ABORIGINAL PEOPLES AND THE CONSTITUTION

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The author discusses recent constitutional developments with respect to recognition of treaty and aboriginal rights. Recent amendments to the proposed Charter of Rights include the use of new terminology and definitions. The author examines the impact of these amendments on aboriginal nationalism, in view of the failure by the federal government to include provisions relating to aboriginal self-government or sovereignty.

INTRODUCTION

On Friday, January 30th, 1981, the Special Joint Committee of the Senate and House of Commons which had been studying the constitutional proposals of the Canadian government, unanimously agreed to amendments to the Charter of Rights giving positive constitutional recognition to treaty and aboriginal rights. A new section 31 is to read:

> (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.

Additionally, section 24 was altered to read:

> 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 settlements.

A third change requires the involvement of representatives of the Aboriginal Peoples of Canada in one of the federal-provincial constitutional conferences that will be called after patriation, in the period before an amending formula is finalized.

This all-party agreement in the Special Joint Committee was reported as an emotional event, with the three national aboriginal organizations announcing that they would now support patriation of the British North America Act, a sharp reversal of previous positions.[1] The federal Justice Minister, Mr. Chrétien, has invoked these provisions as a reason why the government's constitutional package must go forward. A Canadian Press story gave the following account of his statements to the Special Joint Committee on Friday, February 6th:[2]

> . . . Ottawa's chief constitutional spokesman, told the parliamentary committee studying the Trudeau package.
> "We have created expectations and we have to deliver."
> The government doesn't want 'to play politics' on the backs of the handicapped, the natives and anglophones in Quebec, he added in an impassioned speech.
> The government has recently agreed to entrench rights for all three groups in the constitutional package.

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1. "Native rights entrenched in last-minute huddle" *Vancouver Sun*, January 31, 1981, p. A-2; "Natives win approval for aboriginal rights" *Ottawa Citizen*, January 31, 1981, p. 1.
2. "Britain 'won't sway' Liberals", *Vancouver Sun*, February 6, 1981, p. 1.

But there are still outstanding demands from the aboriginal organizations. One is that aboriginal representatives be involved in any future amending process, either as equals to other governments within Canada, or as having a veto on amendments that affect their rights. As well, the amendments did not recognize any right of aboriginal groups to self-government. For these and perhaps other reasons, a majority of the National Indian Brotherhood's provincial and territorial organizations came out in opposition to the package of amendments and in April, 1981, the Brotherhood formally reversed its support for the federal proposals.

What will have been accomplished by these changes? The most dramatic innovation is the recognition and affirmation of "aboriginal and treaty rights". The federal government resisted the "entrenchment" of these rights on the basis that they were insufficiently defined. We will first consider what the provision recognizes and affirms. The second most innovative part of the amendments is the introduction of the phrase "the aboriginal peoples of Canada", which is defined to include the "Indian, Inuit and Metis peoples". The new terminology and the definition were proposed by the three national aboriginal organizations. In the second part of this paper we will examine the question as to whether this is an innovation or a codification of existing constitutional notions. In the third part of this paper we will turn to what has been omitted — the recognition of aboriginal governments within the Canadian federal state with a role in any amending process. In the final part of the paper we will try to assess the meaning of the Indian opposition to the provisions that has developed.

ABORIGINAL RIGHTS

As Mr. Justice Judson commented in the Supreme Court of Canada in the *Calder* case: ". . . when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries".[3] To what extent has Canadian law recognized the legal order established by the Indian and Inuit societies before European settlement?

Canadian law recognized that the Indians were "organized in societies" and responded to them as organized groups. The Royal Proclamation of 1763 refers to the "several nations or tribes of Indians with whom we are connected, and who live under our protection . . .".[4] The treaties were made between representatives of the Crown and leaders representing Indian tribal groups. Indian legislation and the reserve system involved the formal definition of groups of Indians as bands, which had certain rights of self-government on band reserve land. Indians argue that one part of their aboriginal rights is the right to continue as self-governing communities. None of the treaties deals expressly with this question. The Indian Act recognizes band governments which are either traditional or organized in accordance with the Act.[5] In each case it defines rather limited legislative powers for them.

3. *Calder* v. *Attorney General of British Columbia* [1973] S.C.R. 313 at 328.
4. R.S.C. 1970, Appendix, p. 123.
5. Indian Act, R.S.C. 1970, c. I-6. *See* the definition of "council of the band" in section 2(1).

The question of a separate Indian political and legal order within Canada has only rarely been raised in the courts. The question of making "individuals of the Indian Tribes amenable to our Laws for Offences committed amongst themselves" was sufficiently unclear in Upper Canada in 1823 that a special opinion was sought from England. In the absence of any treaty provision on the question, England advised that the criminal law in place in Upper Canada applied to the offence.[6]

The idea that Canada lacked legislative jurisdiction over Indian reserve communities or that Canadian jurisdiction was limited was tested in two cases in the 1950's. In the *Lazare* case[7] counsel for the Caughnawaga Band argued that the federal government lacked the ability to expropriate parts of the Caughnawaga reserve. The argument was based on the original grant of the lands by the French Crown. The Quebec Superior Court upheld federal legislative competence to expropriate Caughnawaga reserve lands. In 1959, in the *Logan* case,[8] the Ontario High Court rejected the claim by the confederacy group on the Six Nations reserve in Ontario that the Six Nations Indians continued to be allies of the Crown and were not subjects. The court ruled that the Six Nations had accepted the protection of the Crown after the American revolutionary war when they emigrated to Canada and settled on land granted to them by the Crown. By accepting the protection of the Crown they owed allegiance to the Crown and became subjects. Therefore the Parliament of Canada had jurisdiction over them.

It is striking that the 1823 question, the *Lazare* case and the *Logan* case all dealt with the question of Indian rights to self-determination in narrow ways. They avoid comment on the idea that Indian self-government might be an aboriginal right.

Indians and Inuit had organized societies with their own systems of law. Has Canadian law recognized rights that were established under those systems of law? The history is mixed. Indian customary marriages were recognized on occasions by Canadian courts and, until 1951, were recognized in the administration of Indian affairs.[9] Indian and Inuit customary adoptions have been recognized by the courts in the Northwest Territories on the basis that custom is a source of law in the common law tradition.[10] Justifications of crime that were valid in traditional Indian society have been rejected as defences in criminal cases, though relevant in the mitigation of sentence.[11]

Aboriginal rights claims are often thought to be limited to land claims or the right to use particular lands for hunting and fishing. The claims to land are, logically, a claim to the recognition of a set of legal rights established under Indian and Inuit customary law, a law that has validity because Indian and Inuit communities had their own governments. The Canadian cases

6. *See* "Status of Indians" *in* Doughty and Story, *Documents Relating to the Constitutional History of Canada, 1819-1829* (Ottawa, 1935) 175-178.
7. *Lazare* v. *St. Lawrence Seaway Authority* (1957) Que. C.S. 5.
8. *Logan* v. *Styres* (1959) 20 D.L.R. (2d) 416.
9. *See* Sanders, *Family Law and Native People* (Law Reform Commission of Canada, 1975, unpublished); Sanders, "Indian Women: A Brief History of their Roles and Rights" (1975) 21 *McGill L.J.* 656.
10. *Re Deborah* [1972] 5 W.W.R 203.
11. *R.* v. *Machekequonabe* (1898) 28 O.R. 309.

which deal with aboriginal rights to land do not place the issue in this larger framework. Nor do they describe aboriginal title claims as simply a form of prescriptive claim, familiar to English real property law traditions.

The Judicial Committee of the Privy Council in 1888 in the *St. Catherine's Milling* case[12] ruled that the title the Indians in the Treaty 3 area had to their traditional lands before the treaty, was a "personal and usufructuary right, dependant upon the good will of the Sovereign . . .". The Judicial Committee attributed that right to the terms of the Royal Proclamation of 1763. The "personal and usufructuary" terminology was continued in a series of judicial decisions dealing with reserve lands, but the question of an Indian title to unsurrendered lands did not arise in Canadian courts again until the *Calder* case, decided by the Supreme Court of Canada in 1973.[13] *Calder* dealt with the question whether a tribe in British Columbia, which had never surrendered its traditional territories, continued to hold an aboriginal title to the land. The Supreme Court of Canada split evenly on the question. Three judges ruled that any Indian title had been extinguished by general land legislation passed in the colony before Confederation. Three judges ruled that the title could only have been extinguished by express legislation or by agreement, and neither had occurred. The seventh judge confined his decision to a technical point and his judgment was part of a majority ruling against the Indian claim. The *Kanatawat* case[14] in Quebec challenged the James Bay Hydro-Electric project on the basis of unextinguished aboriginal rights. The issue was resolved in the end by a negotiated agreement. In 1977 Mr. Justice Dickson, speaking for the Supreme Court of Canada in an Indian hunting case, commented:[15]

> 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. *Attorney-General of British Columbia,* (1973) S.C.R. 313 — 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 an 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, and not on a global basis.

In 1979 the Federal Court, Trial Division, ruled on an Inuit claim to aboriginal title in the Baker Lake area of the Northwest Territories.[16] The court upheld Inuit aboriginal title, but narrowed it to the traditional use of the land.

The federal government issued a policy statement in 1973 on aboriginal title claims.[17] It undertook to negotiate settlements of aboriginal title claims

12. *St. Catherine's Milling* v. *The Queen* (1889) 14 A.C. 46.
13. *Calder* v. *Attorney General of British Columbia* (1973) S.C.R. 313. *See also* Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973) 51 *Can. Bar Rev.* 450; Sanders, "The Nishga Case" (1978) 36 *The Advocate* (Vancouver Bar Association) 121.
14. *Kanatawat* v. *James Bay Development Corporation,* unreported, 22 November, 1973 (Que. C.A.) *revg.* unreported, 15 November, 1973 (Que. Superior Ct.).
15. *Kruger and Manuel* v. *The Queen* [1978] 1 S.C.R. 104.
16. *Baker Lake* v. *Minister of Indian Affairs* (1978) 87 D.L.R. (3d) 342.
17. Reprinted in Sanders, *Cases and Materials on Native Law* (3rd ed. 1976) 82.

in major non-treaty areas of the country. Since that time negotiations have been underway in different parts of Canada, mainly in the northern territories.

Do the amendments constitute a major change in Canadian law on the question of aboriginal rights? There are arguments for both sides. It can be asserted that aboriginal rights claims are confined to claims to land and that the decisions of the Judicial Committee in *St. Catherine's* and of the Supreme Court of Canada in *Calder* mean that Canadian law has always recognized aboriginal title. What is unsettled is the exact content of aboriginal title and whether the concept applies in all parts of Canada. The fact that the amendment "recognizes" aboriginal rights suggests that the effect of the wording is not to create new rights, but to recognize existing rights. Therefore all the unresolved questions about aboriginal rights are still unresolved. They will be resolved by the courts or by negotiation. On the other hand, it can be asserted that we have never had a general recognition of aboriginal rights before. Arguments for aboriginal rights have, in the past, been linked strongly to specific historical documents such as the Royal Proclamation of 1763, a linkage which has been used in an attempt to limit the areas to which such claims can be asserted. Those problems are over, and surely the new provision will send a message to the courts and to the governments that past doubts about the reality of aboriginal rights are gone. The section, after all, is meaningless unless it has strengthened the concept of aboriginal rights in Canadian law.

THE TREATIES

The earliest Indian treaties in Canada were the treaties of peace and friendship in the Maritime provinces in the early 18th century which dealt primarily with political relations.[18] The Royal Proclamation of 1763 formalized the treaty-making procedure by confirming a Crown monopoly on the purchase of Indian lands and requiring a public assembly of the Indian population involved. Although the Proclamation applied to unacquired areas in the existing colonies, in practice the treaty policy was only applied in areas of new colonial settlement, beginning in southern Ontario. The treaty policy was continued in the West by the federal government after Confederation.[19] In the western treaties the government declared its desire to open up the area for settlement and to ensure peace and goodwill. It promised to establish reserves on the basis of one square mile per family of five. The reserve lands were "to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada . . .".

The treaties are fairly minimal documents. While there are some explicitly political aspects to the treaties, the main provisions of the written versions are the Indian surrender of land and the government promises of reserves, annuities, education, agricultural assistance and hunting and fishing rights.

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18. *See* Appendix III in *Native Rights in Canada* (2nd ed. Cumming and Mickenburg eds. 1972).
19. *See Indian Treaties and Surrenders* (3 volumes, Ottawa, 1891 and 1912) reprinted in *Coles Canadiana Collection* (1971); Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (1880) reprinted in *Coles Canadiana Collection* (1971). The post-Confederation treaties are reprinted in a series of pamphlets by the Department of Indian Affairs and Northern Development.

There are discrepencies between government records of treaty negotiations and the written text of the treaties. We now have well-documented descriptions of the Indian understanding of certain treaties, understandings which are markedly at variance with the written version.[20] The question of the correct content of the treaties is now understood, but far from being resolved.

The *St. Catherine's Milling* case,[21] decided by the Judicial Committee of the Privy Council in 1888, described the property consequences of an Indian treaty. As already discussed, the treaty was effective in ending the Indians' "personal and usufructuary right" to their traditional lands. The *Robinson Annuities* case,[22] decided by the Judicial Committee in 1896, dealt with the character and enforceability of treaties. Three arbitrators had ruled on the relative liabilities of Ontario, Quebec and Canada for treaty annuity payments promised under a pre-confederation Province of Canada treaty. The arbitrators asserted that the treaties were in the nature of international compacts and, for that reason, should be liberally construed. The Judicial Committee of the Privy Council neither accepted nor rejected that proposition:[23]

> That rule when rightly applied, in circumstances which admit of its application, is useful and salutary, but it goes no farther than this, that the stipulations of an international treaty ought, when the language of the instrument permits, to be so interpreted as to promote the main objects of the treaty. Their Lordships venture to doubt whether the rule has any application to those parts, even of a proper international treaty, which contain the terms of an ordinary mercantile transaction, in which the respective stipulations of the contracting parties are expressed in language which is free from ambiguity.

The Judicial Committee held that the annuity payments were an obligation of the federal, not the provincial government. Their Lordships stated that the Indians had received, under the treaty,[24]

> . . . a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due . . . . Seeing that the substantial question involved in these appeals is that of contract liability for a pecuniary obligation, they are of opinion that the rule followed by them in some really international questions between Canadian Governments ought not to apply here.

The treaty promises in question were treated as private law obligations arising out of contract. As with other contracts involving the federal government, the agreement was with the Crown represented in the preceding quotation by the governor. In two subsequent cases, Indians were able to enforce treaty provisions in the courts. In *Henry* v. *The King*[25] the Exchequer Court held the Crown liable for annuity payments under the "treaty or contract" between the Crown and the Indian group. In *Dreaver* v. *The King*[26] the Exchequer Court ruled that the government could not deduct the costs of medicines supplied to Indians from their band funds when they had promised to supply a "medicine chest" in the treaty.

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20. *See* Fumoleau, *As Long as This Land Shall Last* (1973); Institute for Research on Public Policy, *The Spirit of the Alberta Indian Treaties* (Price ed. 1979).
21. *Supra* n. 12.
22. *Attorney General of Canada* v. *Attorney General of Ontario* [1897] A.C. 199.
23. *Id.* at 211.
24. *Id.* at 213.
25. [1905] 2 Ex. C.R. 417.
26. Unreported, April 10, 1935 (Ex. Ct.).

In 1956 the Supreme Court of Canada decided the *Francis*[27] case on the question as to whether Indian exemptions from customs duties, promised in the Jay Treaty of 1794, were in effect in Canada. One argument was based on section 88 of the Indian Act, which gives some legal force to treaty provisions. Mr. Justice Kellock, in a judgment concurred in by one other justice, commented:[28]

> I think it is quite clear that "treaty" in this section does not extend to an international treaty such as the *Jay Treaty* but only to treaties with Indians which are mentioned throughout the statute.

Later decisions held that section 88 had no effect on federal laws in any case, so the comment is of little or no guidance.

The question of the exact status of treaties has been alluded to in recent decisions. The Ontario District Court in *Regina* v. *Batisse,* a hunting rights case, commented in 1978:[29]

> Indians have been hunting and fishing in Northern Ontario from time immemorial. Since the earliest days of colonization their rights to occupy and use their ancient lands have been recognized, and hence all North American Governments have taken steps to reach agreements with the Indians to regulate those rights and control development in Indian lands. When Treaty No. 9 was negotiated, the parties to the Agreement were on grossly unequal footings. Highly skilled negotiators were dealing with an illiterate people, who, though fearful of losing their way of life, placed great faith in the fairness of His Majesty, as represented by federal authorities. As a matter of fact, a careful reading of the Commissioners' Reports makes it fairly obvious that the Indians thought they were dealing with the King's personal representatives and were relying on the word of His Majesty rather than officials of Government. They agreed to give up their interest in their land for a few reserves (carefully chosen by the Government to be far away from any potential source of hydro power) and a few dollars per year per family. As a result, approximately 90,000 square miles of resource-rich land was acquired by the Crown, free of any beneficial Indian interest, for an absurdly low consideration (even for that time). It is still not clear whether Indian treaties are to be considered basically as private contracts or as international agreements. If the former, then the very validity of this treaty might very well be questioned on the basis of undue influence as well as other grounds.

The court proceeded to uphold the treaty-protected hunting rights against provincial legislation.

The Federal Court, Trial Division, in May, 1979 commented:[30]

> It is not necessary, for this purpose, to attempt a comprehensive definition of the legal nature of Treaty No. 8. Clearly, it is not a concurrent executive act of two or more Sovereign States. Neither, however, is it simply a contract between those who actually subscribed to it. It does impose and confer continuing obligations and rights on the successors of the Indians who entered into it, provided those successors are themselves Indians, as well as on Her Majesty in right of Canada.

The Federal Court, Trial Division, in July 1979 commented on the character of one of the pre-confederation treaties in Ontario:[31]

> It is obvious that the Lake-Huron Treaty, like all Indian treaties, was not a treaty in the international law sense. The Ojibways did not then constitute an "independent power", they were subjects of the Queen. Although very special in nature and difficult to precisely define, the Treaty has to be taken as an agreement entered into by the Sovereign and a group of her subjects with the intention to create special legal relations between them. The promises made therein by Robinson on behalf of Her Majesty and the "principal men of the Ojibewa Indians" were undoubtedly designed and intended to have effect in a legal sense and a legal context. The agreement can therefore be said to be tantamount to a contract, and it may be admitted that a breach of the promises contained therein may give rise to an action in the nature of an action for breach of contract.

A second line of cases deals with treaty promises which are in conflict with federal or provincial legislation. This issue has always come up in the context

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27. [1956] S.C.R. 618.
28. *Id.* at 631.
29. (1978) 19 O.R. (2d) 145.
30. *Town of Hay River* v. *The Queen* (1979) 101 D.L.R. (3d) 184 at 186.
31. *Pawis* v. *The Queen* (1979) 102 D.L.R. (3d) 602 at 607.

of treaty promises of hunting and fishing rights. Treaty-protected hunting rights have uniformly been held to be subject to federal legislation, notably the Migratory Birds Convention Act and the Fisheries Act.[32] Most hunting laws, however, are provincial. Treaty-protected hunting rights are protected against provincial laws by section 88 of the Indian Act which provides that provincial laws of general application apply to Indians subject to the terms of any treaty. That result depends upon section 88 and not the treaty alone.[33]

Additionally there are a series of cases which hold that treaties are to be liberally construed in favour of the Indians.[34] That rule, however, does not bear directly on the character of treaties.

The lack of a clear definition of the status of an Indian treaty in Canadian law is striking. The treaties were not ratified by federal legislation. The Indian Act has only two provisions dealing with treaties. Section 72 provides that treaty annuity payments are to be paid out of the consolidated revenue fund. Section 88 has already been noted.

The most common analysis of the treaties in the case law is to view them as contracts. But courts have been aware of a problem with this analysis. How does it explain the fact that the contract is with a collectivity, the members of which completely alter over time? Does the tribe have a legal entity apart from its individual members? No legislation confers legal status on the tribes. The case law is even equivocal whether bands established under the Indian Act are legal entities. If the treaties are contracts with continuing parties, the tribes must have a legal status arising from the indigenous legal systems. This involves some recognition of the original political separateness of the tribes. The analysis of treaties as contracts, then, leads to a view of treaties as having some international character.

The major alternative theory to the view of treaties as contracts is to deny any legal significance to treaties at all. This analysis suggests that they were politically motivated documents, designed to achieve peaceful relations. Governments may have a moral obligation to live up to the treaties, but there is no legal obligation. The case law does not support this view.

A third possibility is to view treaties as a form of subordinate legislation. It has often been asserted that the Royal Proclamation of 1763 has never been repealed and is still in effect. It was the Proclamation which formalized the procedures for treaty-making in Canada. The treaties could derive their authority from the Proclamation, without the need for subsequent ratification or implementation by Parliament. As long as the treaties came within the scope of the Proclamation, they would be valid as subordinate legislation. Like any other form of legislation, they would be subject to repeal, express or implied, by subsequent legislation. The difficulty with this argument is that the Proclamation describes the treaties solely in terms of land purchases, a

32. *R.* v. *Sikyea* [1964] S.C.R. 642; *R.* v. *George* [1966] S.C.R. 267.

33. *R.* v. *White and Bob* (1965) 52 D.L.R. (2d) 481; *Kruger and Manuel* v. *The Queen* [1978] 1 S.C.R. 104. The Supreme Court of Canada refrained from mentioning section 88 in the *Kruger and Manuel* case. The section would, therefore, appear to be unnecessary in making provincial hunting laws apply to Indians. Where, however, it specifies an exception (as it does when there are treaty-protected hunting rights) it is effective to prevent provincial laws from applying.

34. *See* for example, *R.* v. *Batisse* (1978) 19 O.R. (2d) 145.

narrow framework within which to view treaties. A second problem is that the Royal Proclamation would be the source of authority for the treaties in Ontario and the West, but not for the earlier treaties in the Maritime provinces.

Will the new constitutional amendments alter Canadian law on Indian treaties? Treaty rights will be "recognized and affirmed". This would seem to make the question of the original status of the treaties irrelevant. In that sense, it domesticates the treaties in a way that has not fully been done in the past.[35] Now we simply have to focus on the "rights" expressed in the treaties. It seems clear that this provision will alter Canadian law. The major decisions of the Supreme Court of Canada which held that treaty rights could be overridden by federal legislation would surely now be reversed. (Equally, if aboriginal rights are held to exist in a certain area the hunting and fishing rights cases which hold that aboriginal rights are subject to federal legislation would be equally vulnerable.) The change can also have consequences for claims involving reserve land entitlement under treaties, claims which are current in parts of Alberta, Saskatchewan, Manitoba and Ontario.

THE ABORIGINAL PEOPLES OF CANADA

The proposed amendments refer to the rights of the "Aboriginal Peoples of Canada", groups defined to include "the Indian, Inuit and Metis Peoples of Canada".

The aboriginal population of what is now Canada encompasses eleven separate language groups and numerous dialects. The status Indian population is divided into 561 bands who have rights to 2,300 reserves. There are Indian bands in all jurisdictions in Canada. In contrast Inuit communities are found only in the Northwest Territories, northern Quebec and Labrador. There are Metis communities in the three prairie provinces and the Northwest Territories and a small number of Metis "colonies" in Alberta, established under special provincial legislation.[36]

The Indian Act and the Department of Indian Affairs evolved to administer the Indian reserve communities. Early Indian legislation was concerned with defining the population entitled to live on reserves in order to more effectively act against the constant problem of squatters on reserve lands. The membership system which became established in Indian legislation used a patrilineal descent rule to define the status of members of nuclear family units. In this way, the government created a uniform system of membership for all Indian tribes in Canada. The government applied the Indian Act membership system to population groups, defined as bands, whose charter members were normally determined at the time of the establishment of reserves or at the time of treaty negotiations. The patrilineal character of the

35. It domesticates the treaties in two ways. The imperial authorization for treaties in the Royal Proclamation of 1763 would cease to be needed as a basis for the legal status of the treaties. Equally, an analysis of the treaties as international law documents would not be needed as a basis for the legal status of the treaties in Canadian law. If the treaties are international in character, the fact that Canada incorporates them in its constitution or in its domestic law does not, of course, end their status as international law instruments.

36. Metis Betterment Act, R.S.A. 1970, c. 233.

system meant that if the father had Indian status, his wife and children had Indian status as well. If the father was non-status, the wife and children lacked Indian status as well. A woman without Indian status could gain Indian status by marriage to a status Indian. A status Indian woman could lose Indian status by marriage to a person without Indian status. In contrast, the United States tended to use a racial criteria for Indian membership, often one-quarter descent.[37]

The Indian Act membership system involves two notable features. Because it does not involve a generic, conceptual or racial definition of Indian, it selected some Indians for recognition and refused to recognize others. The selective character of the system created the category of "non-status Indians". They are people with Indian descent who are not recognized as Indians for the purposes of the Indian Act.

A second notable feature of the Indian Act membership system is that it discriminates on the basis of sex. While that discrimination could not be challenged on constitutional grounds, it was challenged as in conflict with the Canadian Bill of Rights. That challenge was rejected by the Supreme Court of Canada in the *Lavell* case,[38] but the political controversy about the issue has continued. Successive Ministers of Indian Affairs have stated their intention to end the sexual discrimination in the Act.

The origin of the Metis population is separate from the origin of the non-status Indian population, though the two terms are used interchangeably on the prairies. The Metis population developed in the West during the fur trade period, roughly 1670 to 1870. By 1870 the population of Red River in southern Manitoba consisted of 5,720 French-speaking Half-Breeds, 4,080 English-speaking Half-Breeds and 1,600 white settlers. The Metis or Half-Breed population had a distinct self-identity and resisted the incorporation of the North-West into Canada without some recognition of their political demands and property rights. The resistance, the Red River "rebellion" of 1869-70, led to the negotiated entry of the North-West into Confederation and special provisions for "Half-Breed" land rights. The Manitoba Act of 1870 provided for 1,400,000 acres of land to be granted to the descendants of Half-Breed heads of families. This provision for Half-Breed grants was extended to the balance of the Prairies and the present Northwest Territories by the Dominion Lands Act. The system of Half-Breed grants ran parallel to the system of treaties and reserves for Indians. In spite of the terminology the division of the indigenous population into "Indians" and "Half-Breeds" was not exclusively racial either at the time of the original dealings or later. For example, at times the government promoted the conversion of individuals from "Indian" status to "Half-Breed" status in order to free Indian reserve lands.[39]

If there is a legal definition of Metis, it means the people who took Half-Breed grants under the Manitoba Act or the Dominion Lands Act and their

37. *See* Sanders, "The Bill of Rights and Indian Status" (1972) 7 *U.B.C. L. Rev.* 81.

38. *Attorney General of Canada* v. *Lavell* [1974] S.C.R. 1349.

39. *See generally* Stanley, *The Birth of Western Canada* (1936); Sanders, "Metis Rights in the Prairie Provinces and the Northwest Territories: A Legal Interpretation" in Daniels, *The Forgotten People* (1979).

descendants. Section 12 (1) (a)(i) of the Indian Act excludes those people from registration as Indians.

The question whether the Inuit people fall within the constitutional meaning of the term "Indian" in section 91 (24) of the British North America Act was referred to the Supreme Court of Canada by the federal government in 1939.[40] On historical grounds, the Supreme Court ruled that the drafters of the constitution would have considered the Inuit as a tribe of Indians. On that basis they were held to come within federal legislative jurisdiction over Indians. Section 4 of the Indian Act, however, specifically excludes Inuit. There are some provisions in federal statutes and regulations referring to Inuit, mainly in relation to hunting and fishing rights. The only equivalent of the Indian Act or the reserve system for Inuit are in the provisions of the James Bay and Northern Quebec Agreements which settled aboriginal title claims in northern Quebec. For other areas of Canada we have the paradox that Canada maintains a very centralized and uniform aboriginal policy for one group of "Indians", those registered as Indians under the Indian Act, and an almost completely undefined aboriginal policy for another group of "Indians", the Inuit of the Northwest Territories and Labrador. This is seen as a paradox by many Inuit, but has not troubled federal politicians.

The question whether Metis or non-status Indians come within the constitutional definition of the term "Indian" has not been decisively resolved. The loss of Indian Act status by marriage or by the voluntary process called "enfranchisement" would not logically have the effect of taking the person outside the constitutional category of "Indian". Current discussions about revisions to the membership system which would allow the reinstatement to membership of women who lost status by marriage indicates clearly the view of the federal government that the constitutional category cannot be limited by the legislative category created in the Indian Act.

The arguments in relation to the Metis might be thought to be different, but the difference does not bear scrutiny. It could be argued that the Metis were originally a mixed-blood population which had evolved a separate identity in the West before Confederation. Yet the Manitoba Act, which was passed both by the provisional government in Red River, and by the Canadian Parliament (and confirmed as part of the constitution by the Imperial Parliament), states that the Half-Breed grants were made toward the extinguishment of the "Indian Title" to the lands of Manitoba. Additionally, the practice after 1870 indicated that the government did not see a firm and clear division between the two populations. A federally appointed commissioner, reporting in 1944 commented:[41]

> In negotiating the various Indian treaties from time to time the original inhabitants of mixed blood were given the right to elect whether to take treaty or script . . . . When Treaty No. 8, with which we are more directly concerned in this inquiry, was concluded in 1899, a large proportion of those admitted into treaty at that time were of mixed blood.

The term used in the Manitoba Act and the Dominion Lands Act was "Half-Breed", a term with less political significance than "Metis". Clearly mixed-blood peoples were not excluded from Indian status when membership lists

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

41. *Report of the Honorable W. A. MacDonald on the exclusion of Half-Breeds from treaty lists* (August 7, 1944) reprinted in *Native Rights in Canada, supra* n. 18 at 325.

were first prepared and could not now be excluded from Indian status without purging the Indian reserve communities of at least half their population. The exclusion of "Half-Breeds" or "Metis" from the constitutional category of "Indians" would seem contrary to the Manitoba Act, contrary to early practice and disruptive of well-established patterns of Indian policy.

The question of the constitutional position of Metis and non-status Indians has been raised in three cases from Saskatchewan. The three prairie provinces are covered by the terms of the Natural Resources Transfer Agreements which are part of the constitution by the British North America Act of 1930. The Agreements define certain hunting rights for "Indians". The question has arisen whether Metis and non-status Indians are entitled to these constitutionally protected hunting rights. In *R.* v. *Pritchard*[42] a judge of the magistrate's court in Saskatchewan ruled that a non-status Indian, being an Indian by "race and ancestry", came within the constitutional category and had rights to hunt under the Natural Resources Transfer Agreements. The case was appealed to Saskatchewan District Court where it was mistakenly ruled that Pritchard came within the Indian Act definition of Indian.[43] In the *Laprise* case[44] in 1978, the Saskatchewan Court of Appeal noted that at the time of the Natural Resources Transfer Agreements the Indian Act defined Indians as persons entitled to be registered as such. The Court limited the definition for the purposes of the Natural Resources Transfer Agreement to people who were in fact registered as Indians. This meant giving a separate meaning to the term "Indian" in the Natural Resources Transfer Agreement than would be given to the term as found in section 91 (24) of the B.N.A. Act of 1867. A third case, *Bud and Crane,*[45] followed the *Laprise* decision.

The logical role for the courts, in defining the term "Indian" for constitutional purposes, is to allow it to encompass virtually all descendants of the aboriginal population. The decision as to what legislative categories are to be used for the purposes of government programs is a separate question and can be seen appropriately as the task of Parliament, not the courts. The existence of "Indian" hunting rights on the prairies under the Natural Resources Transfer Agreements should not be seen as requiring the courts to develop a limited definition of the term "Indian".

Will the proposed amendments alter the law as it now stands? It can be argued that Inuit, non-status Indians and Metis are already within the category of "Indians" under section 91 (24) of the British North America Act of 1867, and that the new definition is simply a codification of the existing constitutional rules. But the new section does not alter section 91 (24) and, therefore, would not seem to create federal jurisdiction where it did not previously exist. The section is designed to recognize and affirm the aboriginal and treaty rights of the three populations and section 24 is designed to protect those rights and other rights pertaining to the Aboriginal people from the egalitarian provisions of the charter of rights. Inuit aboriginal rights have been uncertain because of the absence of any clear adjudication on

42. *The Queen* v. *Pritchard,* unreported, 1 October 1971, J.D. of North Battleford (Sask. Magistrate's Ct.).

43. (1972) 32 D.L.R. (3d) 617.

44. *R.* v. *Laprise* (1978) 6 W.W.R. 85.

45. (1979) 4 Sask R. 161.

them. That has perhaps now changed with the recognition of Inuit claims in the James Bay and Northern Quebec Agreements and with the *Baker Lake* judgment. Metis rights flow from statutory and constitutional recognition of Metis aboriginal title claims as "Half-Breeds". The new provisions, in a general way, strengthen the aboriginal rights claims of the Metis and Inuit, but do not create wholly new claims.

The proposed amendments require that representatives of the Aboriginal Peoples of Canada will be participants at one of the mandatory federal-provincial constitutional conferences that are to be held after the government's constitutional package has been enacted by the Parliament of the United Kingdom. The section does not suggest how the representatives are to be chosen. It is likely that the federal government will continue to treat the leadership of the three national aboriginal organizations, the National Indian Brotherhood, Native Council of Canada and Inuit Tapirisat of Canada, as being representative of the Aboriginal Peoples of Canada and the proper representatives to be chosen. The leaders of those organizations were invited as observers at constitutional conferences in October, 1978 and February, 1979, and had two brief meetings with committees of the Continuing Committee of Ministers on the Constitution, one in 1978 and the other in 1979. It was the leaders of these organizations who were active in the lobbying and representations which led to the all-party agreement on Friday, January 30th, 1981.

ABORIGINAL SELF-GOVERNMENT

The proposed amendments make no mention of aboriginal self-government. The submissions of all three national aboriginal organizations to the Special Joint Committee included the following proposed section:

> Within the Canadian federation, the Aboriginal peoples of Canada shall have the right to self-determination, and in this regard Parliament and the legislative assemblies, together with the government of Canada and the provincial governments, to the extent of their respective jurisdictions, are committed to negotiate with the Aboriginal peoples of Canada mutually satisfactory constitutional rights and protections in the following areas: inter alia;
>
> a) Aboriginal rights;
> b) treaty rights;
> c) rights and protections pertaining to the Aboriginal peoples of Canada in relation to Section 91 (24) and Section 109 of the Constitution Act, 1867;
> d) rights or benefits provided in present and future settlements of Aboriginal claims;
> e) rights of self-government of the Aboriginal peoples of Canada;
> f) representation of the Aboriginal peoples of Canada in Parliament and, where applicable, in the legislative assemblies;
> g) responsibilities of the Aboriginal peoples of Canada and the provincial governments for the provision of services in regard to the Aboriginal peoples of Canada;
> h) the right to adequate land and resource base and adequate revenues, including royalties, revenue sharing, equalization payments, taxation, unconditional grants and program financing,
>
> so as to ensure the distinct cultural, economic and linguistic identities of the Aboriginal peoples of Canada.

The complexity of the section and its requirement of future negotiations reflects the difficulty of entrenching aboriginal self-determination or self-government without detailed provisions.

Indian legislation, at least since Confederation, has provided for a measure of Indian self-government at the reserve level. This is accepted without question as coming within federal legislative authority although the constitution only refers to jurisdiction over Indians and Indian lands. Indian reserve governments are a distinct order of government in the country. They are municipal-level governments within the provinces that are established by federal legislation. They are distinct from any other local government

units in the country as well since they are both the unit of local government and the collective land holder.

The future of Indian self-government must be seen in the context of two competing concepts of the function of reserves. The reserves were originally established as alternatives to the direct incorporation of the Indian populations into the colonial population. They were designed to settle the Indians, to educate and Christianize them, and establish agriculture as the primary economic base. The reserves were to be a temporary system of separate development: they were part of a long-term plan of assimilation. The reality was much different. Once the Indians were pacified and isolated, there was little Euro-Canadian interest in the reserve communities. The Indians were progressively marginalized, a process which prevented assimilation. The reserves, which were to be a vehicle for integration, failed. In failing, they became a structure which preserved the separateness of Indian communities.

The Indian view of reserves is much diffeent. While the tribal populations understood that they were facing fundamental changes in their way of life, they had no intentions of abandoning the political and social structures they knew. The reserves were areas where their societies could continue and develop. Initially the reserves were not confining. Extensive hunting and gathering activity could take place on traditional lands outside the reserves. As white settlement increased in the fertile areas of Canada, the economic base for the communities became increasingly restricted to the reserves, both by the loss of hunting lands and by the exclusion of Indians from the economic and political life around them. The reserves had become limiting, but they still served the Indian goal of distinct group survival.

The Indian band council system could be seen as an example of colonial indirect rule or as local democratic self-government. In practice, the Department of Indian Affairs used the system as one of indirect rule, with the result that chiefs and councils were more an extension of the Canadian government than the representatives of their people. The Department, at times, ousted chiefs whom they disliked and replaced them with their own preferred candidates. The local Indian Agent held the real power in the community. Band council meetings were called by the Agent, who prepared the agenda and presided over the meeting. This pattern survived until after the Second World War. In the last twenty years some bands have moved to virtually complete self-management of their reserve lands and have assumed the administration of many of the programs of the Department of Indian Affairs. Band legislative powers, set out in sections 81 and 83 of the Indian Act, are modest and have been the focus of little attention in the past. In 1979 and 1980 some bands have experimented with their by-law powers and four court cases have arisen testing band powers.[46]

No distinct local government systems were established by law for the Metis and Inuit populations, with minor exceptions. The Metis "colonies" in northern Alberta have a limited "band council" kind of government under special provicial legislation. The Inuit of Northern Quebec have forms of self-government under the James Bay and Northern Quebec Agreements.

46. To date the only reported decision is *R.* v. *Scobie* (1980) 30 N.B.R. (2d) 70.

Aboriginal leadership in Canada today takes a distinctively "nationalist" position, stressing the goal of self-determination or self-government within Canadian federalism. The document which most clearly marked the emergence of this position is the Dene Declaration of 1975.[47] It began:

> We the Dene of the Northwest Territories insist on the right to be regarded by ourselves and the world as a nation.
>
> Our struggle is for the recognition of the Dene Nation by the Government and peoples of Canada and the peoples and governments of the world.

The Declaration then described the end of colonialism in Africa and Asia but not in the Americas:

> The Dene find themselves as part of a country. That country is Canada. But the government of Canada is not the government of the Dene. The Government of the Northwest Territories is not the government of the Dene. These governments were not the choice of the Dene, they were imposed on the Dene.

The statement concludes:

> What we seek then is independence and self-determination within the country of Canada. This is what we mean when we call for a just land settlement for the Dene Nation.

The government reaction was negative. Indian Affairs Minister Judd Buchanan referred to the Dene Declaration as "gobbledegook". The federal politicians rejected native nationalism in a period in which they were fighting a strong nationalist movement in Quebec. In 1978 Indian Affairs Minister Hugh Faulkner reacted to Dene positions by claiming that the Dene "wanted more than Levesque".

The Inuit Tapirisat of Canada, the national Inuit organization, released a proposal in 1976 for the establishment of an Inuit territory in the Northwest Territories to be called Nunavut. A 1979 paper, Political Development in Nunavut, detailed how the territory would develop into a province in twelve or fifteen years. Because of the isolation and harsh climate of the Inuit lands, the Inuit felt they could maintain control of the jurisdiction if they had a ten year residency requirement for voting.

The federal government responded to both Dene and Inuit nationalism with a rejection of racially defined jurisdictions (other than Indian reserves) and the appointment of the Drury inquiry into the political evolution in the Northwest Territories. During the life of the Drury inquiry, the federal government refused to discuss political or jurisdictional questions as part of land claims negotiations in the Northwest Territories. The native organizations, other than C.O.P.E. in the Mackenzie Delta, were unwilling to separate the issues and no progress has occurred on a settlement of the Inuit or Dene claims. The Drury commission reported in 1980 with recommendations that have been rejected both by the territorial government and the native groups.[48]

The Native Council of Canada represents Metis and non-status Indian populations. In a brief circulated to first ministers in October, 1978, the Council identified their people as an historic national minority:[49]

> We are an historical national minority with rights inherent in that status which go beyond the right of equality of opportunity. The latter right assumes that we be assimilated into either French or English

47. The Dene Declaration is reprinted in *Dene Nation: The Colony Within* (Watkins ed. 1977) 3.
48. Supply and Services Canada, Report of the Special Representative, *Constitutional Development in the Northwest Territories* (January, 1980).
49. "Towards Co-equality: Integration v. Assimilation" in Daniels, *We Are the New Nation* (1979) 47.

> versions of Canadian society. As an historical national minority we have the right to remain separate and distinct from both versions and develop along lines dictated by our own cultural aspirations. The question for us, therefore, is not the vague, charitable one of gaining access to "equality of opportunity" in "the Canadian mosaic", but more correctly, how to relate to Canadian society without losing our identity, lands and those rights inherent in our aboriginal status in the process . . . .
> No other minority in Canada can say that it has a greater right to self-determination than we. We decided not to exercise this right in full when we brought Manitoba into Confederation in 1870. We believed in Confederation then and actively resisted annexation of the West to the United States. We thought Confederation would allow us to develop and prosper as a distinct people, as a partner in Confederation.

The Declaration of Rights of the Native Council of Canada, presented to the federal government in 1979, asserts:[50]

> . . . Metis nationalism is Canadian nationalism. We embody the true spirit of Canada and are the source of Canadian identity.
> That we have the right to self-determination and shall continue in the tradition of Louis Riel — to express this right as equal partners in Confederation.

The nationalist positions of the three national native organizations have led each to seek equal status in the constitutional negotiations. While the three organizations were invited to make submissions and to be participants in the discussions on matters directly affecting them, Mr. Chrétien, the federal Minister of Justice, cautioned their leaders in August of 1980 that, in his assessment, the idea of aboriginal governments as a kind of third order of government within Canada was a "non-starter" in any discussions with first ministers.

While the government has rejected the idea of aboriginal sovereignty it has accepted a notion of aboriginal self-government. Prime Minister Trudeau has identified one of the issues to be discussed with native organizations as "internal native self-government".[51] This is acceptable terminology for the federal government at the moment. "Self-determination within Canada" seems to be unacceptable terminology.

BREAKTHROUGH OR BUY-OFF?

This discussion of the amendments agreed to in the Special Joint Committee shows, I submit, that their impact on aboriginal and treaty claims is not easy to assess. On matters like federal legislative impairment of treaty-protected hunting rights, they can be expected to reverse existing laws. Paradoxically, those laws could have been easily reversed by federal legislation. The amendments undoubtedly will strengthen certain land claims at the expense of both federal and provincial governments. How dramatic that change will be is uncertain. The item which has been the focus of the strongest aboriginal assertions over the last five years, aboriginal self-government, is totally excluded from the package. As well, one important consequence of the recognition of aboriginal self-government is missing — aboriginal representatives have no role in any amending formula yet proposed, even on future constitutional changes that would alter their rights. Aboriginal people have good historical reasons to distrust our good

50. *Id.* at 54.

51. Speech of the Prime Minister April 29, 1980. The National Indian Brotherhood called the assembly the First Nation's Constitutional Assembly. The released text of the Prime Minister's speech referred to the meeting as "A National Conference of Indian Chiefs and Elders".

intentions. It is not easy to reassure them that future amendments are unlikely to harm their position.

The result is that the Special Joint Committee accepted those parts of the aboriginal positions which had become familiar. Aboriginal and treaty claims have been real national political issues in Canada for ten to fifteen years. Aboriginal self-government has been developing as a national political issue only over the last five years and has not yet achieved the breadth of support of the earlier issues. But aboriginal organizations had come to see the earlier definition of their claims in terms of aboriginal and treaty rights as too restrictive and too legalistic. Their more mature understanding of their goals within Canada were, in effect, rejected in favour of earlier and more limited goals. The earlier and more limited goals had been prompted by aboriginal marginality within Canada. On advice from well-meaning Euro-Canadians, they had asserted limited goals in the spirit of politics as the "art of the possible". Now they may only be able to achieve those limited goals. Perhaps this analysis helps to explain Indian reaction against the new amendments. It may, as well, explain why the reaction is only coming from Indian organizations and not from the Inuit and Metis who remain more marginal, politically, than the Indian groups. They would be more willing to take "half a loaf".

There are two other related points which may serve to explain why an agreement was delivered by the leadership of the National Indian Brotherhood, only to have that agreement withdrawn by the member organizations of the Brotherhood. Indian politics in Canada have two non-European features. There is little use of representative leadership and there is a clear distaste for bargaining and compromise. The process that occurred in the Special Joint Committee was a fascinating example of bargaining and compromise. Federal politicians, including the Prime Minister, openly stated that they were bargaining to gain the broadest possible support. The amendments in relation to aboriginal people and in relation to the handicapped were on points that the Liberal government had expressly rejected. But the ability to achieve an all-party consensus on parts of the package was irresistable, given the larger problems faced by the Liberal government on its proposals. The acceptance of the amendments on aboriginal and treaty rights occurred very quickly and withour prior public warning. It required lobbying, compromise and representative leadership. The federal politicians wanted their agreement on the new provisions to be endorsed by the aboriginal leadership. The aboriginal leadership accepted both the process and their roles as representative leaders. The member organizations of the National Indian Brotherhood reacted against both the compromise involved and assumption by the national leadership of representative powers. In other words, the federal political process made demands upon the Indian organizations which went contrary to their political structure or political culture. This meant that the Brotherhood had to either appear as weak and ineffectual to Euro-Canadians or that the Brotherhood's leadership had to take major political risks in relation to their own constituency. The leaders chose the latter course and the political costs to themselves have been high.

This is a flawed victory, but I am still willing to call it a victory. The aboriginal peoples' organizations have been major actors in the constitutional drama of the last few years. It was the Indian leadership that pioneered lobbying in England with their trip in 1979. They have persisted

in lobbying within Canada and could never completely be left off the agenda. While the end result, if it is enacted in a new constitution, is less than they wanted, it will be a unique constitutional provision with both a positive symbolism and a certain promise.

It will give the constitution an appropriate symbolic recognition of the aboriginal people upon whose lands the nation is built. As well it is a promise to recognize historic claims, a promise that we should keep.