncements aiming to eliminate it will be unsuccessful speech acts. Patrick Mackem and other legal scholars maintain that it is only because European powers viewed Aboriginal nations to be inferior that they convinced themselves "...of the justice of their assertions of sovereignty over Aboriginal people and Aboriginal territories."³ Aboriginal peoples were not treated as formal equals. Since Aboriginal peoples have consistently accused the federal government of wrongly interfering with their authority and meddling in their lives, there is not much upon which to build an argument that they consented to be governed. Moreover, the federal government's consistently violating the right will not make it less real. The injustice of the federal government's exercise of sovereign powers over Canada's Aboriginal peoples and its denial of their right to self determination in law, in policy and in action means that the relationship between non-Aboriginal and Aboriginal peoples is unjust at its very roots.

Canada's Aboriginal peoples have an additional moral justice complaint about the only avenue by which they can accuse the federal government of violating of their rights, namely, Canada's court system. Canada's Supreme Court has in its judgements, by and large, supported the federal government's claim to underlying sovereignty.⁴ This may appear to provide some legal legitimacy for the federal government's exercise of sovereignty over Aboriginal peoples; but, how impartial is this adjudicator? Aboriginal people seem justified in maintaining that a just resolution of this fundamental justice question cannot be obtained from a Court which bases its decisions upon British Common Law and acts of Parliament. Procedural justice requires that a justice judgement on whether Aboriginal peoples still possess their inherent right to sovereignty be made by an impartial judge.

Clearly, Canada's Supreme Court does not qualify, as analysis of the commitment to Crown and federal sovereignty implicit and explicit in their decisions attests. In their discussion of *R. v. Sparrow*, Asch and Macklem show that in Common law Aboriginal rights were understood as contingent not inherent, hence Aboriginal rights were "...always subject to regulation or extinguishment by the appropriate legislative authority. The judicial recognition of the inherent nature of aboriginal rights thus occurred in the context of a tacit acceptance of the sovereign authority of the Canadian state over its indigenous population. As a result, the vision of First Nations sovereignty and native forms of self-government generated by an inherent theory of aboriginal right remained outside the purview of Canadian law."⁵ They conclude their

³ Patrick Mackem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001), 121.

⁴ According to Michael Asch, court decisions have protected Aboriginal economic, social and religious rights, but not Aboriginal political rights. "All court decisions rest on the presumption that, while it must be quite careful to protect Aboriginal rights, Parliament has ultimate legislative authority to act with respect to any of them. This position is founded on the premise that the Crown established sovereignty over Indigenous peoples from the moment that Europeans first arrived." (Michael Asch, "Self-Government in the New Millennium," *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*. Eds. John Bird, Lorraine Land and Murray Macadam, (Toronto: Irwin Publishing), 70.

⁵ Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An

examination of Aboriginal sovereignty with a moral assessment, a justice recommendation for the federal government. “An inherent theory of aboriginal right remains true to the belief of equality of peoples and as such should form an integral part of Canada’s constitutional identity.”⁶

Aboriginal leaders and scholars have explicated the violation of their right to self determination in terms of sovereignty. However, Bernice Hammersmith is not alone in noting that the notion of sovereignty is European, and no word in Canada’s indigenous languages means “...what Euro-Canadians mean by this word.”⁷ Dissociating Aboriginal self determination from the notion of sovereignty seems aimed at stressing a different understanding of the content and constraints of sovereign power. Aboriginal leaders and academics who speak of self determination do not see jettisoning the notion of sovereignty as recognizing the federal government has some sovereign authority over Aboriginal people. Rather, this is one of many instances in which Aboriginal people for pragmatic reasons use the axiology of the Western philosophical tradition. Our present unjust relationship cannot change unless they enable us to understand the injustice in it. In order to communicate the extent of the injustice, and represent it so that we understand it, they employ the notion of sovereignty, -a notion firmly attached to our notion of justice. Although non-Aboriginal understanding may be facilitated by this use of our moral conceptual framework, it also creates misunderstandings of Aboriginal axiology. Consequently Aboriginal peoples find themselves working to explain why they maintain that non-Aboriginal sovereignty violates their sovereignty; but, their inherent right to self determination is not the same as non-Aboriginal sovereignty. That they must express their position using components of an axiology which unsatisfactorily represents and may be inconsistent with their values disadvantages Aboriginal peoples in discussions with non-Aboriginal governments. A disadvantage which is another component of the systemic injustice that constitutes their reality.

Taking the lands of Aboriginal peoples

To the extent to which non-Aboriginal people have any moral entitlement to be in Canada and to live and work in a particular part of Canada, these entitlements arise from treaties. In November 2004, when John Borrows told faculty and students at the University of Winnipeg that all Canadians are treaty people, despite years of research into what I have been calling “Aboriginal justice issues” this came as a surprise. The notion that non-Aboriginal people were treaty people should have been as predominant in my thinking as the notion that Aboriginal people are treaty people. But, it wasn’t. Non-Aboriginal people don’t think of themselves as treaty people. Being treaty people might be the way to establish a just relationship with Aboriginal people; but non-Aboriginal people seem to have never viewed themselves as treaty

Essay on R. v. Sparrow” in *Aboriginal Legal Issues: Cases, Materials and Commentary*, 2nd Ed., eds. John J. Borrows and Leonard I. Rotman, (Markham: Lexis Nexis Butterworths, 2003), 361.

⁶ Ibid. 364.

⁷ Bernice Hammersmith, “Restoring Women’s Value” *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*, Eds. John Bird, Lorraine Land and Murray (Toronto: Irwin Publishing, 2002),127.

people. Aboriginal people have treaty rights which are protected by the Constitution. And this protection exists because of the efforts of Aboriginal people to push their justice arguments and the power of these arguments.

Non-Aboriginal treaty rights do not receive similar affirmation and protection. Of course, since non-Aboriginal governments have consistently acted as if their sovereign authority and right to govern the territories of Aboriginal nations does not really depend on treaties, and consistently broke the treaties, it is not surprising that they have not pushed to affirm their treaty rights. The federal government does not want to live within the constraints of its treaty rights and responsibilities. It, and non-Aboriginal Canadians, enjoy the fruits of their unjust exercise of sovereignty and their exercise of rights to the land which they cannot justly claim on the basis of treaties.

Since the rights which the federal government and non-Aboriginal Canadians justifiably claim can only be rights which Aboriginal peoples give when they consent to sharing their territory, it is necessary to dialogue (not negotiate) with Aboriginal peoples in order to discover what those rights are. Non-Aboriginal governments have not discovered, or perhaps fail to see, that the treaty rights of either non-Aboriginal governments or citizens cannot be greater than the rights which Aboriginal people gave. Since non-Aboriginal treaty rights are transferred rights, they cannot be the rights which non-Aboriginal people have always assumed they are. This is because Aboriginal peoples would not claim to possess, and hence not pretend to give the federal government, either the kind of sovereign power it has assumed it has or the private property in the land which it has implemented. According to Aboriginal scholars, claiming and exercising the right to sovereignty as we understand this right, or the right to private ownership of land, are inconsistent with the responsibilities Aboriginal peoples have all to members of their communities and the land. Since these rights do not exist in the Aboriginal worldview, and, since this worldview prohibits activities permissible according to these rights, the federal government violates many treaties whenever it acts as Canada's sovereign authority and whenever its actions imply the land can be privately owned. Leroy Little Bear speaks of the Aboriginal worldview of the land as follows:

To us land, as part of creation, is animate. It has spirit. Place is for the interrelational network of all creation. ...Humans don't own land. ...Land is the place where the renewal processes occur....Land cannot be 'owned'. One can occupy the land for purposes of the interrelational network. ...When our people talk about spirit and intent of treaties, we're talking about the way it has always been. In other words, a guarantee that we were going to remain the same, to be able to continue and respect creation through this inter-relational network. The expectation was that non-Indian society was going to incorporate into that network. You begin to see why Aboriginal people say "we never sold the land. There's no way we could sell the land."⁸

If Aboriginal lands were not to be bought or sold, what rights would Aboriginal peoples

⁸ Leroy Little Bear, "Aboriginal Relationships to the Land and Resources," in *Sacred Lands: Aboriginal World Views, Claims, and Conflicts* eds. Jill Oakes, Ricke Riewe, Kathi Kinew, and Elaine Maloney, (Edmonton: Canadian Circumpolar Institute, 1998), 19-20

be sharing with non-Aboriginal people in the treaties. Use of the land seems to be the only logical answer, and it is an answer which makes much more sense than private property of the Aboriginal notion that nations can share a territory. Private ownership of the land at the time of treaties would have been (and typically still is) understood as individual ownership which excludes rather than includes others in the enjoyment of the land. Aboriginal use of a territory was essentially a community right. As Mervin Huntinghawk, an elder from Rolling River First Nation, Manitoba, put it “Before the arrival of Europeans we had full rights as people, as Aboriginal People. We had rights to land and water. These resources provided our homes, gave us wealth and identity. We had rights to use land and its plants for medicine. We had ownership collectively. We are the First Nations people and this is our land... We are the caretakers of this land, and respect the earth as our mother which gives us life. ...Our elders taught us that earth’s bounty was to be used properly and carefully, with love and respect, not exploited or damaged.”⁹

Since that time in treaty-making when treaties were explicitly used by the federal government as the means by which it secured Aboriginal territory for use by non-Aboriginal settlers, Aboriginal peoples have persistently and loudly protested the injustice of the government’s actions. Although they maintain that they have been unjustly denied access to their territories, they are unable to secure the return of their lands. The federal government is the law maker and law keeper over them. The ‘thieves’ are the ones charged with protecting against rights violations. Although the federal government is not brought to justice and Aboriginal land is not returned, Aboriginal people persist in thinking they were robbed. And from a moral point of view are they not correct? From a moral point of view, the federal government which continues to exercise sovereignty over the lands of Aboriginal peoples is no less a thief in 2006 than decades ago.

I have been focusing on the injustices with which non-Aboriginal governments have loaded the treaty process and the injustices built into the treaty relationship as non-Aboriginal governments have implemented it. However, there is real value in John Borrows’ reminder that non-Aboriginal people are also treaty people and treaties enabled the country’s creation. Borrows accurately portrays treaties as underlying Canada’s political order “...because they allowed for the peaceful settlement and development of large portions of the country, while at the same time promising certainty for Indigenous’ possession of lands and pursuits of livelihoods.”¹⁰ If non-Aboriginal people and governments remained conscious that in their exercise of rights and political authority respectively, they exercise treaty rights, it is easy to believe that they would have to be more constantly aware of the content of Aboriginal rights and the constraints these impose on the rights of non-Aboriginal people and the authority of non-Aboriginal governments.

Non-Aboriginal should be mindful that we are the beneficiaries of treaties. Indeed, as a party to a treaty which gives us responsibilities as well as entitlements, justice requires that we

⁹ Mervin Huntinghawk, “Since Time Immemorial: Treaty Land Entitlement in Manitoba,” in *Sacred Lands: Aboriginal World Views, Claims, and Conflicts* eds. Jill Oakes, Ricke Riewe, Kathi Kinew, and Elaine Maloney, (Edmonton: Canadian Circumpolar Institute, 1998), 39-40.

¹⁰ John Borrows, “Creating Canada: Constructing and Indigenous Country,” Whelan Lecture, University of Saskatchewan, March 2005, 5.

be mindful. Borrows points out that treaties when they were signed were understood to ‘...be for as long as the grass grows, the river flows, and the sun shines.’ And, treaties are living agreements:

...promises about a future to which both parties aspire. If treaties were not lived up to in their first hundred years, that does not mean that they should be discarded today. I have taught contracts law in the past. The prime function of contract law is to protect promises relating to a future state of affairs: If law can do this for corporations, why not for nations? Most Canadians would never consider abandoning foundational legal tenets even though we have not yet realized their full potential. Law creates the structure around which we build our future relationships. Treaties should be regarded as law in this sense.¹¹

I am assuming that, for the most part, Canada’s federal government aims to create just laws and policies; in particular, it aims for laws and policies which treat Aboriginal peoples and persons justly. Making treaty rights and responsibilities a justice test which must be applied to all its actions would allow the government to make great headway in eliminating and avoiding injustices. The treaty-justice-test would allow the government to identify and move to eliminate injustices which are part of its past and present relationship with Aboriginal peoples and persons. And, by continuing to employ the treaty-justice-test, the government would be able to ensure that its actions and laws do not create either more unjust advantages for non-Aboriginal Canadians or add new injustices to the lives of Aboriginal people.

Canadians point with pride to the superior justice of the Canadian over the American non-Aboriginal takeover of the sovereignty and territory of Aboriginal peoples. Surely the treaty route was the morally appropriate route to take, and more just than the slaughter and robbery of the rights and lands of Aboriginal people which took place below 49th parallel. When John Borrows writes of the respect which characterized the early relationship between Aboriginal and non-Aboriginal people, it is easy to think that we did find a better way in Canada.¹² However, the pride non-Aboriginal governments and Canadians might feel because we are a treaty people might have to struggle to survive when we come face to face with unjust treaty processes, unjust treaty content and what seems like an endless string of treaty violations. It is Aboriginal governments, not Aboriginal peoples, which are the source of the injustice. The following comments about treaties by Kevin Bell illustrate some of these injustices:

¹¹ Ibid. 11-12.

¹² “Regarding the treaties as agreements that create mutual obligations, that alternately constrain and benefit both parties to the relationship, is an important interpretative lens through which to view the country’s creation. It stands for the proposition that Canada is created through peoples equally participating in its creation with the knowledge that none should be unjustifiably subordinated or privileged in relation to the other.” (Ibid. 10.)

According to the written versions of the large land surrender treaties, the Aboriginal peoples received reserves, hunting and fishing rights, and other relatively small consideration while the English or Canadians got everything else. Any arguments that Aboriginal peoples had equal opportunity to the wealth of the country ignore the facts that they were prevented from accessing that wealth by law, policy, and practice. Although Aboriginal peoples paid dearly through treaty to maintain their hunting and fishing rights, in many cases the rights were ignored and treaty promises broken.¹³

As Bell indicates, the treaties distributed rights disproportionately in favour of non-Aboriginal peoples. Aboriginal people did not receive their fair share, and the share which non-Aboriginal people could claim based the treaties was not a fair share. Moreover, non-Aboriginal governments increased the injustice by ignoring the treaties and breaking treaty promises. Consequently, the Aboriginal share of the benefits was even less than the original unjust share promised to Aboriginal peoples. To add another layer to the treaty related injustices pile, non-Aboriginal governments, contra treaties, viewed reserves as the only part of their land to which Aboriginal people had undisputed access in order to sustain their lives and communities. It mattered not that Aboriginal people always insisted in treaty making that their permission to use the land and responsibilities to it came from the Creator, were from time immemorial, and would last forever.

Stealing territory from Aboriginal peoples by treaty or by force is still stealing. It is immaterial, from the point of view of the one who is robbed whether Tom gets Bill to say 'take the bike' with his gang standing quietly behind him or by choking Bill. In either case, the bike is stolen, and remains the moral and legal property of Bill. Tom's possessing the bike, and exercising the rights of an owner in his use of it, does not eliminate the wrongness of the stealing of the bike. Rather, a justice analysis reveals that Tom's ongoing uses of the bike constitute additional wrong-doing, which add to rather than lessen his unjust treatment of Tom. Similarly, Non-Aboriginal governments today cannot dissociate themselves from the injustice of the treatment of Aboriginal people in the past by saying, it is past and it is not our responsibility. This is because the unjust institutional structure created by the unjust laws and policies of successive non-Aboriginal governments still exist. The injustice in this institutional structure does not go away because we say Aboriginal peoples were treated unjustly when these laws and policies were created. The only way to eliminate the injustice is to eliminate the institutional structure, and to structure a relationship which is consistent with fundamental justice principles and the legitimate treaty rights of non-Aboriginal people.

Breaking Treaty Promises

One the most unjust violations of treaties on the part of non-Aboriginal governments and Canadians is the attitude that treaties are ancient history, -inconvenient leftovers from an age

¹³ Kevin Bell, "Introduction: An Overview of the Aboriginal Perspective," in *Aboriginal Issues Today: A Legal and Business Guide*, eds. Stephen B. Smart, and Michael Coyne, (Toronto: Self-Counsel Legal Series, 1997), 9.

gone by. So, as exemplified in Jean Chrétien's *White Paper*, prepared for Prime Minister Pierre Elliot Trudeau, Aboriginal rights and treaty rights in particular were regarded as having outlived their usefulness. And, rather than John Borrows' means to a just society, treaty rights, like inherent Aboriginal rights, were claimed to be an obstacle to the equality which characterizes a just society.

It might seem that by securing Constitutional recognition for their Aboriginal and treaty rights, Aboriginal peoples have protected themselves from this attitude and the federal government has eliminated one very large injustice which was part of Aboriginal reality. I do not want to minimize the value of this victory for Aboriginal peoples. Establishing the legitimacy of their treaty rights, is a necessary first step to putting in place the conditions necessary for them to exercise these rights. Given the threat the White Paper had posed to their rights, this victory clearly has the power to prevent future injustice. However, in the omissions of the federal government's efforts to understand either Aboriginal or non-Aboriginal treaty rights since Aboriginal rights were recognized, and since it is not addressing ongoing violations of the treaty rights of Aboriginal peoples, Constitutional recognition of Aboriginal treaty rights serves as the most recent justice principle supporting my systemic injustice argument.¹⁴

The Legal Obstacles to Justice

Time does not permit me to do more than point to the most significant legal obstacles to justice for Aboriginal people, namely, the Indian Act, Residential Schools, the racism of the 'justice system', and the missing legal constraint on the federal government that enables it to persist in omissions regarding its moral and legal responsibilities to Aboriginal peoples and Aboriginal people.

Conclusion

I believe that my inductive argument to establish that Canada is unjust is a strong one, and that I have demonstrated that the federal government has a non-Aboriginal problem that needs to be addressed, not an Aboriginal problem. My 'naming the injustice' approach puts the injustices on the table and facilitates the discovery of their content and scope. Confronted by this picture of systemic injustice, if Aboriginal governments *see* solutions to 'the Aboriginal problem' can only be found in solutions to the 'the non-Aboriginal problem', the largest obstacle to Canada being a just society could become much smaller. Until non-Aboriginal governments

¹⁴ Sharon Venne in her discussion of the federal government's failure to respect and implement treaties claims "In the face of the treaty violations that ensued, Indigenous peoples found no recourse from the state systems within which they lived. As a result, they were forced to seek outside help in fostering understanding and implementation of the treaties. In 1989, their work led to the passage of a resolution by the UN Commission on Human rights calling for a study of treaties made between Indigenous peoples and Europeans." in *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* eds. John Bird, Lorraine Land and Murray Macadam, (Toronto: Irwin Publishing, 2002), 45

recognize that the problem is the injustice inherent in their policies, their actions and their inaction, the injustice will not only persist but keep growing, growing, and growing. That is what systemic injustice does when we ignore it. It multiplies well when left alone; but it does not oblige us by self-destructing.

If an argument can be made that Germans in Hitler's Germany, were morally obligated to resist Hitler's anti-Semitic policies and actions, then there can be no doubt that Canadians are morally obligated to resist Canada's unjust policies and actions regarding Aboriginal people. Political philosophers, who presumably have a moral obligation to inform analogous to the moral (and legal obligation) of a neighbour aware of child abuse next door, have the further obligation to facilitate governments putting in place the conditions which make it possible for Aboriginal people to exercise their rights and prevent Canadian governments to continue their unjust treatment of Aboriginal people.