UNFINISHED BUSINESS:

Aboriginal Peoples and the 1983 Constitutional Conference

by

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PREFACE

One of the major pieces of unfinished business following patriation of the Constitution in 1982 was the future constitutional status of Canada's aboriginal peoples. Section 37 of the Constitution Act, 1982 recognizes this. It required the Prime Minister to convene a constitutional conference within one year of April 17, 1982 at which issues affecting aboriginal peoples would be discussed — and their representatives would be present. As the participants prepared their positions for the conference to be held in March 1983, it was clear that the issues they faced were enormously complex in moral, political, legal and economic terms. How the conference was to be conducted, and how it would arrive at decisions was equally contentious, since this would be the first time that non-governmental groups had ever sat with the First Ministers at a constitutional negotiating table. Whether the meeting would end in bitterness and acrimony, or instead forge new ways to recognize the status of Canada's aboriginal peoples remained very much in doubt.

This Discussion Paper by Norman K. Zlotkin provides a detailed guide through the issues. He explores the legal and juridical precedents in the pre-1982 constitutional treatment of natives. He describes the participation of aboriginal groups in the negotiations leading to the Constitution Act,1982 and provides a careful analysis of the ambiguities and unsettled questions it contains. But he also shows that the aboriginal agenda goes far beyond tying up a few loose ends. Profound

issues such as aboriginal consent for future amendments, self-government for natives, representation in federal and provincial political institutions and a Charter of Aboriginal Rights remain to be dealt with. There must be agreement on procedures, both for the conference itself and for any future discussions. Zlotkin carefully analyzes all these questions and his suggestions point the way to a more fruitful and reasoned discussion.

The challenge facing all governments is a difficult one. As Peter Jull of the Nunavut Constitutional Forum put it in a letter to the Institute of Intergovernmental Relations:

> Assuming that the various governments are interested in seeing anything happen at the First Ministers Conference, and despite all the grumpiness, I think enough of them do want some positive outcome that we can be hopeful. The problem is of the "after you, Gaston" variety. The natives want some assurance that the governments are coming to the table in good faith, and the provinces sit back and wait until the natives reveal enough of their hands that they can decide "how to play it." Beyond that, the natives are painfully unfamiliar with the ways and wiles of intergovernmental conferencing, and the governments are frightened by what they see as the unlimited hopes of the native people.

Professor Zlotkin is cautiously optimistic. There is no reason, he concludes, to believe that the support for compromise revealed after the intergovernmental accord of November 1981 has evaporated. Whatever the outcome, his survey sets out an agenda which will trouble Canadians for years to come.

The Institute is grateful to Professor Zlotkin for his readiness to prepare this paper at short notice and to the Native Law Centre and College of Law, University of Saskatchewan and their staffs for the support they provided him.

Richard Simeon
Director
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N.K.Z.

1 INTRODUCTION

On 17 April 1982 the new Canadian constitution came into effect, recognizing and affirming the existing aboriginal and treaty rights of the aboriginal peoples of Canada. During the patriation process, it was far from clear that these rights would receive constitutional recognition. They were omitted from the initial resolutions presented to Parliament, and dropped from the accord reached by the Prime Minister and nine provincial premiers on 5 November 1981. Only after aboriginal groups organized an ongoing and highly visible campaign that included an extensive domestic and international lobby, representations to international tribunals, and litigation in the English courts, were aboriginal and treaty rights added to the patriation proposal in January 1981 and later reinstated in the final constitutional package.

Aboriginal and treaty rights are now entrenched in section 35(1) of the **Constitution Act, 1982,** which states "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Section 35(1) leaves many questions unanswered concerning the status, content, and scope of aboriginal and treaty rights. However, section 37 requires the Prime Minister to convene a constitutional conference by 17 April 1983 which will include on its agenda "an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada."

The purpose of this paper is to describe the background to the conference, its participants, and the issues it is likely to address.

Constitutional recognition of the aboriginal peoples of Canada and their rights did not begin with the **Constitution Act, 1982.** Similarly, the participation of aboriginal peoples in the process of constitutional reform did not begin with preparation for the 1983 constitutional conference. This paper describes the pre-patriation constitutional recognition of aboriginal peoples and their rights as well as their involvement in and response to the patriation campaign led by the federal government in the 1970s and 1980s.

A wide variety of issues have been suggested as agenda items for the conference. They include the definition of aboriginal rights; aboriginal self-government; women's rights; political representation of aboriginal peoples in Parliament and the provincial legislatures; language, cultural, and educational rights; economic rights; and equalization payments. Although many observers consider some of these issues to be non-constitutional in nature, it is often difficult to separate non-constitutional matters from those that are clearly constitutional. How, for example, should treaty rights (now constitutionally entrenched in section 35) be defined? It has been argued by certain Indian associations that treaty promises should be given a dynamic interpretation which is responsive to modern conditions, and that many of the rights listed above would properly fall under the heading of treaty rights. Similarly, rights recognized or created in land claims settlements may become constitutionally entrenched at a future date; the range of such rights could be as broad as the settlements themselves.

Two procedural issues are likely to receive a great deal of attention at the conference: the future participation of aboriginal peoples in the constitutional amendment process; and their demand that their consent be required for any constitutional change affecting them directly.

It is essential that the constitutional conference lead to an eventual, successful resolution of outstanding issues between governments and

aboriginal peoples. Many of these issues cannot be resolved at a two-day conference. What must result from the conference, however, is the establishment of an ongoing process for their resolution and a guarantee that constitutional protection of the rights of aboriginal peoples - whatever these rights are defined to be - will not be altered without their consent. The ongoing process that comes out of the conference should be a further step toward recognition of the aboriginal peoples as primary actors in the process of constitutional development.

Finally, it should be noted that this paper is based on documents and information available at mid-December 1982. As the conference draws nearer, its agenda will be refined and its procedure determined. Some of the issues discussed in this paper may not be raised at the conference. They are nevertheless serious concerns of the aboriginal peoples, and will inevitably be raised at a later date or in a different forum.

2 THE ABORIGINAL PEOPLES OF CANADA

The term "aboriginal peoples" may be used to describe all peoples who can trace their ancestry in Canada to time immemorial, that is, to a time before written records were kept. As used in the **Constitution Act, 1982,** the term includes Indians (whether or not they are registered under the **Indian Act**), Metis, and Inuit.

Prior to the arrival of Europeans, the aboriginal nations utilized most regions of Canada, either for economic purposes, such as hunting, fishing, gathering, and growing crops, or for religious and cultural purposes. Each nation had its own territory; its boundaries were known and ordinarily respected.

Although their societies were diverse in form, aboriginal nations shared one common feature - their relationship with the land and the waters. There was a deeply-felt connection between the people and the land, and this feeling remains prevalent in the twentieth century. In the words of the Yukon Native Brotherhood,

> Without land, Indian people have no soul - no life - no identity - no purpose. Control of our land is necessary for our cultural and economic survival.[1]

While accurate population figures are not available, there are an estimated 275,000 status Indians,[2] 25,000 Inuit,[3] and one million non-status Indians and Metis[4] living in Canada today, making up a total

aboriginal population of approximately 1,300,000.

The three aboriginal populations share many common social and economic problems. Compared with other Canadians, they are undereducated, suffer from higher rates of unemployment, receive a much lower than average income, live in substandard housing, and have a life expectancy which is much lower than the national average.[5]

Indians

Exclusive legislative authority over "Indians, and Lands reserved for the Indians" was given to the federal government by section 91(24) of the **Constitution Act, 1867** (formerly the **British North America Act, 1867**).[6] The federal government has exercised its authority by means of the **Indian Act**, which dates back to 1868.

The **Indian Act**[7] contains a complex system for the recognition, registration, and deregistration of Indians, which is not based solely upon racial origins. It defines an "Indian" as "a person who pursuant to this Act is registered [or entitled to be registered] as an Indian."[8] Persons entitled to be registered include those defined as Indians on 26 May 1874, band members, and their wives and certain of their descendants.[9]

The status provisions were introduced to Indian peoples during the first post-confederation treaty-making period (1870-76). When these treaties were signed, aboriginal peoples were given the option of taking collective "ownership" of reserve lands or of taking individual ownership of a certain amount of land as private property within the dominant property system. Individuals who chose collective ownership were registered as Indians while those who chose private ownership were not given Indian status. If Indians happened to be away hunting or fishing, or if their band was located in a remote area that was missed by the treaty party, they might not have been registered under the **Indian Act.**

The terms "status Indian" and "treaty Indian" are not necessarily synonymous, as approximately 50 per cent of those registered as Indians are not descendants of the aboriginal peoples who signed treaties.[10] Indians in Quebec, the Maritimes, the Yukon, most of British Columbia, and parts of Ontario and the Northwest Territories are not descendants of signatories of post-confederation treaties, yet they are status Indians because they or their ancestors were placed on band lists by government officials when the band lists were compiled.

Status Indians are entitled to special services provided by the federal government in fields such as education, housing, health, and economic development. They are not required to live on Indian reserves, although many of the special services are provided only to on-reserve residents.

Non-Status Indians

Many Indians who at one time were registered, or whose ancestors were registered, are not considered to be Indians as defined in the **Indian Act**. Through a procedure known as "enfranchisement,"[11] many Indians gave up their status under the **Indian Act**. For example, an Indian who volunteered for duty in the armed forces during the First or Second World War would have been enfranchised. Similarly, an Indian who wanted to vote in a federal election prior to 1960 had to become enfranchised. These individuals would not have understood that they were signing away their legal right to be considered an "Indian." They were paid a lump sum representing future treaty payments, and a per capita share of band funds held in trust by the federal government.[12]

Although voluntary enfranchisement is rare today, involuntary enfranchisement can occur through the operation of the **Indian Act**. For example, an Indian woman who marries a non-Indian man (as defined in the **Indian Act**) loses her Indian status.[13] The fact that she may be marrying a full-blooded though non-status Indian man is irrelevant to the result. The children of their marriage will also be non-status. With enfranchisement, an Indian woman loses her right to live on a reserve and her right to services offered by the federal government to status Indians. The federal

government refuses to provide special economic and social services to non-status Indians.

In the well-known **Lavell** case,[14] the Supreme Court of Canada ruled that the involuntary enfranchisement of an Indian woman through marriage to a non-Indian was not contrary to the **Canadian Bill of Rights.** Recently, however, in the **Sandra Lovelace** case,[15] the United Nations Human Rights Committee held that the same provision of the **Indian Act** violated article 27 of the **International Covenant on Civil and Political Rights,** in that it deprived the complainant of the right to belong to her community.

Metis

Although the term "Metis" originally meant a person of mixed French and Indian ancestry, it is now commonly used to describe all people of partial Indian ancestry, persons whose aboriginal claims were settled by half-breed lands or scrip rather than by treaties and reserves ("scrip" was a coupon redeemable in land or in cash), individuals who were never registered, and non-status Indians.

The **Indian Act** has no application to the Metis, and the federal government refuses to provide them with special economic and social services.

Inuit

The Inuit, formerly known by the Cree name "Eskimo," are divided into five cultural groupings with two basic languages and many dialects. They live throughout the Arctic north of the tree line, including northern Quebec. They have no reserves and have not signed treaties with the Crown.

The Inuit were not affected by early versions of the **Indian Act**, and are explicitly excluded by section 4(1) of the present Act. As with the Metis, there is no legal definition of the Inuit. However, the federal government provides them with certain economic, health, and educational services.

3 CONSTITUTIONAL RECOGNITION PRIOR TO 1982

Constitutional recognition of the aboriginal peoples of Canada does not originate in the **Constitution Act, 1982.** Their special rights have been recognized by several earlier constitutional enactments and orders. However, aboriginal peoples living in different regions of Canada have not received uniform recognition of their rights, and the rights of some of the aboriginal peoples have received no recognition whatsoever. This has resulted in great uncertainty in the scope and content of aboriginal rights. Although the **Constitution Act, 1982** recognizes and affirms existing aboriginal and treaty rights, it does not define them. That is one of the tasks of the upcoming constitutional conference.

Royal Proclamation of 7 October 1763

During the 1750s, Britain was preoccupied with two related military questions in North America. It was fighting France in the Seven Years' War, and facing discontent among the Indian tribes on the frontier over the western movement of settlers from British colonies on the Atlantic seaboard. Britain feared an Indian alliance with the French. To meet the Indian threat, the British followed a policy, from 1754, of recognizing Indian rights in the territory west of the colonies and forbidding settlement on Indian lands unless their surrender had been authorized by England.[16]

After the fall of New France in 1760, Quebec was formally ceded to Britain by the Treaty of Paris in 1763. The Royal Proclamation of 7 October 1763,[17] along with establishing the government of the territories acquired from France, provided explicit recognition of the aboriginal rights of the Indians to which it applied. The Royal Proclamation reserved large tracts of land to the Indians as their hunting grounds. It also established that purchases of Indian lands could only be made by the Crown at a public meeting called for that purpose; that is, all land cessions were to be settled through treaties.

The Royal Proclamation has come to be known as the "Charter of Indian Rights"[18] or the "Indian Bill of Rights."[19] Although recognized as part of the Canadian constitution,[20] its terms are subject to amendment or repeal by Parliament.[21] Its recognition of aboriginal title is followed in various enactments that are part of the constitution of Canada.

Section 52(2) of the **Constitution Act, 1982** sets out the statutes that comprise the constitution of Canada:

> 52.(2) The Constitution of Canada includes
> (a) the **Canada Act**, including this Act;
> (b) the Acts and orders referred to in Schedule I; and
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).

The Royal Proclamation of 1763 has not been included in Schedule I, referred to in subparagraph (b) of section 52(2), but it is referred to in section 25:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

By this section, the aboriginal rights recognized by the Royal Proclamation of 1763 are constitutionally protected from abrogation or derogation through the operation of the Canadian Charter of Rights and Freedoms. For example, an Indian treaty or aboriginal right to hunt for food throughout

the year could not be struck down by the courts because it treats Indians in a special manner and thus violates section 15(1) of the Charter, the "equality rights" section.

Constitution Act, 1867

The unique constitutional status of aboriginal peoples in Canada is recognized in section 91(24) of the **Constitution Act, 1867,** which gives Parliament exclusive legislative jurisdiction over "Indians, and Lands reserved for the Indians." In other words, provincial legislatures have no constitutional authority to make laws concerning Indians and concerning lands reserved for the Indians. This may be considered implicit recognition of an obligation on the federal government to protect the rights and interests of Indian people.

One of the questions raised by section 91(24) is which aboriginal peoples are included in the term "Indians" and thus fall within federal jurisdiction. Status Indians are clearly included, whether or not they are treaty Indians, and in 1939 the Supreme Court of Canada decided that the Inuit are also included within the meaning of the term.[22]

In law it remains undecided whether non-status Indians or Metis are included as section 91(24) "Indians," despite the fact that non-status Indians are, by definition, Indians who have lost legal recognition as Indians through operation of the **Indian Act,** a statute authorized by section 91(24). Although non-status Indians are no longer bound by the limitations or eligible for the benefits found in the **Indian Act,** it does not follow that they should be considered non-Indians in a constitutional sense and (for example) be deprived of their treaty or aboriginal rights. Yet Canadian courts have failed to recognize the special constitutional position of non-status Indians.[23]

Nor have the Metis, the descendants of Indians, been constitutionally recognized as "Indians" under section 91(24). They have, however, been constitutionally recognized as "aboriginal peoples of Canada" by section 35(2) of the **Constitution Act, 1982.**

Boundary Changes

The expansion of the boundaries of Canada or the boundaries of provinces within Canada has in many instances been accompanied by recognition of the aboriginal rights of the original inhabitants of the territory or colony concerned. By Order in Council dated 23 June 1870,[24] Rupert's Land was admitted into Canada on the condition that "any claims of Indians to compensation for lands required for purposes of settlement should be disposed of by the Canadian Government in communication with the Imperial Government."[25] Similarly, the North-Western Territory was admitted into Canada on condition that "the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."[26]

In 1871, British Columbia was admitted into Canada on condition that "the charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union."[27] In **Jack v. The Queen,**[28] Mr. Justice Dickson, the only member of the Supreme Court of Canada to express an opinion on the issue, held that this provision of the **British Columbia Terms of Union** "subjects the exercise of federal powers to a limitation in respect of Indians" in British Columbia.[29]

In 1912, the boundaries of Ontario[30] and Quebec[31] were extended to their present northern limits by legislation which specifically required that treaties be made with the Indian inhabitants.[32]

The statutes and orders mentioned above may be interpreted as recognizing and guaranteeing the aboriginal rights of the native inhabitants of the areas concerned. It should be noted that both the **Rupert's Land and North-Western Territory Order** and the **British Columbia Terms of Union** are

included in Schedule I to the **Constitution Act, 1982** as part of the constitution of Canada.

Constitution Act, 1930

The Natural Resources Transfer Agreements, subsequently incorporated into the **Constitution Act, 1930**[33] (formerly the **British North America Act, 1930**), transferred the beneficial ownership of land and natural resources from the federal government to the governments of Manitoba, Saskatchewan, and Alberta. Each Agreement recognized the obligation of the province to make unoccupied Crown land available to Canada so that Canada could fulfil outstanding land entitlements under treaty.[34] In addition, each contained an identical paragraph recognizing Indian hunting, trapping, and fishing rights:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, 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.[35]

Judicial interpretation has limited the hunting rights constitutionally guaranteed by the Natural Resources Transfer Agreements to status Indians and has excluded non-status Indians and, by implication, Metis, from their benefits.[36]

The Metis

Although the Metis were not given constitutional recognition at confederation in 1867, their role in Canada's formation cannot be ignored. In 1869, the Metis formed a provisional government under the presidency of Louis Riel, which negotiated Manitoba's entry into confederation on terms designed to protect the political, cultural, and land rights of the Metis. Through the **Manitoba Act, 1870**,[37] the federal government put into effect several key demands of the Metis. Manitoba was admitted as a province into confederation and given representation in Parliament. French and English

language rights were guaranteed. The federal government set aside 1.4 million acres of land for the children of the Metis toward the extinguishment of their share of "Indian title." The **Dominion Lands Act,** first enacted in 1874,[38] extended scrip to Metis adults in Manitoba and the Northwest Territories (Saskatchewan and Alberta). During negotiation of the post-confederation treaties, half-breeds (the nineteenth-century term for the Metis) were told they could choose to take treaty or to assert half-breed status and receive land or scrip under the **Manitoba Act** or the **Dominion Lands Act.**

There is no legislative statement that Metis claims have been totally extinguished by land grants or scrip. The only statute to consider the legal consequences of this method of settling aboriginal claims is the **Indian Act,** which by section 12(1)(a) provides that any person who has received or been allotted half-breed lands or money scrip (or his descendants) is not entitled to be registered as an Indian.

Through its inclusion in Schedule I to the **Constitution Act, 1982,** the **Manitoba Act, 1870** is also included in the constitution of Canada.

4 ABORIGINAL PARTICIPATION IN CONSTITUTIONAL REFORM

ABORIGINAL POLITICAL ORGANIZATIONS

Aboriginal political organizations have tended to develop along "status" lines. In other words, separate organizations represent status Indians, Inuit, and the Metis and non-status Indians. This should not be surprising, given that aboriginal peoples are administered and serviced by separate branches or even levels of government, and that they live in separate communities when they are not living in an urban setting.

The last ten years have witnessed the development and growth of sophisticated aboriginal political organizations at the national, regional, and local levels.[39] The political skills of their leaders were keenly tested by the process of constitutional reform, and by the attempt of government leaders to minimize their role in the amendment process.

Indian Political Organizations

Band Councils and Provincial Indian Organizations

An examination of the structure of the status Indian associations will indicate why the division between status and non-status Indian organizations has occurred. Basically, status Indian organizations represent the band councils which were established on Indian reserves through the **Indian Act**.[40]

Band councils and their chiefs are elected by band members.[41] The councils are given very limited powers to govern Indian reserves by the **Indian Act.**[42] They have no effective mechanism for the enforcement of their resolutions or by-laws, nor do they generally have either the capital or the revenue to effectively undertake band projects for the betterment of the reserve population. The Minister of Indian Affairs has the authority to disallow any band council resolution.[43]

Provincial or regional (within a province) Indian organizations are generally controlled by a board of directors composed of all chiefs of the bands who support the organization. The executive is elected by the chiefs or by other representatives of the band councils. A few Indian organizations choose their executive through direct election by band members throughout the province.[44] Constitutional amendments changing the method of election are not infrequent.

Thus the provincial organizations are theoretically controlled by on-reserve residents, for it is they who elect the chiefs who run the organizations. Given an organization controlled by chiefs, there is no method by which non-status Indians may be represented. As a result, it has been necessary for the non-status people to form their own organizations.

During the late 1960s, the federal government brought the bands together for a series of consultative meetings to discuss Indian policy in Canada. In 1969 - within days of the conclusion of these meetings - Jean Chrétien, then Minister of Indian Affairs, released the government's "White Paper," which proposed termination of the special status of Indian people and non-recognition of aboriginal rights and non-treaty land claims.[45]

Indian leaders were outraged, as the termination policy was contrary to their recommendations. Province-wide Indian organizations were either formed or revitalized to oppose the implementation of the White Paper and to research, formulate, and assert land claims. The emphasis on land claims may be traced back to Britain's colonial policy of extinguishing aboriginal rights before development and immigration was allowed to occur.

Indians understand this policy as the primary British, and thus Canadian, recognition of their sovereignty.

The provincial organizations represent the interests of status Indians within the province when dealing with both levels of government, and they have developed programs for land claims research, anti-alcoholism, education, sports and recreation, community development, health, housing, and child welfare. Most program funding comes from federal or provincial grants.

The National Indian Brotherhood and The Assembly of First Nations

The National Indian Brotherhood (NIB) existed until 1982 as a centralized status Indian organization controlled by provincial status Indian associations. The provincial organizations tended to give little authority to the national body and it functioned primarily as a pressure group in Ottawa, relying on its prestige rather than its authority.

Problems with provincial representation contributed to the eventual replacement of the National Indian Brotherhood by the Assembly of First Nations (AFN). In provinces such as British Columbia, Ontario, and Quebec, some bands were not represented by Indian associations with membership in the NIB, and therefore were unable to participate in the formulation of the national Indian association's policy or in the selection of its executive. As the provincial organizations selected delegates to the annual NIB general assembly, even bands that were members of the constituent provincial associations were not guaranteed a vote at the annual meeting. Finally, in September 1979, the general assembly of the NIB passed a resolution calling for an all-chiefs conference.

In April 1980, the NIB held a national all-chiefs conference in Ottawa, which was attended by an estimated 376 chiefs and approximately two thousand other Indians. A resolution was passed calling for the eventual replacement of the NIB by the Assembly of First Nations. In April 1982, following a two-year transition period, David Ahenakew from Saskatchewan

was elected national chief of the AFN and the NIB was no longer in operation.

Inuit Political Organizations

Inuit Tapirisat of Canada

The Inuit Tapirisat of Canada (ITC) is the national organization that represents Inuit political interests. Regional associations include The Committee for Original Peoples' Entitlement (COPE), representing twenty-five hundred Inuvialuit in the western Artic; the Northern Quebec Inuit Association, which was succeeded by Makivik Corporation after the conclusion of the James Bay and Northern Quebec Agreement; the Labrador Inuit Association; the Baffin Region Inuit; the Keewatin Inuit Association; and the Kitikmeot Inuit Association in the central Arctic. They are primarily concerned with land claims negotiations, the preservation of Inuit economies in the face of resource development, the maintenance and preservation of Inuit culture and, generally, the social well-being of the Inuit.

The ITC presented its land claim to the federal government in February 1976. It was a comprehensive social, political, and economic development proposal that asked for the division of the Northwest Territories into two separate political jurisdictions. In one of these areas - Nunavut - the Inuit majority would have a large measure of control.

When the Nunavut proposal was withdrawn a few months after its submission, COPE decided to present its own land claim for the western Arctic. COPE was very concerned about the pending decision regarding a northern pipeline, and wanted a settlement prior to development. Its proposal was presented to the federal government in May 1977 and, although an agreement in principle was signed in October 1978, a settlement has not yet been reached.

On 26 November 1982 John Munro, Minister of Indian and Northern Affairs, announced that the federal government was prepared to accept in principle

the division of the Northwest Territories into smaller political entities. This acceptance was made contingent upon the settlement of land claims, and upon northerners forging a consensus on such issues as boundaries and the distribution of powers with respect to local, regional, and territorial levels of government. Prior to this announcement 56 per cent of the voters in the Northwest Territories supported an east-west division drawn roughly along the tree line.

The federal government's acceptance in principle of division of the Northwest Territories may be seen as a step toward implementation of the ITC's Nunavut proposal. It was a major factor in persuading Peter Ittinuar, the Inuk Member of Parliament from the Nunatsiaq riding in the eastern Arctic to leave the New Democratic Party for the Liberals.

Inuit Committee on National Issues

The Inuit Committee on National Issues (ICNI) was formed in Igloolik at the 1979 ITC annual general meeting. Its major responsibility is to represent Inuit views on the constitution and other issues of national significance. Each regional association has a seat on the Committee. Charlie Watt of Fort Chimo and Tagak Curley of Rankin Inlet are the co-chairmen of ICNI, and Mark R. Gordon will be ICNI's chief negotiator at the constitutional conference.

Metis And Non-status Indian Political Organizations

The Native Council of Canada (NCC) was formed in 1970 to represent the interests of the Metis people and of all Indian people who are not granted recognition or have been deprived of recognition by the **Indian Act** (non-status Indians). Its board of directors is composed of representatives of the various provincial Metis and non-status Indian associations.

Generally, the provincial associations are composed of several regional or community chapters to which Metis or non-status individuals belong.

EVENTS PRIOR TO JANUARY 1981[46]

During the 1970s, aboriginal organizations in Canada concentrated their efforts on the settlement of claims based on aboriginal and treaty rights. The shocking economic and social conditions faced by most native people were to be ameliorated through the negotiation and settlement of outstanding land claims.

At first the federal government refused to recognize the validity of such claims. The 1969 White Paper proposed the termination of special status for Indians,[47] denied the validity of aboriginal land claims, stating "these are so general and undefined that it is not realistic to think of them as specific claims capable of remedy," and rejected treaty rights as "the provisions and practices of another century [which] may be considered irrelevant in the light of a rapidly changing society." It further stated, "The anomaly of treaties between groups within society and the government of that society will require that these treaties be reviewed to see how they can be equitably ended."[48]

Influenced by the **Calder** decision,[49] the federal government announced a change in policy in 1973. **Calder** involved an application by the Nishga Indians for a judicial declaration that they had aboriginal title to the lands they traditionally occupied in northwestern British Columbia. By a four-three decision, the Supreme Court of Canada dismissed their case on a procedural technicality. However, the six members of the court who addressed the issue of aboriginal title split evenly on the question of whether aboriginal title had been extinguished prior to British Columbia's entry into Confederation. Subsequently, the federal government announced a policy of negotiating settlements of comprehensive land claims, that is, claims based on unextinguished aboriginal title.[50] It also announced a policy of settlement of specific claims based on specific acts and omissions of government relating to treaty obligations, legislative requirements, and responsibilities regarding the management of Indian assets.[51]

But the general offer to settle aboriginal land claims was no longer satisfactory to aboriginal organizations. In 1975 the Dene Nation, the association representing Indian people of the Northwest Territories, became the first aboriginal group to assert nationhood within Canada.[52] In 1976 the Inuit Tapirisat of Canada proposed a land claims settlement which included an Inuit-governed territory known as Nunavut. By 1978 the National Indian Brotherhood had identified constitutional reform as a major priority of the status Indians of Canada, and stated that the right of aboriginal peoples to govern themselves would have to be addressed as part of constitutional reform.

Bill C-60: 1978

In June 1978, the federal government introduced Bill C-60, a bill to amend the constitution. It included a provision designed to protect Indian rights based on the Royal Proclamation of 1763 from the effect of the Charter of Rights, which was to apply to all Canadians. Without such a section, it could have been argued that certain rights of the aboriginal peoples - for example, the treaty right to hunt - were unconstitutional because they were inconsistent with the rights of other Canadians as guaranteed in the Charter.

In response to Bill C-60, the National Indian Brotherhood made two basic demands: that the new constitution entrench aboriginal and treaty rights, and that Indians be involved in the process of constitutional reform. Representatives from the NIB, the NCC, and the ITC were invited to the First Ministers' Conference in October 1978 as observers. Observer status gave the three organizations seats at the conference centre but not the right to speak.

The three national aboriginal organizations were invited to send observers to the next first ministers' meeting, scheduled for February 1979. As Douglas Sanders, Professor of Law at the University of British Columbia, put it, "the invitation was particularly meaningless, since most of the sessions were closed."[53] At the meeting all provincial premiers

agreed to the inclusion of a new agenda item, "Canada's native peoples and the constitution."

In response to its effective exclusion from the First Ministers' Conference, the NIB announced that it would visit the United Kingdom and petition the Queen. Although the NIB delegation was not granted a royal audience, the July 1979 trip to England marked the beginning of a concerted effort to lobby in Britain, a strategy which was quite successful in raising the issue of aboriginal rights in the minds of British politicians and in embarassing the Canadian government both in Britain and in Canada.

Following the 1979 federal election, the newly-elected Progressive Conservative Government of Joe Clark promised more concrete involvement in the process of constitutional reform: aboriginal representatives would be allowed to speak at first ministers' conferences on matters that clearly affected native people. Although not consulted on this promise, the provinces did not object publicly to aboriginal participation.

The national aboriginal organizations participated in the 3 December 1979 meeting of the Continuing Committee of Ministers on The Constitution (CCMC). The NIB took the position that Indians should be involved in the constitutional negotiations as governments. Not surprisingly, no agreement was reached on this point.

Shortly after that meeting the Clark government fell, and in February 1980 the government of Pierre Trudeau was reelected. At a first ministers' meeting in June, a two-stage approach to constitutional reform was established. The CCMC would concern itself only with twelve specific items; other issues, including the rights of native peoples, would be left to a second stage of constitutional reform - in other words, they would be considered after the constitution had been patriated.

Aboriginal representatives were not consulted about the proposed two-stage strategy; nor, of course, could they accept it. They were very conscious of the probable difficulties in negotiating directly with the provinces for the recognition and protection of aboriginal and treaty

rights. The provinces benefit from ownership of the lands and natural resources that once belonged to the aboriginal nations, and any recognition of aboriginal and treaty rights might diminish provincial powers.

Unilateral Patriation: October 1980

After the September 1980 First Ministers' Conference failed to reach agreement on constitutional amendment, Prime Minister Trudeau announced that his government would unilaterally patriate the Canadian constitution.

The constitutional resolution of October 1980 did not protect aboriginal and treaty rights. Only two sections could be seen as directly affecting aboriginal peoples. Section 24, dealing with undeclared rights and freedoms, purported to protect the "rights and freedoms that pertain to the native peoples of Canada" from the rights and freedoms guaranteed in the Canadian Charter of Rights and Freedoms, and section 15(2) allowed affirmative action laws or programs for "disadvantaged persons or groups."

The federal government also established a Special Joint Committee of the Senate and the House of Commons to conduct hearings on its constitutional proposal.

The aboriginal response to these unilateral federal efforts was strong and swift. Aboriginal leaders from all parts of Canada converged on Ottawa to lobby their MPs, determined that native peoples would not be ignored in the constitutional process. The NIB established an office in London to co-ordinate an expanded British lobby, and experts in British constitutional law were retained by several provincial Indian associations to advise on litigation in England as a means of stopping patriation without Indian consent.

Several Canadian cases were taken to the Fourth Russell Tribunal on the Rights of Indians of the Americas, held in Rotterdam, Holland in November 1980. The jury found that Canada had failed to involve its aboriginal peoples in the constitutional amendment process. It declared that, as "sovereign units of governance, Native Nations possess the inherent rights

of refusing any incorporation" into a national state without their "authentic participation" and their consent. The Tribunal adopted the declaration presented by the aboriginal delegations, which stated that "Indian peoples have the right to exist as distinct peoples of the world, the right to the possession of their own territories and the right to sovereign self-determination."[54]

The NIB convened the Assembly of First Nations in late November in Ottawa. The Union of British Columbia Indian Chiefs organized the "Constitutional Express," a train which travelled from Vancouver to Ottawa for the Assembly, picking up Indians en route. The Assembly approved "A Declaration of the First Nations," which stated that Indian nations have the right to govern themselves and the right to self-determination, which cannot be altered or taken away by any other nation. When the Assembly concluded, a delegation continued on the Constitutional Express to the United Nations in New York.

Generally, the three national aboriginal organizations did not work together on constitutional matters. An NIB executive council resolution of September 1980 opposed cooperation with the Native Council of Canada, and in August 1981 the NIB General Assembly resolved to "work alone on the constitution."

On occasion the three organizations did cooperate on a common strategy. In October 1980 their presidents - Del Riley of the NIB, Harry Daniels of the NCC, and Charlie Watt of the ITC - held a joint press conference in London, England. In November 1980 the three organizations made a joint submission to the British Foreign Affairs Committee (the Kershaw Committee) and their staff worked to develop common constitutional positions on a definition of "aboriginal peoples," the entrenchment of aboriginal and treaty rights, the recognition of aboriginal self-government, and the requirement of aboriginal consent to constitutional amendment. In December 1980, however, the executive council of the NIB ordered its staff to discontinue work with the other two organizations.

Many influential non-native organizations supported the demands of aboriginal peoples that they be included in the process of constitutional reform and that aboriginal matters be included in the new constitution. As early as 1978, the Constitutional Committee of the Canadian Bar Association in its report, **Towards a New Canada**, stated:

> We must seriously abide by our agreements with the native peoples and recognize their claims as they are established. Indeed constitutional recognition of our commitment to abide by our obligations should be expressly set forth in the Constitution.[55]

In 1980 the Constitutional and International Law Section of the Canadian Bar Association prepared a report entitled "The Native Peoples of Canada and the Canadian Constitution," which recommended that "native peoples ... be represented at constitutional meetings dealing with subject matters that affect them directly," that the constitution "state that native people are entitled to develop their own form of government within Canada," and that aboriginal and treaty rights be recognized and protected in the constitution. The report was distributed at the annual meeting of the Canadian Bar Association in August 1980, and the full membership passed the following resolution:

> That there be special constitutional provisions for native peoples incorporated in any revision of the Constitution of Canada, and that such special provisions include recognition of the rights of women to native status on the same terms as men.[56]

In 1979 the Task Force on Canadian Unity, chaired by Jean-Luc Pepin and John Robarts, recommended that:

> Both central and provincial authorities should pursue direct discussions with representatives of Canadian Indians, Inuit and Metis, with a view to arriving at mutually acceptable constitutional provisions that would secure the rightful place of native peoples in Canadian society.[57]

The national Liberal Party supported the demands of aboriginal peoples to participate in the process of constitutional reform,[58] and the Quebec Liberal Party also recommended that "in the course of negotiations on the adoption of a new constitution, the native peoples should be represented and consulted."[59]

In the Special Joint Committee on the constitution, an overwhelming majority of witnesses addressing the issue - including the Canadian Labour Congress - supported the entrenchment of native rights.[60] By the end of 1980, the federal government faced growing public support for native demands for constitutional recognition.

CONSTITUTIONAL RECOGNITION: JANUARY 1981 - NOVEMBER 1981

On 30 January 1981 Minister of Justice Jean Chrétien,[61] with the backing of all three federal parties and all members of the Joint Committee, and with the approval of the leaders of the national aboriginal organizations, introduced an amendment to the constitutional resolution that recognized the existence of aboriginal and treaty rights. The new section read:

> 34.(1) The 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 Metis peoples of Canada.

For the first time the Metis, who account for approximately 75 per cent of the native population of Canada, were explicity recognized as aboriginal peoples. Although not defined, aboriginal and treaty rights were "recognized and affirmed."

The wording of section 25 was also changed to offer greater protection to the rights of aboriginal peoples from the rights and freedoms guaranteed in the Canadian Charter of Rights and Freedoms. It now read:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

Another new section was introduced at this time. Section 36(2) required that a first ministers' constitutional conference (to be convened within two years of the **Canada Act** coming into force) include in its agenda "an

item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of these peoples," and that the Prime Minister invite representatives of the aboriginal peoples "to participate in the discussions on that item." Aboriginal peoples would be guaranteed participation in a constitutional meeting to discuss their rights, although no promise was made of further participation in the process of constitutional reform.

Thus, certain of the demands of the aboriginal organizations were met. Aboriginal and treaty rights were recognized, the Metis were included in the definition of aboriginal peoples, and there was a guarantee of future involvement in the constitutional process. But other aboriginal demands were not met. The bill contained no requirement for aboriginal consent to constitutional change directly affecting them. In other words, the federal government and the provinces could agree to changes in the constitutional status of aboriginal peoples without their consent, as occurred with the constitutional accord of 5 November 1981. Furthermore, the bill did not recognize the right of aboriginal peoples to determine their own form of government.

Within two days, Jean Chrétien attempted to back down from his agreement to recognize aboriginal and treaty rights. On 1 February he introduced a second amendment, which would permit the federal and any provincial government to come to a bilateral agreement, without aboriginal participation, nullifying the protections of the recently introduced section 34. In the northern territories this could be done by Parliament alone. Faced with immediate protests from the native political organizations and both the Conservatives and N.D.P., Chrétien withdrew this amendment. To native people, this incident strongly underlined the need for a clause guaranteeing that their rights could not be changed without their consent.

When the amendment recognizing aboriginal and treaty rights was announced, the elected leaders of all three national aboriginal organizations publicly supported the changes and stated that they would

support the Trudeau government's fight for unilateral patriation. However, the National Indian Brotherhood and Native Council of Canada were soon to withdraw their support.

Only the Inuit Committee on National Issues stood behind the federal government. Although it continued to demand a consent clause, ICNI believed that the Canadian public (and all three federal parties) supported unilateral action on the constitution, and it was prepared to support government proposals as long as they included the amendments introduced on 30 January 1981. The ICNI reasoned that native peoples could enter into negotiations with governments after patriation to protect specific rights in the constitution.[62]

The support of the NCC for the government's patriation resolution lasted less than three months. In April 1981, Harry Daniels, president of the organization, stated that the Metis people were withdrawing their support because of the failure of the government to adopt an amending formula requiring aboriginal consent for matters affecting native peoples. The NCC's support had been conditional upon an amending formula being introduced that would take into account the special rights of the aboriginal peoples.[63]

The NIB was even faster to withdraw its support from the patriation package, citing the omission of a consent clause and of a provision on self-government. Indian opinion on this issue was not unanimous: provincial associations from British Columbia, Alberta, Saskatchewan, Manitoba, and Ontario were opposed to supporting the patriation resolution while associations from the Yukon and Northwest Territories favoured it.

Instead of supporting the resolution, members of the NIB chose to expand their English lobby. Amendments to the Canadian constitution still required approval by the British Parliament, and several British politicians in the House of Commons and the House of Lords supported the Indian cause. The aboriginal peoples of Canada thus became an issue in Britain, and the Canadian government was forced to respond with its own British lobby and public information campaign.

Some Indian groups extended their information campaign to the continent, visiting France, West Germany, the Netherlands, Denmark, and Norway. The French government officially received Indian delegations from both Saskatchewan and Quebec, and an Alberta Indian delegation had an audience with the Pope.[64]

THE NOVEMBER ACCORD

On 28 September 1981 the Supreme Court of Canada, by a majority of seven to two, ruled that a unilateral request by the Canadian Parliament that the Parliament of the United Kingdom formally ratify its resolution affecting federal-provincial relations was legal.[65] Provincial consent was not necessary. But by a majority of six to three, the court also held that a constitutional convention, not having the force of law, had developed which required that there be a "substantial measure" of provincial consent to a constitutional amendment affecting federal-provincial relations before the amendment could be sent to the United Kingdom. The court was careful not to specify what it meant by a "substantial measure," but the consent was clearly not required to be unanimous.

In other words, the Trudeau government had the legal right to put its constitutional resolution before Parliament for approval and then submit it to the British Parliament for ratification. But to do so without a substantial measure of provincial consent would be unconstitutional in that it would be a breach of an established constitutional convention.

This decision, offering something to both the federal government and the provinces, was the impetus for the November 1981 first ministers' meeting. Native organizations, especially the ICNI, were concerned that the recognition of aboriginal rights would be bargained away by the federal government in its attempt to reach agreement with the provinces. Reassurances were given by federal cabinet ministers, including Jean Chrétien, up to and even during the first ministers' meeting.[66]

When the final accord between the federal and provincial governments was announced on 5 November 1981, a number of significant changes to the constitutional package had been made. One was the insertion of a clause allowing a legislature or Parliament to declare that an Act would operate notwithstanding the fact that it conflicted with sexual equality rights in the Charter; this change led to a concerted lobbying campaign by women's groups across the country. Another was the elimination of the section recognizing and affirming aboriginal and treaty rights. Not surprisingly, aboriginal groups responded with great anger.

It is not clear which provinces were responsible for instigating the removal of section 34 from the constitutional resolution. Similarly, there were conflicting reports as to whether Prime Minister Trudeau and Justice Minister Chrétien supported the removal of this section.[67]

Federal and provincial leaders have given many excuses for dropping the guarantee of aboriginal rights. It has been said that aboriginal rights are insufficiently defined in law to be placed in the constitution. It has also been said that native groups rejected section 34 and could not agree upon what they wanted. The vigorous London lobby was used against them in this regard, even though it was designed to strengthen the aboriginal rights provisions in the constitution. And there is even a suggestion that the section was dropped by accident.

The aboriginal groups did not accept this elimination of their rights, even if many of them felt the protection offered by section 34 was inadequate. Once again they launched an intensive lobbying campaign in Ottawa. The Aboriginal Rights Coalition (ARC) was formed by the ICNI, the NCC, the Native Women's Association of Canada, and certain status Indian groups, such as the Dene Nation, the Council of Yukon Indians, and the Nishga, Haida, and Nootka Tribal Councils from British Columbia.[68] The National Indian Brotherhood was bound by an earlier decision not to work formally with the other groups; therefore, the NIB and most of its members refrained from joining the ARC, although they and the coalition held common positions on the issues and worked together informally.

The federal government took the position that it could not unilaterally change the November accord in spite of its uncontested exclusive jurisdiction over Indians, and urged native groups to press the provincial premiers for change.[69]

Seeing that their lobbying was not achieving the desired results - the reinstatement of section 34 and the introduction of a consent clause - aboriginal organizations turned to more militant tactics. Demonstrations were held in nine Canadian cities.

The campaign for recognition of aboriginal rights received broad public support. As **Globe and Mail** reporters Robert Sheppard and Michael Valpy put it in **The National Deal: The Fight for a Canadian Constitution:**[70]

> Here were federal parliamentarians, led by Pierre Trudeau, engaged in constructing a charter of rights and freedoms that would symbolize the noblest Canada that could be. Yet to achieve this goal, Trudeau and his cabinet - and other politicians on both sides of the House of Commons' central aisle - were prepared to sacrifice recognition of the rights of Canada's original peoples. Of all the paradoxes that surfaced in the constitution jumble, this one was the most intolerable.[71]

Mr. Justice Thomas Berger of the British Columbia Supreme Court and Chairman of the Mackenzie Valley Pipeline Inquiry spoke out against the constitutional accord, and urged that the provision for recognition and affirmation of aboriginal and treaty rights be reinstated.[72]

On 17 November 1981, provincial unanimity against constitutional recognition of aboriginal and treaty rights began to fall apart. In Manitoba, Sterling Lyon's Conservative government was defeated by the New Democratic Party, and Premier Howard Pawley immediately announced his support for the constitutional recognition of native rights. On 19 November, Premier Lévesque of Quebec - who was not a signatory to the November accord - seized the opportunity to state that native rights had been sold out for constitutional support in English Canada's "hypocritically, fundamentally racist" areas.[73] On the same day, Premiers Davis of Ontario and Blakeney of Saskatchewan joined in the support for the reinstatement of aboriginal rights. Blakeney made his support for section 28, the sexual equality section (which had been weakened in the November

accord), conditional upon the reinstatement of section 34. On 20 November Premier Bennett of British Columbia, faced with a hostile demonstration at a Social Credit Convention, agreed to the reinstatement of section 34. Finally Premier Lougheed, after discussions with the Metis Association of Alberta, and after a large demonstration in front of the Alberta legislature, proposed that section 34 be reintroduced with the addition of the word "existing," so that only "existing aboriginal and treaty rights" would be recognized and affirmed.

Following these developments, Minister of Indian Affairs and Northern Development John Munro introduced an amendment to the constitutional bill that would recognize and affirm existing aboriginal and treaty rights.

Justice Minister Jean Chrétien stated that his legal advisers had assured him that the addition of the word "existing" did not change the meaning of the original section.[74] Many disagree with that opinion. One of the rules of statutory interpretation is that every word in a statute has meaning and must be considered in interpreting the statute.

All attempts by the opposition in the House of Commons to introduce amendments to section 35 (as it was renumbered) or to add a consent clause were defeated by the government. On 2 December the full resolution was passed by the House; it was later passed by the Senate and sent to London for ratification.

Peter Jull, a political and constitutional adviser to the ICNI, commented:

> While this was a necessary victory, it was a badly flawed one. The universal desire for addition of a consent clause to prevent future fiascos like November 5 went unfulfilled. The qualification of aboriginal rights by the word "existing" casts uncertainty on the main clause. The scope for opting-out of further amendments by provinces is worrying, as is the more general controversy on amending procedures which might affect native rights. The provincial power to help determine boundaries and possible provincial status in the northern territories is ominous and anomalous. But section 34 was restored and there can never again in Canada be doubt as to the principle of aboriginal rights.[75]

Most Metis and Indian organizations, with the exception of the Métis Association of Alberta,[76] were opposed to both the new wording of section 35 and the constitutional resolution as a whole. So several Indian organizations turned to the English courts.

LITIGATION IN ENGLAND

Following the debate and passage of the **Canada Act**, Canadian Indians launched three separate lawsuits in England in their attempt to stop patriation. The case brought by the Indian Association of Alberta and joined by the Union of New Brunswick Indians and the Union of Nova Scotia Indians was based on the argument that the treaties had been entered into by the Crown and that responsibility for them still remained with the Crown of the United Kingdom, as it had not been explicitly transferred to Canada. They did not contend that the treaties were international in character, and the issues of Indian sovereignty and the role of international law were not raised. The involvement of Indians from New Brunswick and Nova Scotia meant that the court could look at both pre-confederation and post-confederation treaties.

In contrast, the Federation of Saskatchewan Indians based their case on the argument that the treaties signed with the Indian nations were treaties in international law; thus, the United Kingdom did not have the authority to transfer responsibility for them to Canada without the consent of the Indian signatories.

The suit brought by the Union of British Columbia Indian Chiefs, and joined by the Four Nations Confederacy of Manitoba and Grand Council Treaty 9 of Ontario, was based on the argument that Indians had special rights which were protected and entrenched under the constitution of Canada, and that the **Canada Act** deprived them of this protection. They sought a declaration to the effect that the British Parliament had no authority to amend the constitution of Canada to the prejudice of the Indian nations without their consent, and that the **Canada Act** was ultra vires.

According to Professor Douglas Sanders, the litigation showed the "fundamental distrust of the Canadian government" felt by the Indians:

> Indians argued that while Canada was talking of entrenching aboriginal and treaty rights, it had an Indian Government bill in the wings to undercut Indian self-government, and had introduced legislation hostile to Indian land claims in the northern territories. The larger threat was the terminationist policy espoused by the federal government in 1969, which was often alleged to be its hidden agenda. Canada, the argument went, did not have a free hand to terminate Indian rights so long as the treaty link to the United Kingdom existed and so long as the constitution contained its one provision on Indians, section 91(24). Patriation would both sever the treaty link and enable Canada to repeal that section.[77]

The first case heard by the British courts was that brought by the Indian Association of Alberta.[78] Second reading of the Canada Bill was delayed in the British Parliament until the case was completed. On 28 January 1982 the Court of Appeal ruled against the Indians.[79]

Master of the Rolls Lord Denning, Lord Justice Kerr, and Lord Justice May gave different reasons for dismissing the appeal, but all agreed that treaty obligations now rested with the Crown in right of Canada and not the Crown in right of the United Kingdom, and that Canadian rather than English courts would have jurisdiction to determine disputes concerning treaty obligations.

The Court of Appeal refused leave to appeal to the House of Lords,[80] and on 17 February 1982 debate on second reading of the patriation bill began at Westminster.

The Appeal Committee of the House of Lords also refused leave to appeal.[81] Giving judgment for the Appeal Committee, Lord Diplock stated:

> Their refusal of leave is because in their opinion, for the accumulated reasons given in the judgments of the Court of Appeal, it simply is not arguable that any obligations of the Crown in respect of the Indian peoples of Canada are still the responsibility of Her Majesty's government in the United Kingdom. They are the responsibility of Her Majesty's government in Canada, and it is the Canadian courts and not the English courts that alone have jurisdiction to determine what those obligations are.[82]

The Queen gave royal assent to the new Canadian constitution before the cases brought by Indians from Saskatchewan and British Columbia were heard. In May these cases were dismissed by Vice-Chancellor Megarry of the High Court of Justice, Chancery Division.[83] In the Saskatchewan case, he held that he was bound by the Alberta case,[84] and refused to consider the status of the treaties.[85] In the British Columbia case, he held that the **Canada Act** was valid,[86] and that the English courts had no jurisdiction to make declarations as to the validity of the constitution of an independent sovereign state.[87] In June the English Court of Appeal dismissed an appeal of Vice-Chancellor Megarry's decision in the Saskatchewan and British Columbia cases, holding that the **Canada Act** was valid legislation,[88] and refused leave to appeal to the House of Lords.

Although unsuccessful in a legal sense, the litigation brought by Canadian Indians in England should be viewed as part of the overall political strategy of mounting a lobby in Britain against patriation. There can be no question that this lobby helped raise the consciousness of Canadians on aboriginal issues. When the **Canada Act** eventually reached the British Parliament, the House of Commons spent approximately 90 per cent of its time and the House of Lords over 80 per cent of its time on aboriginal matters.[89]

A concluding statement from Lord Denning's judgment is likely to be repeated in future constitutional cases in Canada respecting aboriginal rights:

> There is nothing, so far as I can see, to warrant any distrust by the Indians of the Government of Canada. But, in case there should be, the discussion in this case will strengthen their hand so as to enable them to withstand any onslaught. They will be able to say that their rights and freedoms have been guaranteed to them by the Crown -- originally by the Crown in respect of the United Kingdom — now by the Crown in respect of Canada — but, in any case, by the Crown. No Parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada "so long as the sun rises and the river flows." That promise must never be broken.[90]

Whether Lord Denning's optimism is justified remains to be seen.

5 THE CONSTITUTION ACT, 1982

Three sections of the **Constitution Act, 1982** specifically refer to the aboriginal peoples of Canada and their rights. One of the most important tasks of the upcoming constitutional conference will be to clarify these sections.

Subsection 1 of section 35 states that existing aboriginal and treaty rights are recognized and affirmed. Subsection (2) defines "aboriginal peoples of Canada" to include "the Indian, Inuit and Metis peoples of Canada."

Section 25 is designed to protect the rights and freedoms of the aboriginal peoples from being diminished by the rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms.

Section 37 requires the Prime Minister to convene a constitutional conference composed of the provincial premiers by 17 April 1983, which will discuss "constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the constitution of Canada." This section will be addressed in the next chapter.

Other provisions of the **Constitution Act, 1982** directly affect aboriginal peoples: for example, section 6 (mobility rights), section 15 (equality

rights and affirmative action programs), and Part V (the amending procedure).

This chapter will discuss the meaning of these provisions and raise some of the many problems of interpretation, but will not attempt to provide a definitive legal interpretation. Nor should it be assumed that, because a section contains many problems, those problems will be discussed at the upcoming constitutional conference. Matters omitted from the current constitution, such as aboriginal consent to constitutional changes directly affecting aboriginal peoples and the right to aboriginal self-government within Canada, are likely to be just as important at the conference as problems raised by these sections.

SECTION 35(1): RECOGNITION OF EXISTING ABORIGINAL AND TREATY RIGHTS

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

Aboriginal Rights

There is no definition of aboriginal rights in the **Constitution Act, 1982.** Nor have they been clearly defined in Canadian jurisprudence. But there are two generally accepted uses of the term. Its first meaning is "aboriginal title," which refers to the interest - unsurrendered by treaty and unextinguished by legislation - of aboriginal peoples in lands which they traditionally used and occupied.

The **Baker Lake** case[91] sets out a four-part test for proving the existence of common law aboriginal title in Canada:

> 1. The aboriginal peoples and their ancestors must be members of an organized society;
>
> 2. The organized society must occupy the specific territory over which it asserts aboriginal title;
>
> 3. The occupation must be to the exclusion of other organized societies; and

4. The occupation must have been an established fact at the time sovereignty was asserted by England.[92]

An aboriginal society that can fulfil this four-part test has common law aboriginal title to the lands it occupies.

While the precise nature of aboriginal title has not been defined, the courts have described it as a "burden" on the underlying title of the Crown.[93] Aboriginal title continues to exist until it is extinguished, usually by treaty or agreement between the tribes holding title and the Crown. Treaties that purport to accept Indian land surrenders cover the prairie provinces, most of Ontario, and parts of British Columbia and the Northwest Territories. The James Bay and Northern Quebec Agreement of 1975, signed by the Cree and Inuit, is a modern example of a voluntary surrender of aboriginal title.

Extinguishment of aboriginal title can occur without the consent of the aboriginal peoples concerned through legislation explicitly extinguishing their title,[94] and possibly through legislation inconsistent with its continued existence.[95] Although aboriginal title was recognized in Canadian law prior to the **Constitution Act, 1982**, it was not part of the Canadian constitution and not protected from Parliamentary restriction or even extinguishment. For example, in the **Baker Lake** case,[96] Mr. Justice Mahoney of the Federal Court of Canada ruled that the **Canadian Mining Regulations** took precedence over the unsurrendered aboriginal rights of the Inuit of Baker Lake where there was conflict between the two. Provincial legislatures cannot legislate on the subject of aboriginal title, but the courts have allowed the provinces to restrict aboriginal rights such as the right to hunt by ruling that laws of general application throughout a province apply to Indians in the exercise of their aboriginal rights.[97]

Aboriginal rights, in the sense of aboriginal title, form the basis of current land claims negotiations with northern aboriginal peoples. They also form the basis of litigation between the Government of Ontario and the Teme-agama Anishnabay currently before the Supreme Court of Ontario.[98]

The term "aboriginal rights" is also used to mean those rights of the aboriginal peoples which flow from their traditional use and occupancy of land and waters. The specific aboriginal rights held by a tribe, band, or nation of native people would depend on the nature of the traditional use and occupancy by that specific collectivity. In general, however, aboriginal rights would include the rights to hunt, fish, and trap, as well as the right to gather foods such as berries and wild rice - in other words, rights to exploit the natural resources of the land.

Many aboriginal organizations claim that aboriginal rights also include the right to self-government, as well as language, cultural, and education rights. These rights have not generally been recognized in Canadian jurisprudence.

One of the purposes of the upcoming constitutional conference is to identify and define aboriginal rights. As presently worded, however, the constitution does not define aboriginal rights. It does not identify which peoples hold aboriginal rights or the geographic limitations on the exercise of those rights. Nor does it provide a special forum (beyond the section 37 conference itself) for making such determinations.

Treaty Rights

Following the policy set out in the Royal Proclamation of 1763, the Crown entered into treaties with various Indian nations from Ontario[99] west to the Rocky Mountains.[100] There are also treaties covering parts of British Columbia and the Northwest Territories. Prior to the Royal Proclamation, treaties of peace and friendship were signed with the Micmac and Maliseet nations of the Maritimes. The Indian treaties had the effect of confirming certain aboriginal rights while extinguishing others.

There are major differences between the treaties as written and the Indians' understanding of the agreements they signed. The written text of the treaties included the following rights and benefits to be retained by or given to Indians by treaty.

1. Reserves were to be established within the territories ceded for the exclusive use and benefit of the Indian bands signing the treaties.

2. Small cash payments were to be given to the Indians who were parties to the treaty and thereafter annuity payments would be given to them and their descendants.

3. In the prairie treaties, farming implements and supplies were promised as an initial outlay; thereafter, hunting and fishing materials such as nets and twine were to be furnished on an annual basis.

4. Rights to hunt, fish and trap over the ceded territories were guaranteed.

5. The government was to establish and maintain teachers and schools on reserves.

6. Suits of clothing, flags, and medals were to be given to the chiefs and headmen of the bands.

7. In the prairie treaties, a "medicine" chest for the use of the Indians was promised.

According to the Indian understanding of the treaties, the principles and rights which were confirmed by the treaties and which were to be enjoyed by the Indian nations in perpetuity include the following:

1. The Indian nations retained their sovereignty over their people, lands, and resources both on and off reserve, subject to some shared jurisdiction over the lands known as "unoccupied Crown lands." This is understood as the recognition of the right of Indian government.

2. The Crown promised to provide for Indian economic development in exchange for surrendered lands.

3. The treaties promised revenue sharing between the Crown and Indian nations.[101]

It is also the Indian position that the treaty promises should be interpreted according to modern conditions. For example, the promise of a "medicine chest" should be interpreted as a promise to provide Indians with free health services,[102] and the promise to provide a teacher and school on the reserve should be interpreted as promising Indians a free education, including post-secondary schooling.

Another outstanding issue of interpretation is the meaning of the word "treaty" in section 35(1). It refers to treaties made with aboriginal peoples in territories which are now part of Canada. But it is not clear whether it refers to treaties made outside the current boundaries of Canada with Indian nations inhabiting Canada (for example, by Britain prior to the American Revolution).

Nor is it clear whether it refers to the rights accorded to Indians under international treaties such as the Jay Treaty or the Treaty of Ghent. The Supreme Court of Canada has limited the term "treaty" in section 88 of the **Indian Act** by stating it does not include international treaties.[103] A leading constitutional authority, Professor Kenneth Lysyk (now Mr. Justice Lysyk of the British Columbia Supreme Court), states:

> It does not follow, of course, that the meaning ascribed to the term "treaty" in the Indian Act will be adopted for purposes of the Constitution Act. It may be argued that a more generous interpretation, extending to international treaties, is appropriate for purposes of the constitutional enactment.[104]

"Existing"

When section 35 was reinstated in the **Constitution Act, 1982**, it was identical to its predecessor except for one critical change, the addition of the word "existing."

The narrowest interpretation of "existing" aboriginal rights would effectively give aboriginal rights no constitutional protection. For example, it is not inconceivable that a court might decide, since existing aboriginal rights can be overridden by both provincial legislation[105] and federal legislation,[106] that aboriginal rights "recognized and affirmed" by the constitution continue to exist at legislative sufferance.

A narrow interpretation of "existing" aboriginal and treaty rights would focus on whether the rights were legally exercisable on 17 April 1982, the date on which the new constitution came into force. Rights which could not be exercised legally, although not extinguished, would not be protected.[107] The scope of the rights protected would be limited by any restricting

legislation in force on that date; thus, the constitutional recognition of aboriginal and treaty rights would be further complicated, and would vary from province to province. This interpretation of "existing" would protect some rights, as it would safeguard aboriginal and treaty rights from encroachment by legislation coming into effect after 17 April 1982.

A more likely approach would be to limit the recognition of aboriginal and treaty rights to the kinds or categories of rights recognized by Canadian jurisprudence up to 17 April 1982. Any aboriginal or treaty rights that had been previously extinguished or abrogated would not be given constitutional protection. Aboriginal or treaty rights that had been limited by legislation, but not extinguished, would continue to exist. Kent McNeil, former Research Director of the University of Saskatchewan Native Law Centre, suggests the following test to distinguish rights that have been extinguished from those that have merely been limited:

> A workable test that might be applied to determine whether a particular right has been extinguished or merely rendered unexercisable would be to ask whether the right would be restored if the legislation affecting it were repealed. If the answer is no, then the right must have been extinguished; if yes, it must still exist and therefore is entitled to constitutional protection under section 35(1).[108]

This approach would result in the constitutional protection of aboriginal hunting and fishing rights, and would strengthen the position of aboriginal peoples who are negotiating land claims.

A question remains concerning aboriginal and treaty rights that did not receive judicial recognition prior to 17 April 1982, such as the right to sovereignty or self-government. By definition, aboriginal rights have existed at least since the date of British colonization, although specific rights may not have been exercised or acknowledged for a long period of time. It may be more appropriate to ask whether the claimed rights have existed and whether they have been extinguished, than to search for precedents for their recognition.

Recognition and Affirmation

What is the constitutional status of existing aboriginal and treaty rights that are "recognized and affirmed?" Prior to 17 April 1982, aboriginal rights could be overridden by both federal[109] and provincial[110] legislation, and treaty rights could be overridden by federal legislation[111] but not by provincial legislation.[112]

The term "guarantees" is used in section 1 of the **Constitution Act, 1982,** in protecting the rights and freedoms set out in the Charter. Is a right that is "recognized and affirmed" given less protection than one that is "guaranteed?"

The rights recognized and affirmed by section 35(1) are not subject to the same limitations as the rights and freedoms guaranteed by the Charter. Section 1 states that Charter-guaranteed rights and freedoms are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," and section 33 states that Parliament or a provincial legislature may expressly declare in legislation that a certain Act or provision thereof shall operate notwithstanding certain named Charter provisions. Neither of these possible limitations apply to existing aboriginal and treaty rights, because they are not protected in Part I of the **Constitution Act, 1982** (which contains the Charter) but are contained in Part II.

Remedies

Section 24(1) provides a remedy for anyone whose Charter-guaranteed rights have been infringed or denied:

> 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The court is given a broad remedial power: it is authorized to provide a remedy that is "appropriate and just in the circumstances."

As section 35 is not part of the Charter, section 24(1) cannot be used to enforce aboriginal and treaty rights. However, section 52(1) provides that any law that is inconsistent with the constitution is ineffective:

> 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This section should be sufficient to render inoperative any federal or provincial law which is inconsistent with rights protected by section 35. It should also support the right of an aboriginal people to apply to a court for a declaration relating to their section 35 aboriginal or treaty rights.

Land Claims Settlements

Unlike section 25, section 35(1) contains no mention of rights flowing from land claims settlements. The question arises whether such rights are constitutionally protected from infringement by federal and provincial legislation. Even if land claims settlements are included in the term "treaties" (which is unlikely, since section 25 makes specific reference to both treaties and land claims settlements), the recognition of only "existing" treaty rights would likely exclude the application of section 35(1) to treaty rights acquired after 17 April 1982. Thus, rights acquired in a future land claims settlement would not be constitutionally entrenched, except to the extent that some of the rights contained in a settlement could be classified as existing aboriginal rights rather than newly created rights.

If the James Bay and Northern Quebec Agreement signed on 11 November 1975 is considered a "treaty," rights promised to the aboriginal beneficiaries of the agreement would be constitutionally protected.

The uncertainty over their constitutional status can only make future land claims settlements more difficult to reach.

SECTION 35(2): DEFINITION OF "ABORIGINAL PEOPLES OF CANADA"

Section 35(2) defines "aboriginal peoples of Canada" for the purposes of the **Constitution Act, 1982:**

> 35.(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

Although the terms "Indian," "Inuit," and "Metis" are not defined in the Act, it is important to distinguish between the three different aboriginal peoples. Each may have different aboriginal or treaty rights. Furthermore, a method is required for determining whether a specific individual is an aboriginal person and - if so - to which of the three categories he or she belongs. An individual's classification will determine the package of rights on which he or she can rely.

SECTION 25: PROTECTION FROM THE CHARTER

Purpose

Section 25 indicates that Charter-guaranteed rights and freedoms are not to be interpreted as limiting or denying the rights and freedoms of the aboriginal peoples of Canada:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

This section contains a rule of statutory interpretation: it does not purport to guarantee or create rights; it merely preserves rights, whether or not they are constitutionally entrenched, from the operation of the Charter. Without section 25, it would be arguable that the equality rights guaranteed by section 15 of the Charter take precedence over the rights of aboriginal peoples.

Rights Granted Protection

The rights protected by section 25 are not limited to constitutionally protected rights, as neither rights recognized in the Royal Proclamation of 1763 nor rights acquired by way of land claims settlement are constitutionally entrenched in a direct manner. Nor are the rights protected by section 25 limited to those listed; the reference to "other" rights may include rights arising from statute, such as **Indian Act** rights, and rights recognized by common law.

One of the purposes of section 25 is to protect rights acquired through future land claims settlements from invalidation because they breach the equality rights (section 15) or the mobility rights (section 6) provisions of the Charter. Yet the English version of paragraph (b) uses the words "may be acquired," which speak prospectively. They clearly apply to future settlements, but they may not apply to rights acquired through past settlements, such as the James Bay and Northern Quebec Agreement. This interpretation can be avoided by relying on the French version of paragraph (b), which protects rights and freedoms "acquis par règlement de revendications territoriales" and which, according to section 57, is equally authoritative.

Sexual Equality: Effect of Section 28

Section 28 guarantees Charter rights and freedoms equally to both men and women:

> 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

This section appears to place a limitation on the protection offered to the rights of aboriginal peoples by section 25. It appears to abolish sexual discrimination of all kinds and will likely, in combination with section 15 of the Charter, be used to render inoperative section 12(1)(b) of the **Indian Act**, which survived the operation of the **Canadian Bill of Rights** in the **Lavell** case.[113]

SECTION 6: MOBILITY RIGHTS

Section 6(2) allows residents of Canada to reside and to work in any province. Some Indians fear that this section will permit non-Indians to reside on reserves. Section 25, which protects the rights of the aboriginal peoples from Charter-guaranteed rights, should ensure that **Indian Act** provisions limiting the rights of persons who are not band members to reside on reserves will be maintained. Furthermore, the right to "take up residence in any province" does not necessarily give the right to live anywhere in a province. Therefore, section 6(2) would likely be construed in a manner that does not abrogate or derogate from "other rights" pertaining to Indians.

SECTION 15(1): EQUALITY RIGHTS

Some aboriginal groups fear that section 15(1), the equality rights section (which takes effect on 17 April 1985),[114] could be used to destroy their unique constitutional and legal rights. Section 15(1) reads as follows:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

If the protection offered by section 25 is inadequate, the special legal rights and benefits of the aboriginal peoples would be considered discrimination based on race and thus contrary to the Charter. Furthermore, section 15(2) (discussed below) would only operate to save affirmative action programs with the object of "the amelioration of conditions of disadvantaged individuals or groups." It could not be used to save most aboriginal and treaty rights, and the system of Indian reserves.

Section 33 allows Parliament to declare that an enactment shall operate notwithstanding section 15. It could be used to save legislation such as the **Indian Act** but could not be used to ensure constitutional protection of aboriginal and treaty rights.

SECTION 15(2): AFFIRMATIVE ACTION

Section 15(2) provides that affirmative action programs for individuals or groups disadvantaged because of race are not precluded because of the equality rights provisions of section 15(1).

PART V: AMENDING PROCEDURE

Part V (sections 38 to 49) of the **Constitution Act, 1982** sets out the procedure for amending the constitution. The requirements for federal and/or provincial consent vary with the subject matter being considered.

The general procedure for amending the constitution set out in section 38(1), which requires a resolution of Parliament and resolutions from the legislatures of at least two-thirds of the provinces that have a total of 50 per cent of the population of all the provinces, could be used to limit or abolish (or expand) the constitutional rights of the aboriginal peoples by changing section 35.

If an amendment to section 35 should derogate "from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province," then section 38(3) permits a province to opt out of such an amendment by passing a resolution expressing its dissent prior to the amendment being proclaimed. For example, a constitutional amendment enabling provincial Crown lands to be awarded to aboriginal peoples to settle land claims might be viewed as derogating from the proprietary rights of provincial governments. If so, a province could rely on the opting out provisions to avoid it.

It is arguable that section 43, which provides that amendments that apply to one or more, but not to all, provinces may be made by Parliament and the legislature of each province to which the amendment applies, would allow Parliament and a provincial legislature to limit or abolish (or expand) the section 35 rights of aboriginal peoples in that province. However, it seems more reasonable to interpret section 35 as applying throughout Canada

generally; if this interpretation is accepted, section 43 would not be applicable.

If it is believed that rights flowing from a future land claims settlement require constitutional protection, aboriginal claimants might rely on section 43 to negotiate a promise from the federal government and the province concerned to pass appropriate resolutions to amend the constitution.

Paragraphs 1(e) and (f) of section 42 allow the constitution to be amended by the general procedure set out in section 38(1) for matters relating to "the extension of existing provinces into the territories" and for "the establishment of new provinces." This provision is opposed by northern native groups who are attempting to negotiate land claims settlements that include aboriginal government provisions. The authority to extend provincial boundaries northward or to create a new province without the consent of the affected aboriginal groups seriously undermines their ability to negotiate a form of government suitable to their specific requirements.

No special provision is provided for amending Part II, concerning the rights of the aboriginal peoples, or for requiring the consent of the aboriginal peoples to such an amendment. Section 41(e) requires the unanimous consent of Parliament and all legislatures for an amendment changing the procedure for amending the constitution. Thus the aboriginal peoples would have to persuade all ten provinces and Ottawa to accept their demand for an amendment requiring their consent to constitutional changes directly affecting them.

6 THE SECTION 37 CONSTITUTIONAL CONFERENCE

Section 37 of the **Constitution Act, 1982** recognizes a continuing, though limited, role for aboriginal peoples in the process of constitutional amendment.

> 37.(1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.
>
> (2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.
>
> (3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

Thus, the Prime Minister must convene a constitutional conference with the provincial premiers by 17 April 1983. This conference must include in its agenda an item respecting constitutional matters that directly affect aboriginal peoples, and the Prime Minister must invite representatives of those peoples to participate in those discussions. He must also invite elected representatives of the Yukon and Northwest Territories to

participate in the discussions on any item which, in his opinion, directly affects the two territories.

Subsection (2) indicates that the conference shall address constitutional matters directly affecting the aboriginal peoples "including the identification and definition of the rights of those peoples to be included in the Constitution of Canada." Discussions are not limited to defining the terms used in section 35; they may encompass any rights that could be included in the constitution. Matters that are non-constitutional would be excluded.

Section 37 is noteworthy for its omissions. It does not state how the representatives of the aboriginal peoples shall be selected, or how many representatives shall be invited. It says nothing about whether the representatives of the aboriginal peoples shall have the right to vote at the conference; in other words, the aboriginal peoples may not be able to participate as equals with the federal and provincial governments. Nor does the section spell out how an agreement reached at the conference will become part of the constitution. Very importantly, it does not establish an ongoing role for the aboriginal peoples in the process of constitutional amendment. Nor are they included in the constitutional conference which, by section 49, is required to be convened within fifteen years to review the procedure for amending the constitution. This chapter will discuss these matters, as well as many of the substantive issues that are likely to be included on the agenda of the conference.

THE PARTICIPANTS

On 22 June 1982, Prime Minister Trudeau invited the three national aboriginal organizations - the Assembly of First Nations (AFN), the Inuit Committee on National Issues (ICNI), and the Native Council of Canada (NCC) - to participate in the constitutional conference required by section 37. Each was offered two seats at the conference table and space for a delegation. The aboriginal organizations would be allowed to rotate their representatives, as is the normal practice at such conferences. Since any discussion of the rights of aboriginal peoples directly affects the Yukon

and Northwest Territories, the Prime Minister also invited elected territorial representatives to the conference.

The ICNI and NCC have indicated that they will participate in the conference, and both have been full participants in the working groups established to reach an agenda. Only after long internal debate, however, did the AFN decide to participate in the conference. It has not been participating in the working groups.

Within the AFN, the advocates of non-participation put forward three arguments. First, the provinces have no right to be involved in the affairs, constitutional or otherwise, of Indians. According to section 91(24) of the **Constitution Act, 1867,** Indians fall within federal legislative authority. The identification and definition of aboriginal rights and the other potential agenda items are matters to be determined by Indians and the federal government.

Second, a bilateral process has been established between the AFN and the federal government to discuss questions of mutual concern in a forum other than the constitutional conference required by section 37. If agreement is reached on constitutional matters through the bilateral process, it would be the duty of the federal government to obtain the agreement of provincial governments in order to effect constitutional amendment.

Third, section 37 fails to recognize Indian nations as equal participants in the constitutional process. Indian nations have not been treated as governments; their representatives will be mere invitees at a meeting between the Prime Minister and the provincial premiers.

Within the AFN, the organizations currently negotiating comprehensive land claims in northern Canada were the leading advocates of participation. They were especially concerned with the constitutional entrenchment of land claims settlements and with a definition of aboriginal rights that would not hinder negotiations for the right to determine their own forms of government. These organizations see the conference as an opportunity to influence constitutional change. They are aware that the conference will

occur with or without their participation, and that the **Constitution Act, 1982** gives the provinces a defined role in constitutional amendment.

As for the bilateral process, these groups argue that it will not lead to constitutional change, pointing to the Prime Minister's letter of 12 October 1982 to David Ahenakew, National Chief of the AFN, in which the Prime Minister clearly stated that the provinces must be involved in constitutional amendment and that the federal government will not take on the role of "broker" on behalf of Indians.

At a meeting held in Vancouver between 16 and 18 November 1982, the Confederacy of Nations (the board of directors of the AFN) approved participation in the constitutional conference. They passed a further resolution stating that, by participating, "the First Nations do not recognize, accept or otherwise endorse the right of the provinces in determining the underlying relations between the First Nations and Canada" and that "a mutually satisfactory agenda and format for both the section 37 Conference and the bilateral process shall be agreed upon."

Consistent with its policy of non-participation in federal-provincial conferences, except for those on the economy, the Government of Quebec has said that it would not be participating in the constitutional conference, but discussions are continuing.

TIMING AND LOCATION

Section 37(1) requires that the constitutional conference be held by 17 April 1983. On 21 December 1982 Prime Minister Trudeau announced that the conference would be held in Ottawa on 15 and 16 March 1983. He declined the invitation from the government of the Northwest Territories to hold the conference in Yellowknife, a proposal which was supported by the aboriginal organizations. After consulting Metis and Indian associations, the ICNI responded to the Prime Minister's announcement by asking him to delay the conference until early April and to reconsider his decision to hold it in Ottawa.

ATTEMPTS TO REACH AN AGENDA

As early as 29 April 1980, Prime Minister Trudeau, in a speech delivered to the Assembly of First Nations, suggested a tentative agenda for future constitutional discussions that included aboriginal rights, treaty rights, self-government, native representation in Parliament, and the delivery of services to aboriginal peoples.

In June 1982, the Prime Minister met separately with the three national aboriginal organizations to discuss, among other things, agenda items for the conference. The issues raised at this meeting included the definition and identification of aboriginal rights; continuing involvement in constitutional change; special representation in Parliament and the provincial legislatures; the requirement of aboriginal "consent," both at the conference and to further constitutional amendment; Indian government and self-determination; the development of an economic base; the rights of native women; regional concerns; culture and language; the development of programs; and the delivery of services.

In July the Prime Minister sent a letter to the provincial premiers, outlining his discussions with the aboriginal organizations and suggesting a three-stage preparatory phase to arrive at a workable agenda. The first phase would consist of bilateral federal-aboriginal discussions, paralleled by bilateral federal-provincial discussions. Both sets of discussions would take place at the official level, that is, between bureaucrats rather than ministers. They would explore proposed agenda items and work out the mechanics of the conference.

The second phase would bring together the aboriginal organizations and representatives of the federal and provincial governments at the official level to establish joint working groups on agenda items and to arrive at a draft agenda.

The third phase would be a ministerial meeting with aboriginal participation to settle the agenda.

In his letter to the provincial premiers, the Prime Minister suggested that preparatory work on issues relating to aboriginal peoples be done separately from work required on other agenda items. He also stated that, at his meetings with aboriginal leaders, he had agreed that a continuing process was required, but "was careful to stress that any follow-up must, to a very large extent, be carried out at the official level." He reported that he "did not rule out any issues proposed, but did indicate the difficulty that would be presented by issues such as 'consent' or 'Indian Government.'"

On 14 October 1982, the federal government convened a meeting in Winnipeg with provincial officials, territorial officials, the ICNI, and the NCC to reach agreement on broad subject headings and to establish working groups to refine the agenda. Both the AFN and the Government of Quebec attended as observers only. Several provinces included native representatives in their delegations: Ontario included representatives of the Ontario Native Women's Association and the Ontario Metis and Non-Status Indian Association; Manitoba included a representative of the Manitoba Metis Federation; and Alberta included representatives of the Metis Association of Alberta and the Metis Settlement Association.

At the October meeting, the ICNI set out three priorities for constitutional change: (1) a Charter of Rights of Aboriginal Peoples (a new Part II), which would further identify the civil, political, cultural and economic rights of aboriginal peoples; (2) an amending formula with Inuit involvement; and (3) the amendment of section 42 regarding the creation of new provinces and the extension of existing provinces into the territories.

The NCC set out three priorities: (1) the entrenchment of aboriginal title; (2) the protection of aboriginal rights through an amending formula that guaranteed aboriginal consent; and (3) a new process to resolve outstanding grievances of aboriginal peoples.

Four working groups were to be established to deal with separate agenda topics and to prepare a "situation report" for the ministers to review. Negotiations would not take place at the working group level, although

issues would be screened. A Province of Saskatchewan suggestion that there be separate working groups for each of the aboriginal peoples was not accepted.

Working Group A was to deal with political and legal issues, including a Charter of Rights for Aboriginal Peoples, entrenchment of aboriginal title, native women's rights, political representation in Parliament and the provincial legislatures, the amending formula (including section 42), consent and opting out, and participation in foreign policy. Working Group B was to deal with economic rights including mobility rights, equality rights, hunting and fishing rights, and affirmative action programs. Working Group C was to deal with social and cultural rights, including language and educational rights. Working Group D was to deal with ongoing process, including a method for examining outstanding grievances. The procedure to be followed at the conference itself was apparently not mentioned.

A rigorous timetable was developed, but not followed. The first meeting of the working groups was delayed until 17 November 1982, to give the Assembly of First Nations time to decide whether or not to participate in the constitutional conference. Although the AFN voted to participate in the conference, it also voted not to participate in the working groups, as it had taken no part in their development.

On 17 and 18 November, the working groups met in Ottawa. The number of working groups was reduced from four to two by combining A and D (political and legal issues and ongoing process) and B and C (economic rights and social and cultural rights). The AFN and Quebec continued to send observers only.

Both the Manitoba Metis Federation and the (Manitoba) Confederacy of Chiefs were represented in the Manitoba delegation, and the Metis Association of Alberta and the Federation of Metis Settlements were again part of the Alberta delegation.

The working groups met consecutively rather than simultaneously. The meeting was, for the most part, a discussion of the objectives of the aboriginal groups and of their interpretation of the items placed before the working groups. The NCC put forward a very detailed constitutional amendment proposal that raised several new matters, including a greatly expanded Part II (a "Charter of Aboriginal Rights") and changes to section 36 regarding equalization payments and regional disparities. If anything, the potential agenda seemed to be expanding.

The next meetings were scheduled for Montreal on 8 and 9 December. Provincial officials were expected to respond to the positions of the ICNI and NCC. Federal officials asked that thought be given to priorities and to items that should be discussed in forums other than the constitutional conference.

There are some suggestions that the Montreal meeting did not run smoothly. It appears that the ICNI was dissatisfied with the lack of response to their proposals from government representatives.

It is not clear whether the working group process will be continued. The next step would be a meeting at the ministerial level, which would likely be held in late January 1983, to review reports from the working groups and attempt to finalize an agenda and procedural rules for the conference.

THE ISSUES

Governments and aboriginal organizations may be said to have different approaches to the rights of aboriginal peoples. Governments would prefer to develop comprehensive formulations that can be applied uniformly to aboriginal peoples across the country. Aboriginal organizations seek constitutional recognition that will accommodate the diversity of the aboriginal peoples themselves and allow them to develop their own forms of government. The aboriginal organizations argue that each of the aboriginal nations, tribes, or bands should have the right to negotiate its own place within the scheme of the new constitution.

For the aboriginal organizations, there are two basic ways to approach the issues: they can either prepare a "shopping list" of demands, or they can emphasize the "general principles" they want to see entrenched. At the time of writing, both the ICNI and the NCC had chosen the shopping list approach, although the NCC emphasized general principles in the October meeting, and AFN emphasized "general principles" in accordance with the "Declaration of the First Nations" and the "Treaty and Aboriginal Rights Principles" passed by the joint council of the National Indian Brotherhood in November 1981 and affirmed by the AFN at Penticton in April 1982. The two approaches are not mutually exclusive; many, if not all, of the items on any shopping list would fall within the general principles articulated by the aboriginal organizations, and general principles would be part of any shopping list.

The ICNI justifies a shopping list of demands by its apprehension that the section 37 conference will be its only opportunity to discuss constitutional issues with the first ministers. There is no guarantee of an ongoing process at the ministerial level. The ICNI believes that if it presents a long shopping list, it is more likely to gain agreement on some of the items on the list.

The shopping list approach poses many problems. Some of the issues on the ICNI list do not appear to be constitutional in nature. Some issues appear to be regional or local matters, best dealt with by legislation. The long list of demands makes it more difficult to reach an agenda that satisfies all participants. Some of the issues require substantial financial commitments from government. Moreover, the use of a long shopping list may mean that priority items become buried at the bottom; it may allow governments to give the appearance of meeting native demands without, in fact, dealing with the difficult issues raised during the patriation debate.

An alternative approach involves emphasizing the entrenchment of general principles in the constitution, and relying on future meetings to work out details and legislation to put them into place. It recognizes that aboriginal peoples are not a single, monolithic group, that there are many

different aboriginal nations with different interests and priorities. General constitutional principles could be applied in a flexible manner to the various aboriginal peoples.

There are two serious problems with this approach. A statement of general principles may leave too many areas undefined, and may eventually require judicial interpretation. It is preferable for aboriginal peoples to negotiate constitutional interpretation than to leave it to the courts, which have tended to take a conservative approach to native issues. Furthermore a statement of general principles would be rather ineffective without further discussions between governments and aboriginal peoples on questions of identification and definition of rights. For example, the negotiation of land claims settlements will continue, but governments have not shown the same willingness to renegotiate treaties with the Indians of southern Canada to find a mutually acceptable interpretation based on modern conditions.

ONGOING PARTICIPATION IN THE CONSTITUTIONAL PROCESS

It is not realistic to expect that all or even many of the outstanding constitutional issues involving aboriginal peoples will be settled at a two-day conference. It may be that the only agreement to emerge from the conference will relate to an ongoing process to deal with constitutional issues.

Although the matter has not been thoroughly canvassed at the working group meetings, the question of future participation of aboriginal peoples in the constitutional amendment process may be one where there is a disagreement in principle between governments and aboriginal peoples. Governments fear that the entrenchment of aboriginal participation would amount to constitutional recognition of aboriginal peoples at a level similar to that of the federal and provincial governments in the amendment process.

The three national aboriginal organizations share the demand for aboriginal participation in any ongoing constitutional revision. Prime

Minister Trudeau has agreed with "the need to establish a continuing process to follow up after the Conference," but at the official rather than the ministerial level.[115] In other words, the ongoing process would not necessarily deal with constitutional issues. One would expect the provinces to be hesitant in agreeing to share even a small amount of their constitutional authority with aboriginal peoples.

The **Constitution Act, 1982** says little about procedures for future constitutional changes. Section 46(1) allows either the Senate, the House of Commons, or a legislative assembly to formally initiate constitutional amendment. Section 49 is the only section (other than section 37) referring to a constitutional conference. It requires the Prime Minister to convene a first ministers' meeting within fifteen years of proclamation of the Act to review the provisions of Part V (the amending procedure).

One way of partially addressing the concerns of aboriginal groups might be to add a new provision to the constitution requiring the Prime Minister to convene constitutional conferences with aboriginal participation at specific times - such as every three years - to discuss constitutional matters directly affecting the aboriginal peoples. Or, a provision could be added modelled on section 37(2), requiring the Prime Minister to invite representatives of the aboriginal peoples to participate in discussions whenever a first ministers' conference is held that includes in its agenda an item respecting constitutional matters directly affecting them. A similar provision modelled on section 37(3) could be added, relating to the participation of elected representatives of the governments of the Yukon and Northwest Territories.

Alternatively, the section 37 constitutional conference could be adjourned for a period not to exceed a certain length - for example, three years - while working groups continue to study the issues and develop areas of agreement. This would allow aboriginal peoples continuing involvement in the process of constitutional amendment but would not require governments to expand the role of aboriginal peoples in the constitutional process or to amend the constitution.

A fourth alternative would be to continue the section 37 constitutional conference until the outstanding issues are settled to the satisfaction of the participants. They could meet at fixed intervals - for example, once a year - until a consensus is reached. This approach has been used in international law-making conferences, such as the Third United Nations Conference on the Law of the Sea. The Law of the Sea Conference was convened in 1974, and sessions were held twice a year until the Conference reached agreement in 1982.[116]

With respect to the constitutional conference on the amending procedure, section 49 could be amended to require the Prime Minister to invite representatives of the aboriginal peoples and the territorial governments.

CONSENT TO CONSTITUTIONAL AMENDMENT

The most consistent demands of aboriginal organizations throughout the constitutional debate have been for the entrenchment of aboriginal rights and for a "consent" clause that would prevent the federal and provincial governments from eliminating or bargaining away the constitutional protection given to the rights of aboriginal peoples. The need for such protection was amply illustrated by the November accord, when aboriginal and treaty rights were dropped from the agreement reached by the Prime Minister and nine provincial premiers. Aboriginal peoples are convinced that governments cannot be trusted to protect their rights.

The response from both levels of government has been consistently negative. As well as opposing the principle of granting a veto power over the constitution to a group within Canadian society - pointing out that even Quebec was not given a veto over constitutional change - they raise questions about the lack of a mechanism for aboriginal consent.

Aboriginal organizations have suggested several mechanisms by which aboriginal peoples could give their consent to constitutional amendment. The following are five possible approaches.

(1) Where there is a treaty or agreement, such as a land claims settlement, which is to be constitutionally entrenched, the constitutional provisions relating to it could only be amended in accordance with the terms of the agreement. This requirement could exist along with any other mechanism for aboriginal constitutional consent.

(2) Consent could be given by the national representative bodies and/or governments of the aboriginal peoples at assemblies especially convened for this purpose or at their annual meetings. The consent mechanism could operate in two ways. If not specifically approved, a proposed amendment would not be effective. Alternatively, if not specifically rejected, the proposed amendment would be effective.

Two comments can be made on this proposal. First, it would not be necessary for the constitution to name the national representative bodies. Second, if the representative bodies disagree on the proposed amendment, it would not be applicable to those aboriginal peoples who reject it.

(3) A referendum could be held of all aboriginal peoples or governing bodies affected by the proposed amendment.

There appears to be little interest in a referendum process on the part of either governments or aboriginal peoples. The November accord resulted in the removal of the referendum mechanism from the patriation proposal. Reliance on referenda would tend to weaken the authority of aboriginal governments or representative bodies.

(4) There have been proposals that aboriginal peoples be guaranteed seats in the House of Commons and/or Senate.[117] If such proposals are implemented, the aboriginal deputies and/or senators could be given the authority to accept or reject constitutional amendments affecting aboriginal peoples.

This model has the advantage of being the least threatening to the present balance of power between the federal government, the provincial governments, and the aboriginal peoples. It appears to be a workable

mechanism, and less likely than those previously mentioned to lead to rejection of a proposed amendment. Aboriginal deputies would have to answer to their electorate, but aboriginal senators would have no direct responsibility to their communities. Aboriginal organizations would probably find that this model gives aboriginal peoples insufficient control over constitutional changes directly affecting them. It would also weaken the authority of aboriginal governments.

(5) Mandatory public hearings could be required before a constitutional change is implemented that affects aboriginal peoples. This model would provide a public, highly visible means of eliciting opinions, but it would not allow aboriginal peoples to reject directly an amendment they find unsatisfactory.

Although this mechanism would not likely be accepted by aboriginal representatives at the conference (if it is even raised there), it could provide a vehicle for organizing public opposition to amendments that limit or extinguish the rights of aboriginal peoples.

In examining these proposals, it should be kept in mind that consent would only be required of those aboriginal peoples whose rights are affected by the proposed amendment (although it may not be easy to determine whose rights are affected). If the aboriginal peoples disagree on whether to accept or reject an amendment, it would not be applicable to those who reject it. Moreover, the consent provisions would apply only to sections of the constitution directly affecting aboriginal peoples: section 25, section 35, and any new provisions, such as a requirement that aboriginal consent be given to the establishment of new provinces or to the extension of existing provinces into the territories.

POLITICAL RIGHTS

Self-Government

Prior to the arrival of Europeans in North America, aboriginal nations had their own forms of government to regulate their social, economic,

cultural, political, and legal affairs. They now demand that the right to establish their own forms of government be constitutionally recognized.

The demand for self-government or sovereignty has often been dismissed as a demand for separation. In 1975, then Minister of Indian and Northern Affairs Judd Buchanan characterized the Dene Declaration as "gobbledy-gook." Days before his announcment on 26 November 1982 that his government was prepared to accept in principle the Inuit demand for the subdivision of the Northwest Territories into two territories, Indian Affairs Minister John Munro accused the Inuit of being "separatist." This kind of misstatement of aboriginal demands makes difficult questions even more difficult.

The United States has provided a precedent for internal tribal self-government. Indian tribes have been described as "domestic, dependent nations," constituting distinct political societies capable of governing themselves.[118] The American Congress has enacted legislation to encourage tribal self-government.

The right to self-government may be considered an aboriginal right. The Royal Proclamation of 1763 refers to Indians as "Tribes or Nations" and provides that they shall not be molested or disturbed in the possession and use of their lands. Through the treaty-making process, the right of tribal leaders to surrender aboriginal title on behalf of members of their society was recognized. In other words, the Royal Proclamation and the treaties recognize the existence of Indian self-government.

One of the primary demands of the AFN is that the right to self-government within Canada be constitutionally entrenched. The NCC concurs. Both see the details of aboriginal government being provided for by acts of Parliament, with their consent.

The Inuit would provide for the right of self-government in a land claims agreement. This approach is supported by northern Indian groups.

There is a precedent within Canada for having more than one enactment dealing with aboriginal government. The James Bay and Northern Quebec Agreement, which provides for a very limited form of aboriginal government, has been implemented through complementary legislation by both Parliament and the Quebec National Assembly. There seems to be no reason why there cannot be as many specific enactments dealing with various forms of aboriginal government as there are agreements with aboriginal peoples. This approach would allow the degree of flexibility needed within Canada to fully recognize the special status of the aboriginal peoples.

The issue of self-government has been complicated by the establishment of a Parliamentary subcommittee on Indian self-government. The subcommittee has been holding hearings throughout Canada and intends to continue its sessions in 1983. Indians fear that the existence of this committee will be used as an excuse to avoid dealing with self-government on a constitutional level. Their worry seems to be well-founded; on 9 November 1982, John Munro submitted to the committee a proposal "to develop legislation complementary to the **Indian Act** and allow for optional Indian band government at the community level."

It would be unfortunate if the issue of aboriginal self-government within Canada is not seriously considered at the constitutional conference.

Political Representation in Parliament and the Provincial Legislatures

The NCC draft position paper proposes that each of the aboriginal peoples be given the right to elect their own representatives to Parliament. This would provide a greater opportunity for their concerns to be heard, both in Parliament and throughout the country. Native people would have the option of voting in special federal ridings covering the entire country. Since 1867 a similar system has been in place in New Zealand, which currently gives the Maori four seats in an eighty-seat Parliament. In Canada, ordinary electoral principles would allow seventeen seats to an aboriginal electorate.

The Inuit support this proposal in a general way, although the ICNI has not decided whether there should be separate constituencies for the Inuit or whether present electoral boundaries should be redefined to make the Inuit the majority in their areas. For example, in northern Quebec the electoral boundaries run north and south, placing the Inuit in two ridings. As a result, they have relatively little influence on election results in either riding. The Inuit would also like representation in a reformed Senate.

While the AFN has not taken a position on the issue of a special Indian electorate, it might oppose such a proposal on the ground that seats reserved in Parliament for Indians would undermine the concept of self-government.

As discussed above,[119] guaranteed aboriginal representation in Parliament could provide a means of dealing with the difficult issue of aboriginal consent to constitutional change.

It has been suggested that the notion of a special aboriginal electorate raises many difficult questions for both federal and provincial politicians. First, there is the question of political equality within Canada. No region or ethnic or racial group has yet been given special privileges with regard to election to Parliament. Second, if aboriginal peoples are to have special representation because they are not effectively represented, should not other minority or disadvantaged groups, such as blacks, women, or the handicapped, be given the same privilege? Third, the implication of having separate native members is that deputies elected by the ordinary process would be relieved of the responsibility of considering the interests of aboriginal peoples. Fourth, a native bloc might hold the balance of power in a minority government. Unlike other minority parties in that situation, it would not risk having its numbers reduced at the next election, because it would have a guaranteed number of seats. In other words, guaranteed native representation would effectively create a fourth national party in Canada. This argument assumes that native members would act as a bloc within Parliament rather than join existing parties and follow party discipline.

In spite of the many arguments against guaranteed native representation in Parliament, this item would likely be given serious consideration at the conference if it were to be placed on the agenda.

The NCC also proposes that aboriginal peoples be given the right to elect their own representatives to provincial legislatures. However, the AFN would certainly oppose the guaranteed representation of Indians in provincial assemblies, as Indians and their lands come within federal legislative authority pursuant to section 91(24) of the **Constitution Act, 1867.** The Inuit have not expressed an opinion on this issue, and it should be noted that Quebec and Newfoundland are the only provinces with an Inuit population.

The federal government would not likely oppose this idea, as it contends it has no legislative authority over the Metis and non-status Indians. On the other hand, many of the provinces would likely oppose it, as they contend the federal government does have the constitutional authority to legislate over these groups and might not want to assume the financial burden of providing them with special services.

ABORIGINAL AND TREATY RIGHTS

Identification and Definition

There are three overlapping areas of uncertainty with aboriginal rights: the geographic scope of aboriginal rights; the content of those rights; and the extent to which they have been extinguished, both in scope and in content. An important question is whether the identification and definition of certain rights as "aboriginal" will mean that rights which are not so identified and defined will be viewed either as extinguished or not categorized as "aboriginal" and therefore not recognized and affirmed in the constitution.

In its draft "Recommendations on Provisions to be Added to or for Amendment to the Canada Act 1981," which was presented to the working

groups in November 1982 in Ottawa, the NCC did not attempt to identify and define "aboriginal rights" directly. Instead, it proposed a Charter of Rights of Aboriginal Peoples, which included land and resource rights, civil and political rights, language and cultural rights, economic rights, social rights, international interests, and financial provisions. Land and resource rights included the right to collective ownership of land and its resources, including surface and subsurface rights; the right of aboriginal peoples to use the biological resources on their lands, on unoccupied Crown lands, and on lands to which they have a right of access; and the right to hunt, fish, and gather those resources for economic and cultural purposes. This approach provides the Metis people with rights while avoiding the difficult question of whether their aboriginal rights have been extinguished.

The ICNI has adopted a similar approach. It is suggesting that Part II of the **Constitution Act, 1982** be expanded to include a Charter of Aboriginal Rights that would list aboriginal rights. The ICNI Charter would be based on three general principles: (1) recognition of the collective culture and history of aboriginal peoples; (2) their right to self-governing structures within Canada; and (3) their right to economic resources and the protection of their traditional livelihoods. The notion that aboriginal peoples can own land as a collectivity rather than through "artificial" corporations should be recognized. The Inuit believe that they have title to the ocean bed and therefore have claims on the marine environment.

The AFN has emphasized the inclusion of aboriginal title in section 35. This position has also been adopted by the Government of the Northwest Territories, and is consistent with the positions of the ICNI and NCC.

Unlike the other organizations, the AFN would guarantee specific collective rights - whether treaty rights or aboriginal rights - through schedules attached to the constitution, setting out those rights on the basis of agreements reached through an ongoing process rather than through a Charter of Aboriginal Rights.

All three aboriginal organizations are in agreement that the term "existing" should be removed from section 35. In addition, the ICNI and AFN would strengthen the protection offered by section 35 by adding the term "guaranteed" so that the rights of aboriginal peoples "are hereby recognized, affirmed and guaranteed."

The outstanding issue regarding treaties is whether or not modern treaties in the form of land claims agreements are "treaties" for the purposes of section 35. That being legally uncertain, the rights and freedoms acquired by land claims agreements should be included in section 35.

The AFN position is that "treaties" include the pre-confederation treaties (including the treaties of peace and friendship made with the Indian nations now inhabiting the Maritime provinces), the treaties made outside the current boundaries of Canada with Indian nations living within Canada, and treaties that guarantee certain rights to Indian peoples, even though they were not parties to the treaties.

To date, there has been very little response from government officials on these issues.

Definition of "Aboriginal Peoples"

This issue did not receive much attention in the working groups. The draft recommendations of the NCC would allow each of the aboriginal peoples to provide their own definition. The NCC defines Metis as "any person of aboriginal ancestry who declares himself/herself to be a Metis." Some government officials have expressed concern over a constitutional definition that would allow persons to opt in to a category. The AFN is more concerned with Indian governments having the right to define their own membership criteria than with the actual definition of the term "aboriginal peoples" in the constitution.

If rights flowing from land claims settlements are constitutionally entrenched, the definitions used in the agreements may be indirectly imported into the constitution.

Principles for Negotiating Treaties or Agreements

Both the ICNI and AFN want a constitutional statement of principle that the federal government is commited to negotiating treaties or agreements (including land claims settlements) with the aboriginal peoples, in accordance with broad general principles that recognize their rights to maintain and develop their respective cultures, languages, and traditions; the right to self-government within the Canadian federation; and the right to their lands and waters and to the natural resources therein. The ICNI would exact this commitment from provincial governments as well; however, the AFN sees this commitment as part of the bilateral process that excludes provincial involvement.

In effect, this proposal would allow aboriginal peoples to negotiate their place within confederation according to constitutionally entrenched principles. It is not limited to unsettled land claims. To the extent that existing treaties are inconsistent with the proposed general principles, they would be renegotiated. Similarly, aboriginal peoples whose rights have been extinguished without treaties would have the right to enter into negotiations.

The acceptance of such a proposal would remove many of the problems associated with the lack of an ongoing constitutional process.

Treaty and Aboriginal Rights Protection Office

The AFN has proposed that a Treaty and Aboriginal Rights Protection Office be established. It would function as a formal liaison between Indian peoples and the federal government and (to the extent they may have jurisdiction) the provincial governments in discussions on both constitutional matters, such as the identification and definition of

aboriginal and treaty rights, and non-constitutional matters. This office could be expanded to have attached to it a mechanism for dispute resolution by means other than litigation in the established court systems. This proposal might meet Indian demands for an ongoing process.

WOMEN'S RIGHTS

There seems to be widespread support from governments, the Metis, the Inuit, and the general public for specific constitutional recognition of the equal status of native women. The AFN has been inconsistent in its attitude towards a non-discrimination clause that would be binding on aboriginal governments. Some Indian leaders are concerned that such a clause would limit the right of Indian governments to deal with citizenship issues; others support the constitutional recognition of the equal status of aboriginal women.

It is likely that such an amendment will be approved at the conference.

OTHER ISSUES

Several other issues have been placed before the working groups by either the Inuit or the Metis. They include the right to financial support from other levels of government, language rights, cultural rights, education rights, communication rights, the recognition of customary practices and laws, the ownership and control of heritage resources and archeological sites, participation in international issues of concern to aboriginal peoples, and mobility rights, both domestic and international. Some appear to be issues that could be dealt with by negotiations without constitutional change. Some appear to be issues upon which participants of the conference could reach a consensus.

CONFERENCE PROCEDURE

There has been little discussion between participants on the procedure to be followed at the conference. This may be a comment on the difficulties

posed by the substantive issues. Government officials appear to want to set the agenda before discussing procedure.

On the other hand, governments may believe that the procedure is implicit in Part V of the constitution, which sets out the general amending formula. By section 38(1) Parliament and the legislative assemblies are involved in making amendments to the constitution. The government approach may be that, although aboriginal representatives can "participate in the discussions" at the conference, section 37(2) gives them no role in decision-making.

Other possible decision-making procedures could be utilized to make aboriginal participation meaningful: decision-making by consensus, by a simple majority, or by a two-thirds majority. Taking into account six aboriginal representatives and two territorial representatives, there will be nineteen participants at the conference (assuming that Quebec participates). A two-thirds majority would require the support of thirteen. If a two-thirds majority is required, therefore, the aboriginal peoples and the Northwest Territories could combine to block any proposal not to their liking. (The Government of the Northwest Territories strongly supports strengthening the provisions relating to aboriginal peoples.) Conversely, the aboriginal peoples and the Northwest Territories would only have to persuade the federal government and five provinces (or six provinces without the federal government) to accept a proposal in order for it to be approved at the conference.

As noted above,[120] decision making by consensus is used at international law-making conferences. The participants at the Third United Nations Conference on the Law of the Sea met twice a year for eight years to negotiate a treaty acceptable to all delegates. The principle of negotiating to consensus, rather than voting on proposals and amendments, was central to the conference and was essential to the balancing of interests which the conference required.[121]

A first ministers' conference may not be the most suitable forum for a series of meetings over an extended period of time. The rights of

aboriginal peoples may not always be given high priority on the agenda of Canadian political leaders. The participation of officials rather than first ministers at a continuing constitutional conference would overcome this problem; the representatives at international law-making conferences are not politicians but officials who are experts representing their nations' interests.

Professor Howard McConnell of the College of Law at the University of Saskatchewan has suggested that the conference proceed according to the principle of duality.[122] He would divide the participants into two groups: the Indian, Inuit, and Metis representatives in one and the eleven governments with non-native majorities in the other. They would proceed to deal with the issues on a basis of equality. The principle of duality would imply that both the aboriginal peoples and the first ministers could exercise a veto for the limited purpose of defining "aboriginal rights" and "treaty rights."

On the first ministers' side, unanimity is no longer necessary for constitutional amendment, according to section 38(1). It is evident, therefore, that unanimity would not be required where detailed substantive definitions are involved. The eleven governments could proceed by consensus, by a simple clear majority, or by a clear majority regionally distributed.

Professor McConnell suggests that the conference could convene with an initial broad discussion; after this, each side could meet privately and separately to work out its priorities. The participants could then reconvene, preferably in private, and attempt to reach a mutually acceptable position. Issues upon which agreement is not reached would be left to the courts or to future constitutional meetings.

Professor McConnell's suggestion is an interesting one. However, it appears unlikely that the aboriginal representatives would agree to negotiate as one unit. Nor is it likely that governments would agree to negotiate collectively. In their preparations for the conference there has

been no indication that any of the aboriginal organizations or any of the governments is prepared to give up part of their constitutional "sovereignty" to facilitate reaching an agreement.

If agreement on conference procedure is not reached at the ministerial-level meeting expected to be held in late January, there is a real danger that the constitutional conference will focus upon procedural issues and fail to deal with any matters of substance.

IMPLEMENTATION OF AN ACCORD

Section 37 does not set out a method of implementing any agreement or accord reached at the constitutional conference. The federal government and some of the provinces have indicated that the amending procedure established in Part V would have to be followed. In other words, an agreement would have to be implemented by resolutions of Parliament and at least two-thirds of the provinces with a total of 50 per cent of the population, as set out in section 38(1). Any premier who is party to an agreement would be morally bound to introduce the appropriate resolution in the legislature of his province.

If this approach prevails, implementation of an agreement requiring the consent of aboriginal peoples to or granting them a veto over constitutional amendments directly affecting them (if such an agreement is treated as an amendment to Part V) would be made more difficult by the section 41(e) requirement of the unanimous consent of Parliament and all provincial legislatures. This difficulty may be avoided if the aboriginal consent requirement is placed in Part II rather than Part V, in which case the general section 38(1) formula would apply.

Similarly, any change to the amendment procedure relating to the extension of existing provinces into the territories (section 42(1)(e)) or the establishment of new provinces (section 42(1)(f)) would itself require unanimous consent. This difficulty may be avoided if the change to the amendment procedure imposes a requirement of aboriginal consent rather than

federal and provincial unanimity and the requirement of aboriginal consent is placed in Part II rather than Part V.

The NCC's position is that the words "to be included in the Constitution of Canada" in section 37(2) mean that the provisions of an accord reached at the conference would automatically be included in the constitution.

Professor McConnell provides an approach that avoids the difficulties of the section 38(1) formula. He suggests that an agreement defining "aboriginal rights" could be incorporated by reference into the constitution:

> For the purposes of the definition of "aboriginal rights" in section 35, no amendment is needed because no change is being made to the text of the Constitution. All that is being done is to give one of its terms meaning. Judges do this frequently when they give a fuller extension, through judicial interpretation, to terms such as "peace, order and good government"; the only thing that would differ in this context would be that instead of defining the term through judicial craftsmanship, it would be defined in the process of executive-federalism, as provided for in section 37(2). Consequently, rather than proceeding by the laborious amending process, the testamentary concept of incorporation by reference might be resorted to.[123]

Professor McConnell goes on to say that "the concluding resolution of the Conference would then be endorsed as being incorporated by reference into, and as defining, section 35. This could be done without any undue strain, as section 37(2) refers to section 35, if not by name, at least by necessary inference."[124]

This approach could be applied to the definition of terms already used in the constitution, but would not allow aboriginal peoples to initiate new provisions. "Flesh is merely being put on the skeleton of a change already accomplished."[125] However, most demands of the aboriginal peoples could be characterized as "existing aboriginal and treaty rights." As discussed above, an ongoing process for aboriginal involvement in constitutional change might be developed without constitutional amendment.[126] The adoption of the principle of duality, as suggested by Professor McConnell,[127] would be by convention rather than by constitutional amendment.

Although it leaves many important questions unanswered (for example, How would the courts take judicial notice of the contents of an accord? Would the accord require confirmation by federal statute?), this innovative approach avoids many of the difficulties raised during pre-conference meetings and may provide the procedural compromises necessary for a successful conference.

7 CONCLUSION

Any predictions about the direction of the constitutional conference must, at the time of writing, remain tentative. Many observers expect that the conference will result in the establishment of an ongoing process to deal with the constitutional concerns of aboriginal peoples. The participants do not appear to be close to agreement on the other outstanding issues, except on the issue of women's rights. After the working group meetings in mid-November 1982, it was the assessment of some of those present that the federal government and six of the provinces were prepared for some changes while four of the provinces seemed opposed to most aboriginal demands. More specifically, British Columbia is expected to lead the opposition and Ontario and Manitoba to be the most favourable of the provinces.

If the conference fails to reach agreement on the identification and definition of aboriginal rights, those issues will be left to the courts for determination. This, of course, will create great uncertainty for both aboriginal peoples and government. Moreover, Canadian courts have generally been conservative in their response to questions concerning aboriginal rights. They have often treated such questions as political, and inappropriate for judicial resolution.[128] This judicial attitude is illustrated by the frequently quoted passage from Mr. Justice Dickson's judgment in **Kruger and Manuel** v. **The Queen.**[129]

> Before considering the two other grounds of appeal, I should say that the important constitutional issue as to the nature of aboriginal title, if any, in respect of lands in British Columbia,

> the further question as to whether it had been extinguished, and the force of the Royal Proclamation of 1763 - issues discussed in **Calder** v. **A.G. B.C.** - will not be determined in the present appeal. They were not directly placed in issue by the appellants and a sound rule to follow is that questions of title should only be decided when title is directly in issue. Interested parties should be afforded an opportunity to adduce evidence in detail bearing upon the resolution of the particular dispute. Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that band and to that land, not on any global basis.[130]

If the conference were to be perceived as a failure by aboriginal peoples, it would increase their mistrust of government and make the solution of non-constitutional problems more difficult. Aboriginal peoples would view the failure of the conference as a product of the same attitude that led to the November accord, which removed their rights with a stroke of a pen.

Land claims settlements would also become more difficult. Aboriginal peoples would be hesitant to exchange constitutionally recognized, existing aboriginal rights for the promise of future rights of uncertain constitutional status. Without land claims settlements, the aspirations of native people to control their own lives, the desire of others to exploit non-renewable resources for economic advantage, and the constitutional development of the north would all suffer some degree of frustration.

In addition, aboriginal organizations would likely increase their efforts through the United Nations for international recognition of their rights and for the right to standing before international tribunals such as the World Court. Thus, the failure of the conference would not only be noted domestically; it would embarrass Canada in the eyes of the world.

As the conference draws nearer, the participants will be reviewing their positions and selecting their priorities for discussion. It is vital that the procedural questions be resolved before the conference begins, so that it can come to grips with the very important substantive questions.

It remains to be seen whether the first ministers of Canada are now prepared to treat aboriginal issues more seriously than they did on 5 November 1981, when constitutional recognition of aboriginal and treaty rights was unceremoniously dropped from the proposed constitution.[131] The events following the November accord revealed wide public support across Canada for constitutional recognition of the rights of aboriginal peoples. There is no reason to think that this support has evaporated in the last twelve months.

NOTES

1. Yukon Native Brotherhood, **Together Today for Our Children Tomorrow**, 1973, p. 63.

2. James S. Frideres, **Canada's Indians: Contemporary Conflicts** (Toronto: Prentice-Hall, 1974), p. 15.

3. Department of Indian Affairs and Northern Development, **The Inuit** (Ottawa, 1980), p. 4.

4. Metis and Non-Status Indian Constitutional Review Commission, **Native People and the Constitution of Canada**, p. 8.

5. See generally Frideres, **supra**, note 2, pp. 1-58, and the Report of the Winnipeg Social Planning Council on Status Indians of Manitoba, released 6 January 1983.

6. R.S.C. 1970, App. II, No. 5.

7. R.S.C. 1970, c. I-6.

8. Section 2(1).

9. Section 11.

10. Frideres, **supra**, note 2, p. 2.

11. **Indian Act**, ss. 109-113.

12. Section 15(1).

13. Section 12(1)(b).

14. **A.G. Can.** v. **Lavell**, [1974] S.C.R. 1439; 38 D.L.R. (3d) 481; 23 C.R.N.S. 197; 11 R.F.L. 333.

15. Human Rights Committee Decision, CCPR/C/DR (XIII) R. 6/24, 30 July 1981.

16. Peter A. Cumming and Neil H. Mickenberg, eds., **Native Rights in Canada**, 2nd ed., 1972, pp. 23-26.

17. R.S.C. 1970, App. II, No. 1.

18. **R.** v. **White and Bob** (1964), 50 D.L.R. (2d) 613, at 636; 52 W.W.R. 193, at 218 (B.C.C.A.), per Norris, J.A.

19. **St. Catherine's Milling and Lumber Co.** v. **The Queen** (1887), 13 S.C.R. 577, at 652, per Gwynne, J.

20. **The Queen** v. **The Secretary of State for Foreign and Commonwealth Affairs, Ex parte Indian Association of Alberta**, [1981] 4 C.N.L.R. 86, at 91; [1982] 2 W.L.R. 641; [1982] Q.B. 892; [1982] 2 All E.R. 118; 1 C.C.R. 254, per Lord Denning M.R.

21. **R.** v. **McMaster**, [1926] Ex. C.R. 68, at 72.

22. **Reference re Eskimos**, [1939] S.C.R. 104.

23. See, for example, **R.** v. **Laprise**, [1978] 6 W.W.R. 85; [1978] C.N.L.B. (No. 4) 118 (Sask. C.A.), which held that a non-status Indian is not an "Indian" for the purposes of s. 12 of the Natural Resources Transfer Agreement of 1930. The result was that the defendant, a non-status Indian, could not rely on the protection that s. 12 gives to Indian hunting rights.

24. R.S.C. 1970, App. II, No. 9.

25. **Ibid.**, para. 14, p. 262.

26. **Ibid.**, Sched. A, p. 264.

27. R.S.C. 1970, App. II, No. 10.

28. [1979] 5 W.W.R. 364; [1979] 2 C.N.L.R. 25 (S.C.C.).

29. **Ibid.**, [1979] 5 W.W.R. 364, at 378; [1979] 2 C.N.L.R. 25, at 40.

30. **Ontario Boundaries Extension Act**, S.C. 1912, c. 45.

31. **Quebec Boundaries Extension Act, 1912**, S.C. 1912, c. 40.

32. **Ibid.**, s. 2(c)-(e); **supra**, note 30, s. 2(a)-(c).

33. R.S.C. 1970, App. II, No. 25.

34. Para. 11 of the Canada-Manitoba Agreement, and para. 10 of the Canada-Alberta and Canada-Saskatchewan Agreements.

35. Para. 13 of the Canada-Manitoba Agreement, and para. 12 of the Canada-Alberta and Canada-Saskatchewan Agreements.

36. See note 23, above.

37. R.S.C. 1970, App. II, No. 8. The **Manitoba Act, 1870** was subsequently confirmed by the **Constitution Act, 1871**, R.S.C. 1970, App. II, No. 11.

38. S.C. 1872, c. 23.

39. For a general discussion of the native movement in Canada, see Norman Zlotkin and Donald R. Colborne, "Internal Canadian Imperialism and the Native Peoples," in Craig Heron, ed., **Imperialism, Nationalism, and Canada** (Toronto and Kitchener, Ont.: New Hogtown Press and Between the Lines, 1977), p. 161, at pp. 177-183.

40. R.S.C. 1970, c. I-6.

41. **Ibid.**, s. 74.

42. Sections 81-86.

43. Sections 82(2), 83(1).

44. **E.g.**, Indian Association of Alberta, July 1975 elections.

45. **Statement of the Government of Canada on Indian Policy, 1969** (Ottawa: Queen's Printer, 1969).

46. Many of the events described on pp. 20-33 have been discussed in greater detail by Douglas E. Sanders in "The Indian Lobby," in Keith Banting and Richard Simeon, eds., **And No One Cheered: Federalism, Democracy and the Constitution** (Toronto: Methuen of Canada, 1983, forthcoming).

47. **Supra**, note 45, p. 5.

48. **Ibid.**, p. 11.

49. **Calder** v. **A.G. B.C.**, [1973] 4 W.W.R. 1; 34 D.L.R. (3d) 145.

50. For a recent restatement of this policy, see **In All Fairness: A Native Claims Policy: Comprehensive Claims** (Ottawa: Department of Indian and Northern Affairs, 1981).

51. For a recent restatement of this policy, see **Outstanding Business: A Native Claims Policy: Specific Claims** (Ottawa: Department of Indian and Northern Affairs, 1982).

52. "Dene Manifesto," **News of the North**, 30 July 1975.

53. **Supra**, note 46.

54. Fourth Russell Tribunal, **Proceedings**, 30 November 1980.

55. C.B.A., Committee on the Constitution, **Towards a New Canada** (Ottawa, 1978), p. 11.

56. Resolution #31a, 28 August 1980.

57. Task Force on Canadian Unity, **A Future Together: Observations and Recommendations** (Ottawa: Minister of Supply and Services Canada, 1979), p. 122, recommendation 8.i. The role of native peoples in Canada is discussed generally at pp. 56-59 of the report of the Task Force.

58. Resolution passed by the National Liberal Party Convention, Winnipeg, 4 July 1980.

59. Quebec Liberal Party, Constitutional Committee, **A New Canadian Federation** (Montreal, 1980), p. 84, recommendation 17.3.

60. Forty-two out of forty-three groups and twenty-seven out of twenty-nine individuals supported this position. See Ronald James Zukowsky, **Struggle over the Constitution: From the Quebec Referendum to the Supreme Court; Intergovernmental Relations in Canada: The Year in Review, 1980**, Vol. 2 (Kingston, Ontario: Institute of Intergovernmental Relations, Queen's University, 1981), p. 74, table 6.2.

61. As Minister of Indian Affairs in 1969, Jean Chrétien was responsible for the introduction of the "infamous" White Paper. See p. 20, above.

62. Peter Jull, "Canada: A Perspective on the Aboriginal Rights Coalition and the Restoration of Constitutional Aboriginal Rights," (1982), 30 **IWGIA Newsletter** 82, at 83-84.

63. "Native Council of Canada Withdraws Support for Constitution," **Forgotten People** 8, no. 2 (Spring 1981), p. 10.

64. Sanders, **supra**, note 46.

65. **Reference re Amendment of the Constitution of Canada**, [1981] 1 S.C.R. 753; 125 D.L.R. (3d) 1; [1981] 6 W.W.R. 1; 39 N.R. 1.

66. **ICNI 1981-82 Activities Report**, p. 2.

67. See Sheilagh M. Dunn, **The Year in Review, 1981: Intergovernmental Relations in Canada** (Kingston, Ontario: Institute of Intergovernmental Relations, Queen's University, 1982), p. 33, and Sanders, **supra**, note 46.

68. Jull, **supra**, note 62, p. 87.

69. See Jull, **supra**, note 62, pp. 88-95, for a detailed description of the ARC lobbying campaign.

70. Fleet Publishers, 1982.

71. As excerpted in the **Globe & Mail**, 13 November 1982, p. 10.

72. 10 November 1981, speech at Guelph University and article published in the **Globe & Mail**, 18 November 1981, p. 7. For his outspoken remarks on the November accord, Berger J. was publicly criticized by Prime Minister Trudeau, and was the subject of an official complaint by Federal Court Justice George Addy to the Canadian Judicial Council. The Judicial Council conducted an investigation and stated that Berger J.'s actions were "indiscreet" but constituted "no basis for a recommendation that he be removed from office." See Michael Valpy, "A Rare Case," **Globe & Mail**, 4 September 1982, p. 6.

73. Jull, **supra**, note 62, p. 93.

74. H.C. Debates, 24 November 1981 (Vol. 124, No. 262) at 13203-13206.

75. **Supra**, note 62, p. 96.

76. Sanders, **supra**, note 46.

77. **Ibid.**

78. The original application was dismissed by the High Court of Justice, Q.B.D., on 9 December 1981. On 21 December 1981, Lord Denning M.R. granted leave to appeal.

79. **The Queen** v. **The Secretary of State for Foreign and Commonwealth Affairs, Ex parte Indian Association of Alberta**, [1982] 2 W.L.R. 641; [1982] Q.B. 892; [1982] 2 All E.R. 118; [1981] 4 C.N.L.R. 86; 1 C.C.R. 254.

80. **Ibid.**, [1981] 4 C.N.L.R. 86, at 119.

81. [1982] 2 W.L.R. 670; [1982] Q.B. 892, 937; [1982] 2 All E.R. 143; [1982] 3 C.N.L.R. 195; 1 C.C.R. 288.

82. **Ibid.**

83. **Manuel** v. **A.G. England; Noltcho** v. **A.G. England**, [1982] 3 W.L.R. 821; [1982] 3 C.N.L.R. 13.

84. **Ibid.**, [1982] 3 C.N.L.R. 13, at 28.

85. **Ibid.**, at 29.

86. **Ibid.**, at 21.

87. **Ibid.**, at 22.

88. [1982] 3 W.L.R. 821, 837.

89. Delia Opekokew, **The First Nations: Indian Governments in the Community of Man** (Regina: Federation of Saskatchewan Indians, 1982), p. 28.

90. **Supra**, note 79, [1981] 4 C.N.L.R. 86, at 99.

91. **Hamlet of Baker Lake** v. **Minister of Indian Affairs and Northern Development** (No.2), [1980] 1 F.C. 518; [1979] 3 C.N.L.R. 17 (F.C.T.D.).

92. **Ibid.**, [1979] 3 C.N.L.R. 17, at 45.

93. **St. Catherine's Milling and Lumber Co.** v. **The Queen** (1888), 14 A.C. 46, at 58 (J.C.P.C.).

94. **Calder** v. **A.G. B.C.**, [1973] 4 W.W.R. 1; 34 D.L.R. (3d) 145.

95. **Ibid.**, per Judson J.

96. **Supra**, note 91.

97. **Kruger & Manuel** v. **The Queen**, [1978] 1 S.C.R. 104; 75 D.L.R. (3d) 434; 34 C.C.C. (2d) 377; [1977] 4 W.W.R. 300; 15 N.R. 495.

98. **A.G. Ont.** v. **Bear Island Foundation**, S.C.O. No. 25196/78. At the time of writing, the presentation of the evidence was expected to be completed by March 1983.

99. Not all areas in Ontario are covered by treaties.

100. The fact that a particular province is covered by treaties does not necessarily mean that all Indian nations with aboriginal title in that province were parties to the treaties.

101. Opekokew, **supra**, note 89, pp. 16-17.

102. See **R.** v. **Johnston** (1966), 56 D.L.R. (2d) 749 (Sask. C.A.), in which the "medicine chest" clause of Treaty 6 was held to mean "no more than the words clearly convey," which would be a first-aid kit.

103. **Francis** v. **The Queen**, [1956] S.C.R. 618, at 631.

104. Kenneth M. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada," in W.S. Tarnopolsky and G.-A. Beaudoin, eds., **The Canadian Charter of Rights and Freedoms: Commentary** (Toronto: Carswell, 1982), p. 467, at 485.

105. **Kruger & Manuel** v. **The Queen**, **supra**, note 97.

106. **R.** v. **Derriksan**, 71 D.L.R. (3d) 159; 31 C.C.C. (2d) 575; [1976] 6 W.W.R. 480; 16 N.R. 321; [1977] C.N.L.B. (No. 1) 3 (S.C.C.).

107. This was the interpretation given to s. 35 by Seniuk P.C.J. in **R.** v. **Bear**, 11 January 1983 (Sask. Prov. Ct.).

108. Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada," [1982] 4 **Supreme Court L.R.** 255.

109. **R.** v. **Derriksan, supra,** note 106.

110. **Kruger & Manuel** v. **The Queen, supra,** note 97.

111. **Sikyea** v. **The Queen,** [1964] S.C.R. 642; 50 D.L.R. (2d) 80; [1965] 2 C.C.C. 129; 44 C.R. 266; 49 W.W.R. 306; **R.** v. **George,** [1966] S.C.R. 267; 55 D.L.R. (2d) 386; [1966] 3 C.C.C. 137.

112. **R.** v. **White & Bob** (1965), 50 D.L.R. (2d) 613 (B.C.C.A.); aff'd. (1966), 52 D.L.R. (2d) 481 (S.C.C.).

113. **Supra,** note 14. In any event, s. 12(1)(b) may be repealed before s. 15 of the Charter comes into force on 17 April 1985.

114. **Constitution Act, 1982,** s. 32(2).

115. Letter from Prime Minister Trudeau to Premier Davis, 27 July 1982.

116. For a history of the Conference see Stevenson & Oxman (1974), 68 **A.J.I.L.** 1; (1975), 69 **A.J.I.L.** 1 and 763; and Oxman (1977), 71 **A.J.I.L.** 247; (1978), 72 **A.J.I.L.** 57; (1979), 73 **A.J.I.L.** 1; (1980), 74 **A.J.I.L.** 1; (1981), 75 **A.J.I.L.** 211; (1982), 76 **A.J.I.L.** 1.

117. See pp. 66-68, below.

118. **Cherokee Nation** v. **Georgia** (1831), 30 U.S. 1, at 15, 5 Peters 1, per Marshall C.J.

119. See pp. 63-64, above.

120. See p. 62, above.

121. Oxman (1980), 74 **A.J.I.L.** 1, at 46-47.

122. W.H. McConnell, **Indians and the New Constitutional "Package": Some Suggestions for Innovation,** paper delivered at the University of Saskatchewan Native Law Centre Seminar on Indian Government, 15 January 1982, p. 9.

123. **Ibid.**, p. 8.

124. **Ibid.**, p. 9.

125. **Ibid.**, p. 10.

126. See pp. 61-62, above.

127. See p. 74, above.

128. The Supreme Court of Canada demonstrated a similar attitude in its 1981 constitutional decision, **supra**, note 65, in which the majority described unilateral patriation as being legal but contrary to constitutional convention.

129. **Supra**, note 97.

130. **Ibid.**, [1978] 1 S.C.R., at 108-09; [1977] 4 W.W.R., at 303.

131. According to a memo from Dennis Marantz of the Federal-Provincial Relations Office of the federal government to Senator Jack Austin, Social Development Minister, dated 8 July 1982, the federal strategy for the conference, as approved by Prime Minister Trudeau, involves "reducing native expectations" and "embroiling" provincial governments in the process of discussions and perhaps negotiations: "Ottawa Indian Strategy Detailed in Leaked Memo," **Globe & Mail**, 20 January 1983, p. 3.

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