By comparison, the last time the annual unemployment rate in Canada averaged less than 7 percent was in 1975. Canada is facing the 18th consecutive year with unemployment averaging above 7 percent and in most of this period the unemployment rate averaged well above this level.

If we look at the unemployment experiences of the provinces during the past 10 to 20 years, we find that eastern Canada has largely been a basket case with generation after generation facing dismal job prospects. For example, Newfoundland last recorded an annual unemployment rate below 10 percent in 1972; New Brunswick in 1975. Nova Scotia has had unemployment rates below 10 percent only twice since 1976 and Quebec only four times in the 17 years since 1976. (Should it be surprising that separatist support has increased dramatically during this time?)

"Kim Campbell is right that it appears at this time that little can be done to quickly reduce the unemployment rate to an acceptable level, at least below 7 percent. ... [But] [t]he fixation on the deficit should not serve as an excuse for inaction by the federal government. Growth and jobs are the goals of the government, not a rigid and irrational commitment to reducing the deficit."

Even Alberta and British Columbia, the two provinces that have surpassed the pre-recession employment levels, have not had sterling unemployment records. Alberta last averaged less than 7 percent unemployment in 1981, and British Columbia has had an unemployment rate below 7.5 percent only twice since 1974, the last time in 1981.

A forecast recently published by the Institute for Policy Analysis at the University of Toronto predicts that if the Canadian economy is able to grow consistently and buoyantly, the national unemployment rate will fall to 7.4 percent by 1998. This implies that Canada is unlikely to record an average, annual unemployment rate below 7 percent during the last 25 years of this century.

Is There a Solution?

I will deal with this question in more detail in next month's commentary. But for the time being, let me state that Kim Campbell is right that it appears at this time that little can be done to quickly reduce the unemployment rate to an acceptable level, at least below 7 percent. Jean Chrétien and Audrey McLaughlin are also right in claiming that it is the responsibility of the federal government to tackle the unemployment crisis. The fixation on the deficit should not serve as an excuse for inaction by the federal government. Growth and jobs are the goals of the government, not a rigid and irrational commitment to reducing the deficit.

However, there is little the federal government can do on its own to stimulate the economy. All the provinces are cutting back in their misplaced efforts to rapidly reduce their deficits. These actions will only weaken the Canadian economy. More importantly, each of the G-7 nations has agreed to pursue policies to reduce its respective deficit. These actions will prolong economic weakness in Europe, Japan, and North America and exacerbate the unemployment crisis in Canada.

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LEGAL REPORT

Constitutional Right of Aboriginal Self-Government

Existing already?

by Bruce Ryder

The clause that would have explicitly recognized an inherent right of aboriginal self-government in the constitution died along with the rest of the Charlottetown Accord last fall. Does that mean that the right currently lacks constitutional protection?

The Dominant View

According to the dominant view, the demise of the accord left us with a constitutional status quo that exhaustively distributes sovereignty between federal and provincial governments. Those governments are under no legal obligation to recognize aboriginal self-government, at least not until the right is entrenched by constitutional amendment. If this position is correct, aboriginal communities cannot compel governments to negotiate self-government, and if negotiations do take place, the legal deck is stacked against them. Moreover, unilateral assertions of jurisdiction by aboriginal governments are illegal.

RCAP Challenges Legal Orthodoxy

In an important paper in August entitled *Partners in Confederation*, the Royal Commission on Aboriginal Peoples (RCAP) has persuasively challenged the orthodox view. They conclude that a third order of aboriginal government already exists

under the Canadian constitution. In their view, aboriginal governments have the same range of powers in their communities as the federal government has under section 91(24) of the *Constitution Act, 1867*. The precise scope of their jurisdiction ought to be determined by negotiations. The RCAP suggests, aboriginal communities have the right to unilaterally assert jurisdiction, at least with respect to matters of vital concern to the life and welfare of their communities.

The RCAP believes that the aboriginal right of self-government is inherent in origin, flowing out of the practices and history of particular aboriginal communities. The right of aboriginal peoples to govern themselves as component units of Confederation was incorporated in the common law doctrine of aboriginal rights, which includes all customs or practices integral to distinctive aboriginal cultures. Since 1982, common law aboriginal rights have had constitutional status by virtue of section 35, which recognizes and affirms "existing aboriginal rights."

Existing or Extinguished?

The critical question is thus whether an aboriginal right of self-government is "existing" for the purposes of section 35. According to the Supreme Court of Canada decision in *Sparrow*, "existing" aboriginal rights are those that were not fully extinguished by a clear and plain Crown intention prior to 1982. The aboriginal right of self-government has never been explicitly extinguished. Was it necessarily extinguished by colonial or post-Confederation events?

The RCAP paper argues that although aboriginal political systems were severely distorted and circumscribed by pre- and post-Confederation developments, their authority was not entirely curtailed. The *Constitution Act, 1867* may have exhaustively distributed legislative power between federal and provincial governments, but it did not remove the overlapping power of aboriginal communities to deal with matters affecting aboriginal peoples. Similarly, federal Indian legislation did not deprive Indian peoples of all governmental authority. Therefore, the right of self-government qualifies as an "existing" right under section 35.

The BCCA Decision in Delgamuukw

The British Columbia Court of Appeal reached the opposite conclusion in its decision in *Delgamuukw v. B.C.*, released in June. The court unanimously overturned McEachern C.J.'s holding at trial that aboriginal title to land had been extinguished by a series of pre-Confederation proclamations and ordinances designed to facilitate settlement and the establishment of British authority in the colony. The court found that the assertion of Crown title to all lands in the colony could co-exist with aboriginal title to land, and thus, there had been no clear and plain extinguishment of the aboriginal interest.

"Both future negotiations and court decisions ought to be informed by the persuasive grounds presented by the RCAP for concluding that the right of self-government is constitutionally guaranteed as an existing aboriginal right."

However, a 3 to 2 majority of the BCCA gave short shrift to the claim that the Gitskan and Wet'suwet'en peoples of central British Columbia have an existing right of self-government. The majority judges expressed the opinion that any right of aboriginal self-government was extinguished by the assertion of British sovereignty over the colony, or, alternatively, by the introduction of the exhaustive distribution of powers in the *Constitution Act, 1867* to British Columbia when the colony joined Confederation in 1871.

The BCCA's view that the constitution guarantees no space for the continued exercise of aboriginal jurisdiction is not unfamiliar. But it is a view that rests on a shaky and rarely explored intellectual foundation. Divining a clear and plain intention by implication from events is an inherently risky enterprise. The majority judges did not explain why the continued exercise of aboriginal self-government was necessarily inconsistent with the assertion of British or Canadian sovereignty. If underlying Crown title and aboriginal title can co-exist on the same land, why reject co-existing Canadian and aboriginal jurisdiction? While the BCCA clearly rejected McEachern C.J.'s casual approach to extinguishment of title to land, the same flaws are replicated in its approach to jurisdiction.

Conclusion

In an August meeting, the provincial premiers all agreed to put pressure on the federal government to pursue negotiations on implementing the right of aboriginal self-government. The federal political parties should be pressed to clarify their positions in the current election campaign. The Supreme Court will likely have an opportunity to hear an appeal of the *Delgamuukw* decision in the years ahead. Both future negotiations and court decisions ought to be informed by the persuasive grounds presented by the RCAP for concluding that the right of self-government is constitutionally guaranteed as an existing aboriginal right.

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