

**THE POLITICAL AND LEGAL  
INEQUITIES AMONG ABORIGINAL  
PEOPLES IN CANADA**

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Institute of  
Intergovernmental Relations  
Kingston, Ontario

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ISBN 0-88911-421-8

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## PREFACE

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Section 37 of the *Constitution Act, 1982* (as amended) requires the holding of a series of conferences by 1987 to deal with "constitutional matters that directly affect the aboriginal peoples of Canada." Discussion leading up to and during the First Ministers' Conferences on Aboriginal Constitutional Matters quickly focused on the task of making constitutional provisions for aboriginal self-government. Many involved in the process openly questioned the meaning of "aboriginal self-government".

In view of the importance of this subject, in May of 1984 the Institute of Intergovernmental Relations launched a research project on "Aboriginal Peoples and Constitutional Reform". Phase One of the project responded to concerns that emerged at the outset of the constitutional negotiating process. As indicated by its title, "Aboriginal Self-Government: What Does It Mean?", Phase One examined various models, forms and proposals for aboriginal self-government. This included an exploration of the citizenship rights of aboriginal peoples, the experience of aboriginal self-government in other nations, and a review of Canadian developments over the past few years. The results of these investigations were compared to the positions taken by parties to the constitutional negotiations, in an effort to identify areas of emerging conflict and consensus. These findings were elaborated in five Background Papers, a Discussion Paper and a Workshop, which was held two months prior to the 1985 First Ministers' Conference (FMC).

Developments in 1985, subsequent to the first Ministers' Conference, may have a dramatic impact on the constitutional negotiation process. At a meeting of government ministers and aboriginal leaders held in June, 1985, several governments indicated their intention to pursue the negotiation of individual self-government agreements, and then to consider their entrenchment in the constitution (the "bottom-up" approach). This contrasts with the proposal, which has thus far dominated discussions, to entrench the right to aboriginal self-government in the constitution, and then to negotiate individual

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February, 1987

## ACKNOWLEDGEMENTS

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I would like to acknowledge the law firm of Blaney, McMurtry, Stapells, Aarons & Watson for providing me with the resources to conduct the research for this paper and to my secretary, Sandy Wabegijig, for her services.

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## ABSTRACT

The historical fact that aboriginal rights are derived from the original possession of the North American continent, and the restrictions and limitations in applying such rights to a select group of aboriginal peoples by Canadian law and policy, is the basis of the present political and legal inequities among aboriginal peoples.

These political and legal inequities can be addressed by the governments of Canada and the provinces by the passage of constitutional provisions and specific legislation expressly implementing the rights of the aboriginal peoples presently not covered by legislation, treaties or land claims agreements.

## SOMMAIRE

*Le fait historique que les droits des autochtones proviennent de ce qu'à l'origine, ils possédaient le continent nord-américain, et les restrictions et limitations dans l'application de tels droits à un groupe particulier de peuples autochtones par la loi et la politique canadiennes, est à la base des inéquités politiques et judiciaires actuelles parmi les peuples autochtones.*

*Les gouvernements du Canada et des provinces peuvent s'attaquer à ces inéquités politiques et judiciaires par l'adoption de dispositions constitutionnelles de législation spécifique mettant expressément en vigueur les droits des peuples autochtones qui ne bénéficient pas présentement de législation, de traités ou d'accord en ce qui concerne la revendication de territoires.*

## 1 INTRODUCTION

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The thrust of the constitutional process is the recognition of self-government for aboriginal peoples on the basis, essentially, of a self-realization of their historic patterns. There are indications that a process for negotiations directed at agreements, relating to self-government, will be established at the 1987 First Ministers' Conference on Aboriginal Constitutional Matters. Those peoples who are not members of bands and who are landless desire equal access to a process of negotiations for self-government, and the equal results of such negotiations. This position is at odds with the entire history of aboriginal rights which has its basis in diversity.

To a certain extent, this position is a microcosm of confederation. One of the basic aims of the confederation movement which created Canada, was to establish a new nation and a new nationality; however, that did not entail a cultural uniformity. George Etienne Cartier stated, in the Confederation debates, that the different nations in the cultural sense should survive within the new juridical nation. However, the system of intergovernmental fiscal transfers between regions, through federal payments to provincial governments, recognizes that the infrastructure through which these cultural entities would flourish, must be comparable.

Aboriginal peoples of Canada are described in the *Constitution Act, 1982*<sup>1</sup> as including the Indian, Inuit and Métis peoples of Canada. However, the qualifications and rights accruing to different peoples is left for future definition and identification pursuant to the four constitutional conferences on matters directly affecting the aboriginal peoples of Canada, provided for by the *Constitution Act, 1982*, as amended.<sup>2</sup> Three conferences have been held as of the date of this paper.

Until there is an express definition and identification of all the aboriginal peoples of Canada and their rights for purposes of qualification to most major rights, the *Indian Act*<sup>3</sup> prevails.

According to some aboriginal peoples, the present constitutional reform process, in identifying and defining rights, is also an attempt to

immemorial. Aboriginal title flowed from the law of nations so that the Indian tribes in the United States retained their inherent internal sovereignty as domestic dependent nations. The Royal Proclamation was only a secondary source. The cases are discussed later.<sup>8</sup>



## 2 THE ABORIGINAL PEOPLES

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The recognition which Canadian and English law and policy gave to the historic fact of who had original possession of the North American continent, is the basis of the present legal and political inequities among the aboriginal peoples. This diversity created by legislative limitations translates to only a certain group of aboriginal peoples having the right to exercise fully their aboriginal rights whether as communities or individuals. The government of Canada has generally chosen not to provide for programs and services to Non-Status Indians and have claimed that they have no constitutional responsibility for the Métis. Except for Alberta, the provinces have also denied any responsibility over the Métis peoples.

### A. History

Under section 91(24) of the *Constitution Act, 1867*,<sup>9</sup> Parliament is vested with the exclusive legislative authority over "Indians, and lands reserved for the Indians". The constitutional term "Indian" which appears to describe the aboriginal peoples of Canada has been utilized since 1867, whereas the broader term "aboriginal peoples" only became part of constitutional usage in 1982. Hence, we are left with a long history of that former term being in use, qualified and defined repeatedly by statute. The Supreme Court of Canada in *Lavell*<sup>10</sup> had stated that Parliament could not have effectively exercised its authority without enacting laws establishing the qualifications required to entitle persons to status as Indians and to the use and benefit of Crown "lands reserved for Indians". The *Indian Act*, enacted to this end, was necessary for the implementation of the authority so vested in Parliament under the constitution.

However, while the *Indian Act* may exclude a particular class from its own coverage, it cannot affect a person's status as an Indian under the *Constitution Act, 1867*. The Supreme Court of Canada, in the 1939 case<sup>11</sup> (on whether the term "Indians" as used in head 24 of section 91

aborigines for whom lands had not been reserved, seems to afford no good reason for limiting the scope of the term "Indian" itself.

Justice Cannon, in a concurring opinion, adds that section 91(24) included all the present and future aboriginal native subjects of the proposed Confederation of British North America. He adds that, at the time, it was intended to include Newfoundland.

Justice Kerwin, also in a concurring opinion, adds that when the Imperial Parliament enacted that there should be confided to the Dominion Parliament power to deal with "Indians and lands reserved for the Indians", the intention was to allocate to it authority over all the aborigines within the territory to be included in the confederation.

## 1. *Indians*

The inequities and differences of economic and political rights among the aboriginal peoples have their source in the absolute power vested in Parliament, confirmed by the courts, at least until 1973, when *Calder* ruled that the source of aboriginal rights was not due to the Crown's recognition. Because of this extraordinary power, the Crown (in right of Canada) has chosen to recognize only those peoples identified as Indians to be entitled to the use and benefit of Crown "lands reserved for Indians", and consequently, eligible for its protection and access to its services and programs.

The *Indian Act* tracks "Indians" from particular bands whose charter members were usually determined at the time a reserve was established or on the making of a treaty.

An "Indian" is a person who is registered as an Indian, pursuant to the *Indian Act* and its amendments of 1985. The Act specifies who is and who is not entitled to be registered. The Act provides for the Department of Indian Affairs and Northern Development to maintain an Indian Register in which shall be recorded the name of every person who is entitled to be registered as an Indian under this Act.

Some of the legal consequences of Indian status under the *Indian Act* can be summarized as follows:

(a) the person is entitled to any benefits promised to their nation in a treaty including the right to hunt, fish, and trap for food (Section 88);

(b) the person may be entitled to financial aid (tuition and living allowance) while attending post-secondary education (Sections 114 - 123);

A unique right, which has been available to any aboriginal person in Canada, is the right to free passage into the United States, if the person is of at least half Indian ancestry. This right is recognized by United States law.<sup>13</sup>

Another unique right available to an aboriginal community is the right to be declared by the Governor-in-Council to be a band for the purposes of the *Indian Act* with the corresponding right of the individuals who are members of that community to be entitled to be registered as an Indian and as a member of the new band (Sections 2(1)(c), 6(1)(b), and 11(1)(b)).

Because of the patrilineal system (descent through the male line) and the provisions excluding certain categories of people, many persons of varying degrees of Indian blood and culture were outside the statutory definition. These people became known as "Non-Status Indians" and were not eligible for the same federal services and programs as Status Indians.<sup>14</sup>

## 2. *Inuit*

The Inuit of Quebec, referred to in the 1939 Supreme Court of Canada case, are now covered by the *James Bay and Northern Quebec Agreement*<sup>15</sup> and the *James Bay and Northern Quebec Native Claims Settlement Act* of 1977.<sup>16</sup> The Agreement has the same status as a treaty and is constitutionally protected by the *Constitution Act, 1982*, as amended:

Section 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

.....

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

From the Inuit perspective, the main purpose of the Agreement was to give them the means through which they could ensure their cultural survival and traditional way of life by creating a structure for their own institutions and, at the same time, to allow them to participate in the economic development arising in Northern Quebec.

Those Inuit resident in the Northwest Territories continue under the exclusive jurisdiction of the Government of Canada. Because they represent the majority of the population in their region, they advocate a

reserved for Indians. It is arguable that they, in fact, are covered by the Supreme Court of Canada case which ruled that the intention was to allocate, to the Government of Canada, the authority over all the aborigines. However, since the late 19th century, they have been excluded from any aboriginal rights' provisions save for the *Métis Betterment Act* of Alberta of 1938 and with amendments in 1940.

#### 4. *Non-Status Indians*

The Government of Canada has stated that the *Indian Act* amendments of 1985 will address the long festering grievances of Indians who lost their status as a result of various Government measures.

As of April 17, 1985, four categories of persons may apply for registration to the Registrar.

(a) Persons included in the first category are those who had lost status through sexual discrimination or other involuntary action pursuant to the *Indian Act*:

(i) Those who lost status because their mother and father's mother gained status through marriage to an Indian (i.e., those who lost status through the "double mother" rule);

(ii) An Indian woman who lost status through marriage to a non-Indian under the former section 12(1) (b) of the *Indian Act*;

(iii) A person who lost status because he/she was an illegitimate child of an Indian woman and non-Indian man and was successfully protested out of membership;

(iv) An Indian woman and her children ordered enfranchised through the woman's subsequent marriage to a non-Indian (involuntary enfranchisement);

(b) Persons covered in the second category are Indian men, their wives and children, who lost status through voluntary enfranchisement. Originally, Indians were not considered citizens of Canada, and they did not have the right to vote in either federal or provincial elections. Canadian citizenship was granted to Indians in 1952, and the provincial franchise (the right to vote) was extended to Indians at different dates in different provinces. Under the *Indian Act*, Indians could choose to become

provisions, their wives and children, are now eligible only for Indian status. Under section 11(2)(b), children, one or both of whose parents are as a result of the 1985 amendments newly entitled to be registered, (first generation descendants) are now eligible for Indian status only.

Notwithstanding these amendments, there are still some persons of varying degrees of Indian blood, culture, and who identify as Indians, who are outside the statutory definition.

These peoples' ancestors may never have been brought into the provisions of the *Indian Act* initially. The Commissioner's report on the circumstances surrounding Treaty No. 2 states that,

But it is to be remembered that *a large number of Indians*, whose lands were ceded by the second treaty, *were not present*. The distance from the hunting grounds of some to Manitoba Post is very great; but while their absence was to be regretted for some reasons, it effected a very considerable saving in the item of provisions.<sup>18</sup> (emphasis added)

The *Indian Act* traces Indians from particular bands whose charter members were registered, usually at the time of treaty, or when a reserve was established. If an individual was not present, it is conceivable that they may never have been registered and hence, their descendants would be outside the statutory provisions. Researchers of Indian claims have identified such people as "stragglers". The *Indian Act* amendments do not cover their particular problem because it only addresses those people who were, at one time, members and who had, thereafter, lost their status and their children's status, whereas the stragglers were never covered.

##### *5. Certain Implications of the Inequities Among Aboriginal Peoples*

One of the most important economic rights held sacred by aboriginal peoples is the right to hunt, fish, and trap at all times of the year. However, this right is unique to those Status Indians covered by a treaty. For those Status Indians not covered by a treaty, which would cover the areas of most of British Columbia, parts of Quebec, and the two territories, this right has not yet been expressly and clearly found in law to be protected by aboriginal rights.

In *Dick v. The Queen*, the Supreme Court of Canada stated in 1985 that,

One issue that does not arise is that of Aboriginal Title or Rights. In its factum, the appellant expressly states that he has "not sought

items of daily clothing and ceremonial clothing. In 1980, the year of the charge, there were forty-five active hunters in the band out of a population of three hundred and fifty. They took one hundred and seventeen deer and forty-eight moose in that year. That provided a yield of sixty-five to seventy pounds of meat for every man, woman, and child. The meat was shared out among band members in accordance with the institutional practices of the Shuswap people. The times of year for hunting animals and fishing, the places to hunt, and the techniques of hunting are taught to young male members of the band by their fathers and grandfathers.

Some of the meat is smoked, some is salted, some is frozen, and some is eaten fresh. The preservation of the meat and the preparation of food is largely done by the women of the band. Women also tan and treat the hides and make the traditional clothing. The skills and techniques for preserving food and making clothing are handed down from one generation to the next.

When the meat supply runs out the hunters go out for more. They go when it is needed. That happens every spring when the supply of preserved meat, from animals killed in the fall, comes to an end.

The hunters in the Alkali Lake Band do not hunt for trophies; they do not hunt for recreation, nor do they look on hunting as recreation; they do not leave the carcasses of the animals they kill in the woods. If they work for wages it is not as an alternative to hunting but in order to acquire the means to hunt for food.<sup>20</sup>

The accused gave evidence that his own family requires four or five deer each year, for food. The evidence of the conservation officer is that a hunter is limited to one deer per year, as the *Wildlife Act* and regulations limits them to that one deer.

Lambert, J. then stated that he derived some sense of the nature of Indianness from the fact that the Indians in Alberta, Saskatchewan, and Manitoba have the right to hunt and fish for food at all seasons of the year and the treaty Indians in British Columbia also have that right. He thought that those rights are characteristic of Indianness, at least for those Indians and if for those Indians, why not for the Alkali Lake Band of the Shuswap people.

However, the Supreme Court found that Lambert, J. had erred in law because what is relevant is not the effect of the legislation on Indians, but whether the intent, purpose or policy of the legislation clearly impairs the status of Indians. The intent of the *Wildlife Act* was as a law of general application and not to single out Indians for special treatment.

## B. Laws on Aboriginal Title and Treaties

### 1. Royal Proclamation of 1763

The Royal Proclamation of 1763 was issued by King George III of England following the Treaty of Paris, in which France ceded all her rights to sovereignty, property, and possession in Canada to Great Britain. The Royal Proclamation established the government of the territories acquired from France, and announced a new policy with respect to Indians and their lands. It was described by Mr. Justice Sissons in *Koonungnak*<sup>22</sup> as a "Charter of Indian Rights" that did not create new rights, but rather, affirmed old rights. It includes the following provisions:

- (a) the Indian allies are not to be disturbed in the possession of their hunting grounds;
- (b) the hunting grounds that have not been ceded to or purchased by the Crown, are reserved for the Indians;
- (c) no patents should issue for lands beyond the bounds of the newly created colonies;
- (d) private individuals may not purchase the reserved lands, and private persons settled on the lands must leave them;
- (e) lands may only be purchased from the Indians by the king at a public meeting held for that purpose.

The Royal Proclamation is now referred to in the *Constitution Act, 1982*, and may have constitutional force. In the *Canadian Charter of Rights and Freedoms*, section 25 protects "any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763;" from being abrogated or derogated from by the guarantee of rights and freedoms in the *Charter*. This protection is given further weight by the amendments made in 1983. Section 35.1 states that the Government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the *Constitution Act, 1867* and to sections 25 and 35 of the *Constitution Act, 1982*, a constitutional conference similar to the present section 37 conference is required.

In *Guerin*, Mr. Justice Dickson refers to the Royal Proclamation at length, as the first undertaking by the Crown to protect Indian land interests by assuming the role of "go-between" in dealings between Indian peoples and others, with respect to Indian lands. While doing so, he also

that Johnson's claim to title could not be recognized, the United States Supreme Court was obliged to examine the nature of Indian title, and expressed the first recognition of aboriginal rights found in North American law. Chief Justice Marshall found that the Indians were "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it," because they had occupied the lands from time immemorial. Aboriginal title flowed from the law of nations, and only secondarily from the Royal Proclamation of 1763. Nevertheless, the continued existence of aboriginal title was not inconsistent with the governmental sovereignty of the colonizers. Chief Justice Marshall found that legal title to the land was vested in the discovering nation, subject to the Indians' right of occupancy. Thus, while the Indians retained aboriginal title, they could only sell their land to the government, not to private individuals.

In *Cherokee Nation v. State of Georgia*,<sup>27</sup> the Cherokee Nation brought a motion in the United States Supreme Court to restrain the State of Georgia from forcibly exercising its legislative power on their territory. They claimed to proceed against the State of Georgia as a foreign state. The United States Supreme Court found that the Cherokees could not, with strict accuracy, be called foreign nations; they could more correctly be called domestic dependent nations, whose relationship to the United States resembled that of a ward to his guardian. Nevertheless, the Cherokees were a state and had been uniformly treated as a state since the settlement of the United States. The numerous treaties made with them recognized that the Cherokees were capable of political responsibility and of maintaining the relations of peace and war. The acts of the United States Government plainly recognized the Cherokee Nation as a state, and the courts were bound by those acts.

In *Worcester v. Georgia*,<sup>28</sup> the case involved criminal proceedings by the State of Georgia against Samuel Worcester, a white missionary, for "residing within the limits of the Cherokee nation, without a permit" and "without having taken the oath to support and defend the constitution and laws of the State of Georgia." Worcester claimed that the state law under which he was charged was unconstitutional, as it failed to recognize the sovereignty of the Cherokees and their freedom to govern themselves without interference by the states. The United States Supreme Court supported his plea, and declared the law in question to be "repugnant to the constitution, treaties and laws of the United States." In the course of his decision, Chief Justice Marshall also discussed the nature of aboriginal title and stated the *contra proferentum* rule, that "The language used in the treaties with the Indians should never be construed to their prejudice".



### (c) The Power to Legislate

Tribes have the power to make substantive criminal and civil laws in internal matters. One area of extensive tribal power is domestic relations among tribal members, such as marriage, divorce, child welfare matters, and support of family members. Tribal law, which may incorporate the inheritance laws and customs of the tribe on the descent and distribution of the property of tribal members, is retained by the tribes. A tribe has the power to tax, which courts have held to include the power to impose taxes for licensing and property taxes.

### (d) The Power to Administer Justice

Exclusive tribal judicial jurisdiction over reservation affairs is retained if a tribe has not expressly given up the power, or if there is no explicit legislation extinguishing that power. Most tribes operate their own court systems, and except as required by the *Indian Civil Rights Act*,<sup>31</sup> the structure and procedure of such courts may be determined by the tribes themselves.

### (e) The Power to Exclude Persons from Tribal Territory

This power is tied to a tribe's ability to protect the integrity and order of its territory and welfare of its members.

## 3. *Treaties*

The Royal Proclamation of 1763 establishes a procedure - the treaty making process - for all future land transactions. That the Royal Proclamation decreed that the Indian nations should consent, not only to the disposition of the land, but also to the purposes for its disposition, is relevant in understanding the terms of the treaties.

### (a) Maritime Treaties

The series of submissions and agreements, sometimes described as "Treaties of Peace and Friendship", cover the period from 1693 to 1794. There is no indication that any land cession treaties were made, nor any compensation given. The conclusion has been reached that the procedures, outlined in the Royal Proclamation of 1763, were not followed.<sup>32</sup> The question continues as to whether the lands in the Maritimes were ever properly surrendered by the Indians. Do the aboriginal rights to that area continue? The hunting and fishing provisions of the treaties of peace and friendship are currently utilized

The court also ruled that the Treaty constitutes a positive source of protection against infringements on hunting rights, rather than a mere general acknowledgement of pre-existing, non-treaty, aboriginal rights. There is a reinforcement of what the Chief Justice characterizes as the "generally accepted view that Indian treaties should be given a fair, large and liberal construction in favour of the Indians." A very important finding is that the Treaty right to hunt and fish "as usual" is not limited to the types of weapons used in 1752 to hunt. It is to be interpreted in a flexible way that is sensitive to the evolution of changes in the normal hunting practices. It was also stated that the treaty should not be interpreted to be limited to treaty protection for hunting for non-commercial purposes.

The Court added that the onus is upon the Crown for proving the circumstances and events of hostilities justifying termination, and found that this onus had not been met. It also found that the Treaty had not been terminated by extinguishment and, again, required strict proof of extinguishment. The Chief Justice cautioned that he did not wish to be taken as expressing any view on whether, as a matter of law, treaty rights may be extinguished.

The Court found that *Simon* had established a sufficient connection with the Band, which had entered into Treaty, on the basis of being a member of the Shubenacadie Indian Brook Band of Indians, living in the same area as the original signatories. It would impose an impossible burden of proof to establish descendancy through written records, as the Micmacs have an oral tradition.

The *Simon* case is of great importance to Indian people of the Maritimes, Southern Ontario, and Vancouver Island, whose pre-Confederation treaties have been of uncertain force and status.

Of great impact to other treaties is the notion that treaty rights should be considered in light of modern reality. There is a general strengthening of rules of construction of treaties, in favour of the Indian parties, and the onus upon the Crown to demonstrate lack of entitlement or a restriction to treaty rights is more stringent.

#### (b) Southern Ontario

The Royal Proclamation of 1763 procedures for extinguishing the Indian title were implemented, for the first time, to obtain lands in Upper Canada, now southern Ontario.

There are thirty-two treaties listed as having been entered into, to purchase land from Indians in Ontario. Additionally, there are the Robinson-Huron and Robinson-Superior Treaties in which the land on the reserves, established under the treaties, has not been surrendered.

Farming was to be a new economic pursuit and, to that end, in many cases more than half the negotiations dealt with the means in which an Indian agricultural economy could be established. At the same time, the Indians wished to maintain their traditional economic lifestyle which, since time immemorial, had yielded food, clothing and equipment.

After a hundred years or so, the need to maintain that lifestyle continues, as evidenced by the substantial number of decisions on hunting and fishing.

The treaties usually provide that,

they, the said Indians, shall have the right to pursue their avocations of hunting and fishing (and trapping in some treaties) throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.

The cases usually have touched on how far the federal and provincial governments can regulate against those rights. The courts have used other sources as protection of the treaty provisions. Section 88 of the *Indian Act* elevates treaties to the status of legislation, so far as provincial legislation is concerned, in providing that provincial laws of general application shall apply to Indians "subject to the terms of any treaty and any other Act of the Parliament of Canada". In essence, the *Indian Act* has incorporated, by reference, certain parts of the treaties into federal law. This has been necessary because of the uncertain legal status of treaties. To a great extent, the courts have characterized treaties as contracts, whereas Indian people have characterized them as international treaties.

The courts have also used the Natural Resources Transfer Agreements<sup>38</sup> between the federal government and the provinces to reinforce the treaty provisions. The Natural Resources Transfer Agreements between the federal government and the provinces of Alberta, Manitoba, and Saskatchewan were confirmed by the *Constitution Act, 1930*. They provide for "the right of hunting, trapping and fishing, game and fish for food at all seasons of the year, on all unoccupied Crown lands, and on any other lands to which the said Indians may have a right of access". These provisions enlarged the areas in which Alberta, Saskatchewan and Manitoba Indians could hunt and fish for food. However, their rights to hunt and fish are limited to

in the James Bay region except for the purposes of determining which of the Cree and Naskapi beneficiaries are "Indians".

The existing Cree and Naskapi bands are constituted as corporations. The previously existing bands ceased to exist and all rights, titles, interests, assets, obligations, and liabilities vest in these new corporate bands. The bands, newly incorporated, may be legally designated by any of their English, French, Cree, or Naskapi names.

The members of each of the bands are the beneficiaries who are enrolled, or entitled to be enrolled, on the community list in respect of that band, pursuant to section 3 of the James Bay and Northern Quebec Agreement.

Under section 3, the beneficiaries are any of three categories of persons who, as of November 15, 1974, are: registered under the *Indian Act* and members of one of the bands; of Cree or Naskapi ancestry, ordinarily resident in the territory; or persons of Cree, Naskapi or Indian ancestry who are recognized by one of the communities as having been a member thereof.

A band acts as the local government authority on Category 1A or 1A-N lands, to use, manage, administer, and regulate lands and resources and to establish and administer services and programs. These bands may make by-laws of a local nature for the good government of its lands and inhabitants, including land, resource use and planning, zoning, hunting, fishing, trapping, and wildlife protection.

In the provisions on succession, Cree or Naskapi customs on adoption and marriage, along with traditional property holdings, are recognized. If a person dies intestate, a family council decides on the disposition of traditional property, and if there are no surviving relatives or a family council cannot be formed, the band council makes the determination.

The laws have the following application in their order of priority:

- (a) the James Bay and Northern Quebec Agreement as ratified by the *James Bay and Northern Quebec Native Claim Settlement Act*;
- (b) the *Cree-Naskapi (of Quebec) Act*, and the band by-laws made pursuant to it;
- (c) Acts of Parliament of a general nature; and
- (d) finally, provincial laws of general application apply only if a matter is not covered by the Agreement, the statutes unique to the Crees, by-laws made thereunder, or a federal statute.

original cash settlement and the internal self-government powers are, in law, the most favourable terms to date for aboriginal people in Canada.

##### *5. Constitution Act, 1982 and Amendments Thereto*

When the constitution was finally patriated in 1982 certain provisions covering aboriginal peoples were eventually included.<sup>44</sup>

Section 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

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

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Section 35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "Constitution Act, 1867", to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

With the addition of these constitutional provisions, the question of the meaning of "existing aboriginal rights" is an item on the national constitutional agenda. It has been stated that any meaningful discussion of the constitutional rights of the aboriginal peoples must be based upon a clear understanding of who the aboriginal peoples are, and where they are located. The provinces have added that it will be of great importance for governments to know how many aboriginal persons there are within

here encompasses only the right to hunt and fish as their ancestors did. Earlier expert evidence had been accepted by Justice Mahoney which established that the Inuit had been organized into a band level society which had no chieftains or states or nations. In other words, aboriginal title will correspond to the degree of organization that the group exercised, to be determined, in each case, by a subjective test.

In proving aboriginal title, individuals who are not recognized by the *Indian Act* will continue to have a serious problem. In *Simon*, although Chief Justice Dickson recognized the difficulty in providing evidence, which is conclusive proof that a person is a direct descendant of a tribe covered by the Treaty of 1752, he relied on the evidence that the accused was a registered Indian, under the *Indian Act*, and who was a member of a band living in the same area as the original tribe which was party to the treaty. Because of the substantive test requirement and the proof of descendancy requirement, the aboriginal and treaty rights do not apply equitably to the aboriginal peoples. As an example, Non-Status Indians or Métis have attempted to safeguard their traditional economic lifestyle as evidenced by their position that the right to hunt, fish, and trap should be applied to them equally. With the test of proof of descendancy still being based on *Indian Act* membership, the inequities continue.

Additionally, the inclusion of "existing", as a limitation, further aggravates the inequitable application of those rights. The use of "existing" may mean that only those rights survive which were unextinguished as of April 17, 1982. In other words, those aboriginal and treaty rights which were voluntarily surrendered or extinguished by competent legislation remain extinguished. However, future legislation will not be able to so impair those rights. As of April 1982, extinguishment can occur only by consent or constitutional amendment.

Although the provinces and the federal government have full powers to amend the constitution, they are now required by section 35.1 to consult the aboriginal peoples before any amendments are made to the constitutional provisions which effect aboriginal rights.

### 3 CONSTITUTIONAL REFORM PROCESS, 1983-1987

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#### A. Federal and Provincial Government Positions on Their Jurisdiction Over Aboriginal Peoples

##### 1. Federal Government

Notwithstanding the additions of section 25 and 35 in the *Constitution Act, 1982*, the federal government continues to exercise its jurisdiction over aboriginal peoples pursuant to its powers in section 91 (24) of the *Constitution Act, 1867*. The only practical implication of the *Constitution Act, 1982*, as amended, is that the federal government has the responsibility for convening and chairing the First Ministers' Conferences mandated by section 37.

The federal government's position appears to continue to be that section 91(24) covers all aboriginal peoples, except for the Métis. They state that in practical terms, both levels of government have jurisdiction over all aboriginal peoples because the people in question are either aboriginal, disadvantaged, or ordinary citizens of Canada in its provinces or territories.

In the proposed federal 1985 Accord relating to the Aboriginal Peoples of Canada, the rights of the aboriginal peoples of Canada to self-government that are set out in agreements were to be given constitutional protection. These rights were to be contained in agreements entered into with the representatives of the aboriginal peoples and the two levels of governments. Both Parliament and the legislatures of the provinces in which those aboriginal people lived were required to approve, by legislation, these agreements before they attained constitutional status.

The proposed Accord also had a section related to federal-provincial-territorial cooperation on matters affecting the aboriginal peoples. It committed the governments to improving the socio-economic conditions of the aboriginal peoples of Canada and to

transfer of powers to be an amendment of the Section 91 and 92 powers, by which the federal government is assigned legislative jurisdiction of the powers enumerated in section 91 and the provinces are assigned the powers enumerated in section 92. They may consider that such an amendment requires unanimous consent because it affects the core of the federation.

## **B. Aboriginal Peoples' Positions on Their Differences and Similarities**

It is essential to assess the positions of the representatives of the aboriginal peoples in order to clarify the question of how the inequities among the different peoples may be corrected. If the right to self-government will be constitutionalized on the basis of the 1985 proposed Accord, which envisages agreements first being reached with the representatives of the aboriginal peoples, the question of who these recognized representatives are becomes very important.

### *1. Assembly of First Nations (AFN)*

The National Indian Brotherhood (NIB), duly incorporated under the laws of Canada with an executive composed of the provincial and territorial Indian organizations (PTO'S), reorganized into the Assembly of First Nations in 1980. The Federation of Saskatchewan Indians and the Indian Association of Alberta, who were two of the twelve PTO's on the executive, initiated the change to transfer power to the chiefs of each band, which totalled approximately 570 bands or First Nations, as they became known. The reorganization essentially shifted the power base from the prairie Indian organizations, who had controlled the NIB from sheer personality and organizational strength, to other provinces, in particular, Ontario and British Columbia, with the greater Indian population base. There were no structures for the accommodation of regionalism of Indian life in Canada, which would reflect not only substantial traditional First Nations' differences, but the varying experiences whether under treaty or without treaties, or their notion of their relations with the Crown, in right of Britain or Canada, or with the provinces. In fact, the AFN eventually was seen by some First Nations with strong nationalistic viewpoints as a vehicle for assimilation, rather than a vehicle for the protection of the cultural differences of the First Nations.

By 1982, and preliminary to the First Ministers' Conference (FMC) of 1983, the AFN faced serious internal divisions. The FMC is a "multilateral" process which involves not only the federal government



constitution, but they would also have to enact the agreements concluded under the amendment, perhaps even on matters over which the province has no legislative authority. Most Indian people are fearful because of their experiences with the provinces over such matters as their hunting and fishing rights, which are often in conflict with local interests (such as farmers). The provinces have normally found themselves caught in the middle, but Indian people perceive that with the restrictive provincial game or wildlife acts, the Non-Indian residents of the provinces have the political advantage. The historical experience is to look towards the Crown initially, in right of the United Kingdom, now in right of Canada for protection. Any dilution of that historic relationship is seen as a dilution of Indian nationhood, which is protected by this relationship.

At the 1985 FMC, the PTNA was utilized as a surrogate for the AFN by the Prime Minister in his zeal to receive agreement from a major group of Status Indians. At a private meeting, the Prime Minister was informed by the PTNA leadership that their concern was that the self-government amendment which was being discussed (which required the approval by the provincial legislature of any agreements defining rights of self-government), would have the effect of undermining the federal exclusive powers and responsibilities under section 91(24) of the *Constitution Act, 1982*. The Prime Minister replied that he would jealously guard any such federal powers, and assured the PTNA representatives that there was no attempt to extend provincial jurisdiction through the back door. He stated that he was fully in support of the initiatives taken by his Minister of Indian Affairs, including treaty renovations. He expressed his personal support for the bilateral process and would proceed forthwith with that process. The non-derogation clause, which now stated that "nothing in this section abrogates or derogates from any rights to self-government, or any other rights that the aboriginal peoples of Canada may have, or may acquire, by way of treaties or land claims agreements", was strengthened to accommodate the PTNA concerns. Because a parallel "bilateral" process had been their priority, the PTNA withdrew their opposition to the proposed Accord. The Prime Minister announced this to the FMC delegations.

However, there was no agreement in 1985, and once the government did not require the PTNA as a surrogate for the AFN, their representation was no longer treated seriously.

The governments appear to be seriously considering that the rights of the aboriginal peoples of Canada to self-government will be those rights that are spelled out in agreements with representatives of aboriginal peoples.

Before agreements are reached there must be parties which are recognized as the true representatives. For purposes of these

federation. However, negotiating constitutional amendments and seeking agreements among seventeen delegations is a slow process. To assist in understanding self-government, and to assist in making it a practical reality, this initiative on a community-by-community approach is being followed.

How and if these community-based negotiations will correspond with the AFN's position is at issue.

The AFN's objectives in relation to the constitution are the following:

1. Deletion of the word "existing" from S.35(1) of the *Constitution Act, 1982*.
2. Explicit recognition of First Nations' title (an aboriginal right) to land.
3. Explicit *guarantee* of aboriginal and treaty rights.
4. Explicit recognition of First Nations' right to self-government (an aboriginal right).
5. Commitment to a process to clarify jurisdictions of First Nations' Governments.
6. Provisions for fiscal resources to First Nations' Governments.
7. Commitment to treaty renegotiation at option of First Nations' Government.
8. Provision for the democratic right of First Nations' to consent to amendments affecting:
  - (i) aboriginal rights, especially transfer or extinction;
  - (ii) treaty rights; and
  - (iii) governmental relationships.
9. Provision for enforcement and remedies.<sup>49</sup>

It is conceivable that each of the separate agreements will eventually be given constitutional recognition. It is possible that there may be a role for the national organizations to establish general guidelines, but for the different recognized communities to negotiate the specific rights and remedies unique to their situation. In fact, this procedure corresponds

To achieve this objective, the governments and the representatives of the aboriginal peoples were required to enter into discussion, on a bilateral or multilateral basis, as was appropriate. Included in the discussions was the determination of the respective roles and responsibilities of the governments in improving cooperation on programs and services, and the transfer of programs and services to institutions of self-government. The NCC is on record as stating that an organization to deliver programs to urban aboriginal people would be a possible form of self-government.

The Accord also included another schedule which would establish a working group to consider data on the numbers and geographic concentration of aboriginal peoples. This data would be useful, in particular, for those peoples who are dispersed and without a territorial base. In this way, their connection to their aboriginal peoples can be recognized, not only for cultural purposes, but in the efficient delivery of programs and services on an equitable basis.

For those peoples whose status will be restored, under the *Indian Act*, that restoration will be for the most part, only on paper. They will face difficulties in returning to their communities, not only because they have made homes elsewhere, but because the communities will have difficulty in accepting them. We have instances of people who were added to band lists in the early 20th century still being ostracized. The NCC is considering the option of new bands being constituted, pursuant to the *Indian Act*, particularly for those people who may not receive band membership in 1987. The policy of the Department of Indian Affairs, as evidenced by the Conne River Band,<sup>51</sup> is that a group must approximate Baker Lake's directive for an organized society for it to be recognized as a band. This route, notwithstanding its difficulties, may be the most advantageous. Not only would the pressure be from the organization, but also from the federal government on the provincial government to set aside the land base required by the new bands. Additionally, even those peoples not now eligible for *Indian Act* status may be so declared to have both status and membership in the new band by the Governor-in-Council pursuant to section 2(1)(c) of the *Indian Act*.

### 3. Métis National Council (MNC)

The Métis National Council represents primarily the Métis based in the western provinces who trace their roots to the Red River settlement. They have a strong nationalistic element which wishes to retain the Métis culture as unique and separate from other aboriginal groups.

Historically, there has been an express decision against special status for the Métis. The Métis fought for special political and property rights

follow. The agreement would be presented to the Northwest Territories Assembly, the federal Government and to the northern voters.

For the Inuit in the James Bay and Northern Québec region in Québec, their rights are embodied in their agreement. Unlike the Cree-Naskapi, they do not have a corresponding federal statute outlining their self-governing powers.

The Inuit villages are now Québec municipalities under Québec jurisdiction. They now state that their agreement to be under Québec jurisdiction was conditional on Québec providing a level of programs and services. They object strongly to the Northern Québec Transfer Agreement, under which Canada transferred its municipal services' responsibilities to Québec.

The ICNI first appeared to support the 1985 Accord, but eventually, divisions appeared which may have originated from the Inuit of Québec. The Accord was rejected because of the provincial veto to any constitutional recognition of self-government.

Unless the Government of Canada and the provinces agree to an aboriginal form of self-government similar to the domestic dependent sovereign form exercised by Indian nations in the United States under which Indian governments are immune from state intrusion, there may be no constitutional agreement in 1987. The AFN may reject any form of delegation and provincial involvement. The ICNI may reject provincial involvement.

The MNC and NCC's interests may be in the greatest jeopardy as their rights will remain uncrystallized if there is no definition and identification of aboriginal rights. Other avenues for their rights' implementation will be necessary.

Another conflict may jeopardize agreement in 1987. The provincial governments require that the resourcing of aboriginal self-government be clarified before a general clause on self-government is entrenched. The federal government appears to be willing to amend the constitution without any financial commitment. The provinces appear to have a practical and logistical point as evidenced by the experience of the James Bay Cree and the beneficiaries of the treaties. Where terms have been left without an infrastructure for implementation, those rights have remained vague and illusionary. A general clause may remain just a general clause and the constituents of the MNC and the NCC may not be in any better position past 1987 unless a mechanism whether through the present *Indian Act* or new legislation for those rights to be properly implemented.

## 4 CONSTITUTIONAL REFORM

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### A. Proposed 1985 Constitutional Accord on Self-Government, and its Relationship to the 1987 First Ministers' Conference

The provinces are concerned with the possible transfer of powers to a third order of government. Once aboriginal self-government is clothed with powers similar to those in sections 91 and 92 of the *Constitution Act, 1867*, the provinces argue that there is a transfer of powers. Changing the legislative competence is more than just dealing with rights under section 35, it is a fundamental constitutional amendment of sections 91 and 92. If there is a transfer of power to an aboriginal self-governing entity within a province, it can adversely affect other parts of the provincial powers. The provinces assert that aboriginal self-government must be practical, in that it must be compatible with municipal and provincial regimes that are adjacent to it. The provinces are also concerned about the resourcing of self-government, which they state is more than the fiscal aspect. It probably includes whether a land base must be provided for those who are now landless. The form or model of the institutional arrangement of aboriginal self-government is at issue. The form will have its basis on its authority. The decision for 1987 is whether it is created by delegation, such as the municipal status of the Inuit villages, or if it has a constitutional basis with a guaranteed jurisdiction, such as the section 91 and 92 powers of the federal government and the provinces.

Another serious problem confronts aboriginal governments which would possess constitutionally recognized authority. The intergovernmental aspects of federalism could not accommodate a large number of individual self-government units representing a distinct order of government. The aboriginal representatives now recognized, such as the AFN and NCC, could not be substitutes for the leaders of self-governing communities, as they do not have the executive authority to bind them. As events have shown during this process, individual communities will repudiate them, and as such, they do not have the status and authority of governments.

## 5 CONCLUSION

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Those aboriginal peoples who fall outside the provisions of the *Indian Act*, and who reside in the provinces are, in reality, unable to obtain any benefits from their status as aboriginal peoples. The aboriginal rights which accrue to Indian people who fall within the provisions of the *Indian Act*, and aboriginal peoples who are covered by the James Bay Agreement translate into lands and resources, and the right to exercise a degree of self-government over those lands. The majority of aboriginal peoples who are not Status Indians or beneficiaries under the James Bay Agreement have no lands set aside for them. Their resource base is limited to any resources available to any disadvantaged Canadian. Without the lands and resources, they have little need for organized internal political societies. Thus, not only are they denied economically, but they are denied the right to flourish politically in institutions of their own making.

The main issue in the constitutional process for these "have-nots" is equity of access, not necessarily to programs and services, but equity of access both to the process of negotiating self-government, and to the guarantee that there will be equality in the results of such self-government negotiations. Minimal norms which would apply across the board to all agreements for self-government may need to be entrenched. These bottom line prerequisites include a land base with resource rights, local governments powers over the land base, and a level of transfer payments to ensure the equal delivery of services. It would, however, be understood that such agreements would be entered into with communities which are organized. These communities should include any groups that are in a rural area who may designate themselves as an aboriginal community. Such communities should be eligible for lands, resources and self-government powers to a degree that ties in with their aboriginal history. The James Bay Agreement is a precedent whose history can be applied to other aboriginal communities across the country. This is evidenced by the desire that most of those communities, who are not covered by the treaties, have of maintaining a traditional economic life style similar to Status Indian communities.

## NOTES

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1. Schedule B to the Canada Act, 1982 (U.K.), c.11.
2. Section 37 of the *Constitution Act, 1982* provided for the 1983 First Ministers' Conference on Aboriginal Constitutional Matters, Section 1 of the 1983 Constitutional Accord on Aboriginal Rights provided for the 1984 conference, and section 37.1 which was added by the Constitution Amendment Proclamation, 1983 provides for the conferences held in 1985, and the conference to be held in 1987.
3. R.S.C. 1970, C. I-6, as amended.
4. *Guerin v. R.*, [1984] 2 S.C.R. 335.
5. R.S.C. 1970, App. II, No. 1.
6. *St. Catherine's Milling and Lumber Co. v. R.* (1888) 14 App. Cas. 46.
7. *Calder v. Attorney-General of B.C.*, [1973] S.C.R. 313.
8. Page 18.
9. R.S.C. 1970, Appendix II, No.5.
10. *Lavell v. Attorney-General of Canada*, [1974] S.C.R. 1349.
11. *Reference re Term "Indians"*, [1939] S.C.R. 104.
12. A charter was granted in 1670 by King Charles II of Great Britain to trade in the land drained by rivers running into Hudson's Bay to the Governor and Company of Adventurers of England (the Hudson's Bay Company).
13. 8 U.S.C., section 1359 allows free passage across the United States border for Canadian Indians of at least half Indian ancestry. A similar right has been sustained under the Jay Treaty, Nov. 19, 1794, Great Britain - United States, art.III, 8 Stat. 116, 117 T.S. No. 105. See *United States ex rel. Diablo v. McCandless*, aff'd, 25 F.2d 71 (3rd Cir.1928). However, these provisions do not allow free passage of dutiable goods. *Akins v. United States*, 551 F.2d. 1222 (C.C.P.A. 1977). The free passage provision for United States Indians coming into Canada is not reciprocally recognized by Canadian law.

36. The Haldimand Proclamation stated,  
 "I have, at the earnest Desire of many of, these His Majesty's faithful Allies, purchased a Tract of Land..." The Haldimand Procl, 1784.  
 The Simcoe Patent, 1793 stated,  
 "...whereas the attachment and fidelity of the Chiefs, Warriors and people of the Six Nations to Us and our Government has been made manifest....by the bravery of their conduct....We being desirous of showing our approbation of the same and in recompense of the losses they may have sustained....confirming....the full and entire possession...of the said District or Territory to be held and enjoyed by them in the most free and ample manner and according to the several customs and usages of them...." (emphasis added.)
37. [1973] 6 W.W.R. 97.
38. The Dominion of Canada transferred to the provinces of the prairies the same type of assets which were owned by other provinces under section 109 of the *Constitution Act, 1867* such as lands, mines, minerals and royalties.
39. Many aboriginal peoples have condemned the agreement for its extinguishment clause. However, in December, 1986, the Government of Canada announced a new policy on aboriginal land claims which abandons blanket extinguishment of all aboriginal rights as the condition for any land settlement agreements.
40. Statutes of Quebec, 1978, c.92.
41. S.C., 1983 - 84, c.18.
42. Wendy Moss, The Implementation of the James Bay and Northern Quebec Agreement in Morse, B., *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada*, Carleton University Press, 1985, p. 689.
43. Note 42, above at 688.
44. For a more complete description of the process leading up to these clauses, see, Zlotkin, Norman K., *Unfinished Business: Aboriginal Peoples and the Constitutional Conference*, Institute of Intergovernmental Relations, Queen's University, Kingston, 1983.
45. [1980] 1 F.C. 518.
46. Note 6, above.
47. The Honourable David Crombie, Minister of Indian Affairs and Northern Development, *Policy Statement on Indian Self-Government in Canada*, Ottawa, 1986 at 2.
48. S.C., 1986, c.27.
49. Assembly of First Nations, Position Papers distributed at Rally in Support of the Rights of Indigenous People to Self Determination, Toronto, October 29, 1986



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