

# THE RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

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*The provisions on aboriginal peoples in the Constitution Act, 1982, reflect the development of political and legal concerns in the period since the second World War. Canadian concern with aboriginal peoples has been in line with or ahead of similar developments in international law. Section 25 recognizes that the distinct group rights of aboriginal peoples cannot be subject to the egalitarian provisions of the Charter of Rights and Freedoms. Section 35 recognizes and affirms existing aboriginal and treaty rights, but does not substantively enhance those rights. It does prevent their nonconsensual limitation or extinguishment by other than a constitutional amendment. Section 37 provides for a special first ministers conference, recognizing that aboriginal questions were incompletely considered in the constitutional review process. A consent clause to amendments was omitted though there is some tradition of seeking aboriginal consent to changes which affect them. Any provision on aboriginal self-government was also omitted, though it has become a basic concern of aboriginal leaders in recent years.*

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*Les dispositions contenues dans la Loi constitutionnelle de 1982 se rapportant aux peuples autochtones reflètent l'évolution des préoccupations de nature politique et juridique depuis la deuxième guerre mondiale. Le Canada s'est penché sur le sort des peuples autochtones en même temps ou avant que le droit international ne le fasse. L'article 25 reconnaît que les droits ancestraux des peuples autochtones ne peuvent être assujettis aux dispositions égalitaristes de la Charte des droits et libertés. L'article 35 reconnaît et confirme les droits existants—ancestraux ou issus de traités—des peuples autochtones mais ne les accroît pas en substance. En l'absence de consentement mutuel, cet article empêche que ces droits soient restreints ou abolis autrement que par un amendement constitutionnel. L'article 37 prévoyant la tenue d'une conférence des premiers ministres, on reconnaît ainsi que les questions se rapportant aux peuples autochtones n'ont pas été entièrement examinées au cours du processus de la révision constitutionnelle. On a omis d'inclure une clause prévoyant le consentement de ces peuples à tout amendement bien qu'une certaine coutume exige que l'on obtienne ce consentement pour tout changement susceptible de les toucher. On a également omis d'inclure une disposition se rapportant au gouvernement autonome des peuples autochtones alors que c'était une des préoccupations essentielles des dirigeants de ces peuples aux cours des dernières années.*

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*Introduction*

The rights of the aboriginal peoples proved to be one of the most complex issues in the events which led to the patriation of the Canadian Constitution. In retrospect the political process employed was crucial to any agreement on substantive provisions about aboriginal peoples. If a special constituent assembly had been created to draw up new constitutional provisions, as was occasionally proposed, it seems clear that it would have favoured provisions on the rights of the aboriginal peoples. The special reports which were produced in the period, notably those of the Task Force on National Unity, the Canadian Bar Association and the Quebec Liberal Party, all proposed substantive provisions.<sup>1</sup> But the constituent assembly model was rejected in favour of traditional Canadian executive federalism, in which responsibility lay with the Prime Minister and the provincial premiers. When the provincial premiers were excluded by the federal unilateralism of October, 1980, responsibility lay with the federal executive. The results of executive decision-making were the delay or rejection of provisions relating to aboriginal peoples. In June, 1980, the Prime Minister and the provincial premiers agreed to put off aboriginal questions for a future stage of constitutional reform. That continued to be the federal government's position after the unilateral strategy was announced in October, 1980. After provisions on aboriginal peoples had been included in the reform package, it was a first Ministers meeting in November, 1981, which removed them. The executive can work behind closed doors. The negative decisions of June, 1980, October, 1980, and November, 1981, were made in closed meetings. The negative decisions were not explicitly acknowledged in the public statements issued after the meetings, reflecting the moral and political problems involved in Canada in opposing aboriginal claims. Throughout the reform period, politicians never publicly stated any opposition to substantive provisions on aboriginal and treaty rights. But the opposition existed. Executive decision-making allowed that opposition to prevail.

Provisions on aboriginal peoples were inserted in the reform package in a period in which federal executive decision-making had been partially abandoned. The federal government's unilateral strategy had proven highly unpopular and the government attempted to build support through the hearings of the Special Joint Committee on the Constitution in late 1980 and early 1981. The Special Joint Committee became a species of constituent assembly. The opposition parties and the various witnesses who appeared before the committee publicly favoured substantive provisions on the rights of aboriginal peoples. The federal government was able to appropriate that sentiment as support for its package by abandoning its

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<sup>1</sup> The various reports are described in Sanders, *Prior Claims: Aboriginal People in the Constitution of Canada*, in Peck (ed.), *Canada and the New Constitution, The Unfinished Agenda*, Institute for Research in Public Policy, Montreal (1983), Vol. 1, p. 225.

objections to an aboriginal and treaty rights clause. A deal was struck on January 31st, 1981, publicly endorsed by the three federal political parties and the three national aboriginal organizations. As already noted, the provision which emerged was dropped at the first ministers conference in November, 1981. It was restored in a modified form in response to public objections and Indian demonstrations.

Executive decision-making had been closed. In contrast the processes which led to agreements on a rights provision in January, 1981, and to restoration of a modified provision in November, 1981, were open. Non-governmental groups were participants. Politicians were called upon to publicly state their positions. Any such public process favoured provisions on the rights of aboriginal people.

The legislative history for section 35 of the Constitution Act,<sup>2</sup> 1982, gives little guidance as to what the provision means or was intended to mean. The section was the result of political bargaining. It reflects a broad consensus in Canadian thinking that the aboriginal people have been denied their rights and have legitimate claims against the Canadian state. It confirms that the aboriginal people are not now viewed simply as economically deprived or as victims of discrimination. Section 35 accepts aboriginal claims to special rights based, directly or indirectly, on their traditional control of the lands we now know as Canada.

The provisions on the rights of aboriginal people in the Constitution Act, 1982, are a re-emergence of issues which were featured in constitutional documents from 1763 to 1930. Constitutional provisions on aboriginal peoples are found in the Royal Proclamation of 1763,<sup>3</sup> the Constitution Act, 1867,<sup>4</sup> the Manitoba Act, 1870,<sup>5</sup> the Rupert's Land and North-Western Territory Order, 1870,<sup>6</sup> the British Columbia Terms of Union, 1871,<sup>7</sup> the Ontario and Quebec boundaries extension Acts of 1912<sup>8</sup> and the Constitution Act, 1930.<sup>9</sup> The provisions vary.<sup>10</sup> The Royal Proclamation, the Manitoba Act, the Rupert's Land and North-Western Territory Order and the Ontario and Quebec boundaries extension acts have provisions recognizing aboriginal territorial rights, usually by requiring compensation for their extinguishment. Provisions on the establishment of reserves are found in the British Columbia Terms of Union and in the Constitution Act,

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<sup>2</sup> C. 11 (U.K.).

<sup>3</sup> R.S.C. 1970, Appendix 1.

<sup>4</sup> 30-31 Vict., c. 3 (U.K.).

<sup>5</sup> R.S.C. 1970, Appendix 8.

<sup>6</sup> *Ibid.*, Appendix 9.

<sup>7</sup> *Ibid.*, Appendix 10.

<sup>8</sup> 2 Geo. V, cc. 40 and 45 (U.K.).

<sup>9</sup> R.S.C. 1970, Appendix 26.

<sup>10</sup> These constitutional provisions are described in Lysyk, *The Unique Constitutional Position of the Canadian Indian* (1967), 45 *Can. Bar Rev.* 513; Sanders, *op. cit.*, footnote 1.

1930. But this history has little to do with the provisions of the Constitution Act, 1982, other than the role it played in aboriginal claims litigation in the 1960s and 1970s. Aboriginal questions re-emerged in Canadian life in the years after the second World War for reasons distinctive to that period. The provisions of the Constitution Act, 1982, should be seen against the political and legal history of the post-war period.

Reforms were necessary in Canadian Indian policy after the second World War. Indians were clearly second-class citizens. They were denied the vote.<sup>11</sup> They had separate and unequal schools. They had no legal access to liquor. They were excluded from family allowances. The Indian Act<sup>12</sup> maintained old prohibitions against the potlatch and the sun dance, as well as a bar on collecting money to advance land claims. A Special Joint Committee of the Senate and House of Commons held hearings on the Indian Act from 1946 to 1948. The Committee recommended that "with few exceptions, all sections of the Act be either repealed or amended. . .".<sup>13</sup> It proposed a second special joint committee to review government proposals for a new Indian Act. The Committee also recommended the establishment of an Indian claims commission, modelled on one in the United States. The federal government rejected the proposal for a second special joint committee and introduced a revised Indian Act in the House of Commons in June, 1950. Indians mounted a campaign against the bill, which had been prepared without consultation. The campaign forced the government to withdraw the bill and to convene a meeting of Indian leaders in 1951 to approve the text of a new revision. Recognizing that meaningful Indian involvement in the legislative process had not occurred, the government promised that future amendments to the Indian Act would be preceded by adequate consultation.

The 1951 Indian Act<sup>14</sup> was a modest reform. Outdated sections were repealed. A centrally administered membership system was established.<sup>15</sup>

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<sup>11</sup> Indians in Nova Scotia had the vote, but not Indians in other jurisdictions. The history of the voting provisions is recounted in Hawthorn, *A Survey of the Contemporary Indians of Canada* (1967), Vol. 1, Ch. 13.

<sup>12</sup> R.S.C. 1927, c. 98.

<sup>13</sup> Fourth Report, Special Joint Committee of the Senate and House of Commons on the Indian Act, Tuesday, June 22nd, 1948, Minutes of Proceedings and Evidence, Session 1948, No. 5, p. 186.

<sup>14</sup> R.S.C. 1952, c. 149.

<sup>15</sup> Band lists were unevenly maintained before 1951. In parts of the country they did not exist until the 1951 provisions were implemented. There were two major controversies about membership on the prairies, both involving the federal government striking a group of people off the band lists alleging that their fathers or grandfathers had taken half-breed scrip or been non-Indians. The first incident is recounted in Sissons, Judge of the Far North (1968), p. 50. It led to a judicial inquiry, the report of which is partly reprinted as Appendix V in Cumming and Mickenberg (eds), *Native Rights in Canada* (2nd ed., 1972). The second incident generated considerable publicity and was resolved against the government in *Re Members of the Samson Band* (1957), 7 D.L.R. (2d) 745 (Alta D.C.).

Most of the liquor provisions could now be phased out at a local or provincial level. The federal vote was not extended to Indians, for the government felt there was a conflict between Indian special status and regular citizenship rights. As a compromise, the government permitted Indians to vote after 1950 if they signed a waiver giving up any tax exemptions under the Indian Act.

John Diefenbaker was elected as Prime Minister in 1957. He had defended Indians and Métis in his law practice in Saskatchewan.<sup>16</sup> Unlike any other major political figure of the period, he had a sense of the historical and legal claims of aboriginal people. He appointed the first Indian senator, James Gladstone. In 1960 he extended the federal vote to Indians, pledging that the vote would not affect special status or treaty and aboriginal rights. The earlier requirement on tax exemptions was dropped. There was little other legislative change. Two membership provisions which had caused controversy were repealed.<sup>17</sup> Diefenbaker established a second Special Joint Committee on Indian Affairs, with Senator Gladstone as a co-chairman.<sup>18</sup> The work of the committee led to a sharper concern with the exact roles of the federal and provincial governments in the provision of services to Indians. Diefenbaker placed Indian questions on the agenda of a federal-provincial conference in 1963. That led to a special federal-provincial ministerial conference on Indian affairs in 1964.<sup>19</sup>

The Special Joint Committee repeated the earlier recommendation of an Indian claims commission. Mr. Diefenbaker introduced legislation to establish such a commission in 1961, but passage was delayed by consultations with Indian groups. When the Diefenbaker government fell in 1963 a second claims commission bill was listed on the order paper. The establishment of a claims commission became Liberal party policy as well. Lester

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<sup>16</sup> In vol. 2 of his autobiography, *One Canada* (1977), at p. 117 Mr. Diefenbaker recounted: "From the beginning of my practice, I never charged a Métis or an Indian who came to me for advice. I was distressed by their conditions, the unbelievable poverty and the injustice done to them. I was touched when Maria Campbell, in her book *Halfbreed*, wrote of me:

He would represent anyone rich or poor, red or white. If they had a case and no money he would help. . . . He helped us, and the important thing was that he did so when no one else would."

Diefenbaker acted in the Indian hunting rights case *R v. Smith*, [1935] 3 D.L.R. 703 (Sask. C.A.).

<sup>17</sup> The amendments ended the possibility of non-voluntary enfranchisement and meant that any individual whose name had remained on the band lists after the 1951 revisions could not be challenged on the basis of pre-1951 allegations.

<sup>18</sup> The Special Joint Committee of the Senate and the House of Commons on Indian Affairs held hearings from 1959 to 1961. It made its second and final report on July 8th, 1981.

<sup>19</sup> Federal-Provincial Conference on Indian Affairs, Report of Proceedings, Indian Affairs Branch, Department of Citizenship and Immigration (Oct., 1974).

Pearson suggested there be an international character to the commission, perhaps by the inclusion of a Maori from New Zealand.<sup>20</sup>

Near the end of the Diefenbaker years, the federal government commissioned Professor H.B. Hawthorn to do a general study of the condition of Indians in the country. The report, published in two volumes in 1966 and 1967, was a modest, reformist document, designed to be saleable to the politicians and the bureaucracy.<sup>21</sup> It seemed to suit the reformism of the period, during which school integration was proceeding and a community development programme had been launched. The government held extensive consultations with Indian leaders on Indian Act reform in 1968 and 1969, complying with the promises of consultation which had been made after the revisions of 1951.<sup>22</sup>

The early Trudeau government was impatient with incremental reforms and proposed major structural change in the white paper of 1969.<sup>23</sup> Special status was identified as a trap. The proper goal was equality of rights. Federal responsibility for Indian affairs was to be phased out. The Indian Act would be repealed. Indian treaties would end. Aboriginal rights claims and the promised Indian claims commission were rejected. Commentators suggested that Mr. Trudeau's opposition to special status for Quebec had led to the rejection of special status for any other groupings within the country.

Indian activism had been developing. In 1965, 1968 and 1969 there were Indian demonstrations in Edmonton, Kenora, Cornwall, Lytton, Kamloops and The Pas. The Nishga Indians had begun their lawsuit claiming aboriginal title. The white paper of June, 1969, gave an emerging Indian leadership a unifying national issue. The policy was interpreted as a threat to the treaties, the reserves and the very survival of Indian collecti-

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<sup>20</sup> Though the claims commission had become the stated policy of the two major national parties, no commission was ever established. A claims commission was the stated policy of the Trudeau government until the white paper of June, 1969. Following part of that document, the government appointed Dr. Lloyd Barber as Indian Claims Commissioner, but the position had no adjudicative power. It was not the commission which had been promised. The investigative Indian Claims Commission which was established was changed into the Indian Rights Commission, as a result of negotiations between the National Indian Brotherhood and the federal government, but the new body never became truly functional. It is now generally accepted that claims should be settled by negotiation and not by the creation of a special tribunal like a claims commission.

<sup>21</sup> Hawthorn, *A Survey of the Contemporary Indians of Canada*, Vol. 1 (1966), Vol. 2 (1967).

<sup>22</sup> Reports of each of the consultations meetings were published by the Department of Indian Affairs and Northern Development. There are seventeen separate reports of the regional meetings, beginning with the one held in Yellowknife in July, 1968. The national meeting at the end of the process was published under the title *Verbatim Report of National Conference on Indian Act, April 28th - May 2nd, 1969, Holiday Inn, Ottawa.*

<sup>23</sup> Statement of the Government of Canada on Indian Policy (1969).

ties. The Indian opposition took all three national political parties by surprise. The federal government began funding Indian organizations to hold consultation meetings about the federal proposals, apparently expecting Indian opposition to dissipate. A Cree leader from Alberta, Harold Cardinal, replied to the white paper with a book *The Unjust Society* and the "red paper" which, with national Indian backing, was presented to Mr. Trudeau in the spring of 1970.<sup>24</sup> The Prime Minister expressed his personal preference for the goal of equality, but formally withdrew the white paper. The white paper controversy was a major embarrassment to the Trudeau government, which had come to power pledging social justice. The controversy led to the "core funding" programme, under which the federal government gave annual grants to Indian, Inuit and Métis organizations, to allow them to effectively represent their people.

Indian political and legal activity during the first half of the 1970s focused on aboriginal and treaty claims. Three major lawsuits proceeded through the courts involving aboriginal title claims in British Columbia, the Northwest Territories and Quebec.<sup>25</sup> The Supreme Court of Canada divided equally on the survival of Indian aboriginal title in British Columbia in the *Calder* decision of January, 1973.<sup>26</sup> The minority Liberal government of the day was under pressure from opposition political parties and from sympathetic public opinion. In February, 1973, the government agreed to negotiate a settlement of Indian aboriginal title claims in the Yukon territory.<sup>27</sup> In August it announced a general policy of negotiating settlements in northern Quebec, British Columbia and the northern territories.<sup>28</sup> That policy statement preceded by about three months a ruling by the Quebec Superior Court ordering a halt to the massive James Bay hydro-electric project on the basis of unextinguished Cree and Inuit aboriginal title. While the injunction was hastily lifted by the Quebec Court of Appeal, pending a full hearing, there was now considerable pressure on the

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<sup>24</sup> (1969); Indian Chiefs of Alberta, Citizens Plus (Indian Association of Alberta, June, 1970).

<sup>25</sup> *Calder v. Attorney General for British Columbia*, [1973] S.C.R. 313; *Re Paulette*, [1973] 6 W.W.R. 97; rev'd on other grounds, [1976] 2 W.W.R. 193 (N.W.T.C.A.), [1977] 1 W.W.R. 321 (S.C.C.); *Kanatawat v. James Bay*, Quebec Superior Court, Malouf J., Nov. 15th, 1973, unreported, leave to appeal to the Supreme Court of Canada denied from the lifting of the interim injunction, [1975] 1 S.C.R. 48. The only notable later case is *Baker Lake v. Minister of Indian Affairs and Northern Development* (1978), 87 D.L.R. (3d) 342 (F.C.T.D.).

<sup>26</sup> *Ibid.*

<sup>27</sup> See Lysyk, Bohmer, Phelps, Report of the Alaska Highway Pipeline Inquiry (1977), Ch. 8.

<sup>28</sup> The Aug. 8th, 1973, Statement of the Federal Government on Aboriginal Claims was about four pages. It is reprinted in Sanders, *Cases and Materials on Native Law* (1976), p. 82. It is described, though not reprinted, in *In All Fairness; A Native Claims Policy* (1981).

Quebec government to arrive at a negotiated settlement. An agreement in principle was announced in the fall of 1974 and a final agreement was signed the following year. The issues in the Northwest Territories became the subject of the Mackenzie Valley Pipeline Inquiry. The Inquiry, headed by Judge Thomas Berger, received extremely favourable publicity during the three years of hearings and deliberations preceding its 1977 report.<sup>29</sup>

General economic conditions became progressively worse in the years after 1973. The James Bay project has been completed, but other northern energy projects have died, reducing the pressure on aboriginal peoples for negotiations or litigation. In this period aboriginal groups have increasingly focused on political rights as the proper framework for their claims. The first major signal of this evolution was the Dene Declaration of 1975, in which the Indians of the Northwest Territories sought recognition as a nation within Canada.<sup>30</sup> The claim to political rights led the aboriginal groups to see the issue of constitutional reform as an aboriginal issue. The response from both Prime Minister Clark and Prime Minister Trudeau was accommodative. Both recognized the legitimacy of aboriginal participation in the reform process and the appropriateness of new provisions on the rights of aboriginal people.<sup>31</sup> Promises were made only to be denied in practice. As a result aboriginal groups became opponents of the reform process. The aboriginal demands appeared to have been satisfied by the agreement of January 31st, 1981, on an aboriginal and treaty rights clause. But when the aboriginal groups realized that no additional progress was going to occur on the recognition of a right of self-government or on a consent clause to future amendments, the two major aboriginal organizations resumed their opposition.<sup>32</sup> That opposition continued through the balance of the reform process, down to the declaration of April 17th, 1982, as a day of mourning.

In the end, the new constitution has three provisions on aboriginal peoples. Section 25 protects certain rights of the aboriginal peoples from the egalitarian provisions of the Charter of Rights and Freedoms. Section 35 recognizes and affirms existing aboriginal and treaty rights. Section 37 provides for a first ministers conference to discuss the rights of the aboriginal peoples, with aboriginal representatives in attendance.

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<sup>29</sup> Berger, *Northern Frontier, Northern Homeland; The Report of the Mackenzie Valley Pipeline Inquiry*, Vol. 1 (1977).

<sup>30</sup> See Watkins (ed.), *Dene Nation; The Colony Within* (1977), p. 3.

<sup>31</sup> See Sanders, *The Indian Lobby*, to be published in a collection of papers on the patriation process by the Institute for Intergovernmental Relations, Queen's University.

<sup>32</sup> The two organizations were the National Indian Brotherhood (later renamed the Assembly of First Nations), representing status Indians and the Native Council of Canada, representing Métis and non-status Indians. The Inuit have a national organization, Inuit Tapirisat of Canada, but the Inuit involvement in the constitutional reform process was generally by the Inuit Committee on National Issues.



Canada is not the only country with substantive provisions in its constitution for aboriginal peoples. We tend to be familiar only with the division of powers arrangements for indigenous peoples in the federal Constitutions of the United States and Australia. Substantive rights provisions occur in certain constitutions in Central and South America. The Constitution of Brazil provides:<sup>33</sup>

Lands inhabited by forest-dwelling aborigines are inalienable under the terms that federal law may establish; they shall have permanent possession of them and their right to the exclusive usufruct of the natural resources of all useful things therein is recognized.

The Constitution of Panama provides:<sup>34</sup>

The State guarantees to the indigenous communities reserves of land and the collective property in the same, necessary for the attainment of their economic and social well-being.

The Constitution of Mexico provides that the land of indigenous communities is inalienable and prohibits its seizure or transfer. The Constitutions of the Soviet Union and China have provisions for "autonomous" governmental units for minority nationalities. We have traditionally conducted our aboriginal policies in isolation from the experience in other jurisdictions. No external examples were cited in the debates on sections 25, 35 and 37.<sup>35</sup>

The Charter of Rights and Freedoms was influenced by international human rights instruments, notably the International Covenant on Civil and Political Rights. It does not appear, however, that the aboriginal rights provisions were influenced by international law developments. They could have been.<sup>36</sup> In 1973 Louis B. Sohn, the distinguished United States authority on the international law of human rights, stated that the subject of the human rights of indigenous peoples was "clearly on the agenda of the world community".<sup>37</sup> Professors Richard Falk and Ian Brownlie made submissions to the Mackenzie Valley Pipeline Inquiry to the effect that

<sup>33</sup> This translation is from Brazil, Report to the Committee on the Elimination of Racial Discrimination, CERD/C/66/Add. 1, July 17th, 1979, p. 11.

<sup>34</sup> Constitution of 1972, art. 116, translation by writer.

<sup>35</sup> There have been two comparative institutions that have interested Canadians, the United States Indian Claims Commission and the special Maori seats in the New Zealand Parliament. While we have discussed these on many occasions, we have never adopted either institution.

<sup>36</sup> See Clinebell and Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law* (1977-78), 27 *Buffalo L. Rev.* 669; Bennett, *Aboriginal Rights in International Law*, Royal Anthropological Institute of Great Britain, Occasional Paper No. 37 (1978); Opkekokew, *The First Nations: Indian Government in the Community of Man*, Federation of Saskatchewan Indian Nations (1982); Sanders, *The Re-emergence of Indigenous Questions in International Law*, to be published in the inaugural number of the *Canadian Yearbook of Human Rights*, University of Ottawa.

<sup>37</sup> *The Wingspread Report: Protection of Human Rights for Indians and Inuits* (1973), p. 2 of the forward.

international law principles, including the right of self-determination, applied to the Dene in the Canadian north. In 1981 an Australian legal scholar wrote:<sup>38</sup>

If there is not yet to hand an applicable body of international standards for the most central concerns of Aboriginals and Islanders—group recognition, autonomy, land rights—it appears to be only a matter of time before there will be.

In 1957 the International Labour Organization completed Convention 107 on the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.<sup>39</sup> The focal point of discussions on the special problems of indigenous peoples proved to be in the United Nations concern with racial discrimination. In 1971 the Sub-commission on the Prevention of Discrimination and the Protection of Minorities commissioned a special study on discrimination against indigenous populations.<sup>40</sup> Indigenous questions featured in the final statement of the 1978 United Nations conference on racism. It was an agenda item for a regional human rights seminar in Nicaragua in 1981.<sup>41</sup> In 1982 the Sub-commission established a Working Group on Indigenous Populations which will meet in Geneva each summer.<sup>42</sup> And the situation of indigenous populations is on the agenda of the second United Nations conference on racism to be held in Geneva in August, 1983.

Two international organizations of indigenous peoples have been established and are accredited as "non-governmental organizations" by the Economic and Social Council of the United Nations. The largest, the World Council of Indigenous Peoples, was formed under the sponsorship of the National Indian Brotherhood of Canada and has its secretariat in the Department of Native American Studies at the University of Lethbridge in southern Alberta.<sup>43</sup> The Indian Law Resource Centre, an Indian controlled

<sup>38</sup> Nettheim, *Victims of the Law* (1981), p. 4.

<sup>39</sup> The Convention (No. 107), is reprinted and discussed in Bennett, *op. cit.*, footnote 36.

<sup>40</sup> The Special Rapporteur assigned to the report is Mr. Martinez Cobo of the Sub-commission on the Prevention of Discrimination and the Protection of Minorities. Mr. Wilhelmsen Diaz of the Human Rights Division has been preparing the report, which, as of early 1983, remains incomplete.

<sup>41</sup> The writer was commissioned by the Human Rights Division of the United Nations to prepare one of two background reports for the seminar. It appears that the Managua seminar was the first United Nations conference to have indigenous peoples as an agenda item. While provisions on indigenous peoples were included in the final statement of the 1978 racism conference, the subject was raised in the meeting by the Norwegian delegation and had not been on the agenda.

<sup>42</sup> The chairperson of the Working group is Mr. Asbjorn Eide of Norway. Mr. Eide had been part of the Norwegian delegation at the 1978 United Nations conference on racism and had testified on behalf of the indigenous Sami people of Norway in litigation challenging plans for a major hydro-electric project on the Alta River.

<sup>43</sup> The only account of the organization is Sanders, *The Formation of the World Council of Indigenous Peoples*, Document No. 29, International Work Group for Indigenous Affairs (1977).

law group in Washington, D.C., has also gained "non-governmental organization" status. As well, a number of non-indigenous support organizations are active internationally, notably the International Work Group for Indigenous Affairs, Survival International, the Anthropology Resource Centre and Cultural Survival.<sup>44</sup> An informal working group of nations has emerged, concerned with indigenous questions in the international system. The group is led by Norway and includes Denmark, Finland, Sweden, the Netherlands and Australia. Canada is a member, a fact apparently better known in Oslo than in Ottawa.<sup>45</sup>

Canadians have not generally been aware of the international developments on indigenous peoples. In deciding upon new constitutional provisions we were not so much responding to international developments as moving in a parallel or pioneering manner. It will surprise most Canadians to know that Canada's international reputation on indigenous questions is very good. While we are conscious of how poorly we have done, we are ahead of most other countries in acknowledging the situation and accepting aboriginal peoples as distinct political groupings within the state.

What exactly have we done on aboriginal questions in the Constitution Act, 1982? Let us examine the three sections which have been included, sections 25, 35 and 37, and the two major items which were omitted, a consent clause for amendments and aboriginal self-government.

### I. *Section 25.*

Section 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.

Section 25 recognizes that the rights of aboriginal people, as distinct group rights, could be seen as in conflict with the egalitarian provisions in the Charter of Rights and Freedoms. This is, by now, a familiar issue in Canada. The white paper of 1969 perceived such a conflict and resolved it in favour of equality. After the government withdrew the white paper, it seemed that the courts might accomplish the same goal by applying the 1960 Canadian Bill of Rights<sup>46</sup> to the Indian Act. In 1969 the Supreme

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<sup>44</sup> The support organizations are described in Bodley, *Victims of Progress* (2nd ed., 1982), Ch. 10.

<sup>45</sup> Contact was apparently established through the Canadian embassy in Oslo. The major figure within Norway in developing this informal grouping has been Mr. Knut Sverre, who was an ambassador at large concerned with human rights until the change of government in the fall of 1981.

<sup>46</sup> S.C. 1960, c. 44.

Court of Canada ruled that a liquor section of the Indian Act was inoperative because of conflict with the Canadian Bill of Rights.<sup>47</sup> In 1972 a trial judge ruled that the whole Act was inoperative.<sup>48</sup> In 1973 the Supreme Court of Canada halted this trend when it upheld sexually discriminatory provisions in the Indian Act membership system.<sup>49</sup>

The United States courts exempted the Indian area from the application of their constitutionally entrenched Bill of Rights, partly on the basis that the authority of tribal governments derived originally from sources outside the United States Constitution. In 1968 Congress enacted an Indian Civil Rights Act,<sup>50</sup> as part of the Civil Rights Act of that year. It applied Bill of Rights provisions to Indian communities, but with significant modifications (one of which allowed theocratic governments). In 1978 the Supreme Court of the United States upheld tribal membership criteria virtually identical to the criteria upheld in Canada in the *Lavell* case.<sup>51</sup> Neither the constitutional nor the legislative bill of rights is currently seen as a threat to Indian special status in the United States.

A similar resolution appears to be developing in the international law of human rights. The 1957 International Labour Organization Convention on the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries<sup>52</sup> recognized aboriginal title to traditional lands, but defined the major goal as the integration of tribal populations. The Convention limits "special measures" to the period in which "the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong . . .". Special measures must not create or prolong "a state of segregation . . .".

Racial discrimination is condemned in the Charter of the United Nations and in the Universal Declaration of Human Rights. It is prohibited by the 1965 International Convention on the Elimination of All Forms of Racial Discrimination<sup>53</sup> and by the 1966 International Covenant on Civil and Political Rights.<sup>54</sup> The Racial Discrimination Convention made provi-

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<sup>47</sup> *R v. Drybones*, [1970] S.C.R. 282.

<sup>48</sup> *Isaac v. Davey*, [1973] 3 O.R. 677. The issue was not determined by the Ontario Court of Appeal until after the Supreme Court of Canada ruling in *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, with the result that the arguments based on the Canadian Bill of Rights were abandoned both at the level of the Court of Appeal and the Supreme Court of Canada.

<sup>49</sup> *Attorney General of Canada v. Lavell*, *ibid.*

<sup>50</sup> 25 U.S.C. §§1301-1303.

<sup>51</sup> *Santa Clara Pueblo v. Martinez* (1978), 436 U.S. 49.

<sup>52</sup> *Supra*, footnote 39.

<sup>53</sup> Res. 2106A (XX) of Dec. 21st, 1965, in force Jan. 4th 1969.

<sup>54</sup> Res. 2200 (XXI) of Dec. 16th, 1966, in force March 23rd 1976.

sion for affirmative action programmes, while providing that any such measures should not.<sup>55</sup>

. . . lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Yet it was out of the concern with racism that a focus on the distinct problems of indigenous peoples has arisen. The study, currently underway, of discrimination against indigenous populations was suggested in an early draft of a major United Nations study on racial discrimination. The discussions in the Committee on the Elimination of Racial Discrimination (established under the 1965 Convention) have treated indigenous policy issues as distinct questions. This recognition of the unique aspects of indigenous questions was confirmed in the final statement of the 1978 United Nations conference on racism and subsequent meetings during the balance of the decade to combat racism. As well, the decision of the Human Rights Committee in the *Lovelace* case found the goal of tribal survival to be not inconsistent with the provisions of the International Covenant on Civil and Political Rights.<sup>56</sup>

Given national, comparative and international experience on this issue it was appropriate that two kinds of provisions should be included in the Charter of Rights and Freedoms. Section 15(2) allows temporary affirmative action programmes. Section 25 protects, on a permanent basis, the special rights of aboriginal peoples.

What rights are protected by section 25? Given that the section is not a source of rights, the language could be and is very broad. When section 25 refers to "any aboriginal, treaty or other rights or freedoms" does it require that the rights must be "existing" as of the date of the provision? Does it require that the rights and freedoms be ones which had been legally recognized? Indian leaders argue that they have an aboriginal and treaty right to determine their own membership. This right has not been recognized in Canadian law. Parliament has assumed the authority to determine Indian membership by legislation. If a court were to rule that self-definition of membership was an aboriginal right there could still be no conflict between the aboriginal right and the Charter of Rights and Freedoms, for the legal system does not recognize any decisions of an Indian group over membership which are not in compliance with the Indian Act system. Section 25 does not allow an aboriginal right of self-definition of membership to prevail over the Indian Act.<sup>57</sup> If, however, the federal govern-

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<sup>55</sup> Art. 1 (4). The Convention can be found in Brownlie, *Basic Documents on Human Rights* (2nd ed., 1981), p. 150.

<sup>56</sup> *Lovelace v. Canada* (1981), 2 Human Rights L.J. 158.

<sup>57</sup> It would have to be argued that the Indian Act was in conflict with the Charter and no longer in force, which would presumably leave bands free to determine their own membership.

ment withdrew from determining membership in favour of the tribes, would this restoration of an aboriginal right to determine membership prevail against the Charter of Rights and Freedoms? Logically it should, unless the courts freeze rights as of April 17th, 1982. There is no mandate in section 25 for such a restrictive interpretation.

Does section 25 protect existing legislation, notably the Indian Act, against the Charter of Rights and Freedoms? While the Indian Act may confirm certain aboriginal and treaty rights to reserve lands, it could not be described solely in terms of such rights. Are the Indian Act provisions on membership included within the "rights and freedoms that pertain to the aboriginal peoples" so as to protect that system from the Charter of Rights and Freedoms? Certainly the membership system is about "rights" and about rights which "pertain" to the aboriginal peoples. If the wording had been "the rights of the aboriginal peoples" it would have been reasonably clear that the definition of membership was not a recognized right of the aboriginal peoples. The language used is much more inclusive. It is difficult to think of a broader word than "pertain". It seems, therefore, that section 25 would protect the Indian Act membership system from the Charter of Rights and Freedoms. Is section 25 subject to section 28, which provides:

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

As Hogg notes,<sup>58</sup> section 28 was inserted to ensure that the Charter provisions on sexual equality could not be overridden by the process described in section 33. It was not aimed at section 25. But, nevertheless, we are left with the section 28 "notwithstanding" language and the section 25 non-abrogation, non-derogation language. By regular norms of statutory interpretation, section 25, as the specific provision, would prevail over section 28, the more general provision. It seems, therefore, that the new provisions will not reverse the *Lavell* decision, but leave the question to legislative resolution. This is somewhat surprising, for the federal politicians seemed to believe that the new provisions would themselves resolve the issue in favour of sexual equality.

The subsections of section 25 are reasonably clear. As Lysyk suggests, the reference to the Royal Proclamation of 1763 in section 25(a) has symbolic importance.<sup>59</sup> The judgments in the Supreme Court of Canada in the *Calder* case seem to have made the question of the application of the Royal Proclamation largely irrelevant in land claims litigation.<sup>60</sup> For

<sup>58</sup> Hogg, *Canada Act 1982 Annotated* (1982), p. 73.

<sup>59</sup> Lysyk, *The Rights and Freedoms of the Aboriginal Peoples of Canada* in Tarnopolsky and Beaudoin (eds), *The Canadian Charter of Rights and Freedoms* (1982), p. 467.

<sup>60</sup> *Calder v. Attorney General of British Columbia*, *supra*, footnote 25. Mr. Justice Hall's reasoning would have the Proclamation apply as a codification of common law

aboriginal people, the Proclamation is significant in its recognition of them as distinct political groupings ("nations or tribes") and its formalization of the treaty methodology, a consensual methodology for authorizing changes in Indian-European relations.

Section 25(b) prospectively includes future land claims settlements within the protection of the section. Existing land claims settlements would be included in the main body of section 25. Lysyk has suggested that the phrase "land claims settlement" would be limited to what the government has termed since 1973 "comprehensive claims", that is aboriginal title claims in non-treaty areas. But the phrase should also include those "specific claims" which relate to land. So, for example, the treaty land entitlement claims in Saskatchewan and the cut-off land claims in British Columbia would give rise to land claims settlements for the purposes of section 25(b). The settlement of disputes about treaty annuity payments or interest on band trust funds would not.<sup>61</sup>

## II. Section 35.

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

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

The Canadian legal system has given some recognition to aboriginal rights, most commonly in the area of land rights. The Royal Proclamation of 1763 recognized Indian land rights, though the exact geographical application of the Proclamation has never been authoritatively settled. Provisions in the Rupert's Land and North-Western Territory Order of 1870 and in the Quebec and Ontario boundaries extension acts of 1912 recognized Indian land rights in the context of requiring compensation or treaties.

Aboriginal rights to land flow from the prior occupation of Canada by aboriginal populations. They are, logically, part of the package of rights which the tribes had before European colonization. A full recognition of aboriginal rights would involve (a) the recognition of aboriginal self-

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principles. Mr. Justice Judson stated that the Proclamation was not the exclusive source of aboriginal title and referred, instead, to long established occupation of the land as the basic concept.

<sup>61</sup> The comprehensive claims policy of the federal government is stated in *In All Fairness; A Native Claims Policy*, *op. cit.*, footnote 28. The specific claims policy is stated in *Outstanding Business; A Native Claims Policy* (1982). The full extent of reserves promised in the prairie treaties have not been established, particularly in the northern areas. Extensive negotiations and implementation have gone into the resolution of treaty land entitlement questions in Saskatchewan. The cut-off lands issue is peculiar to British Columbia, and refers to lands excised from Indian reserves as part of the implementation of the McKenna-McBride Royal Commission Report on Indian Affairs in the Province of British Columbia. The lands were taken without the regular consent required by the terms of the Indian Act.

government, (b) the recognition of customary aboriginal law, (c) the recognition of aboriginal land rights, and (d) the recognition of land-based rights, such as those of hunting, fishing and trapping. Aboriginal rights have tended to be seen in Canada only in terms of the last two categories. This narrow view would have been consistent with an analysis of aboriginal rights as a form of prescriptive title to land. But the courts have not described aboriginal rights in those terms.

There has been an assertion by Indian leaders, particularly from British Columbia that an explicit recognition of aboriginal title is important. They have argued that "aboriginal rights" could be narrowly interpreted as limited to cultural rights. The reaction of most lawyers is to see "aboriginal rights" as a broad term which would include aboriginal title and other rights. The Indian argument sees the ownership of the land as the fundamental concept on which other rights, including the right of self-government, are based. On reflection, the difference in terminology reflects different cultural perceptions, not a debate on the meaning of words.

The legal question of the existence of aboriginal title in British Columbia, the Yukon and Northwest Territories, parts of Quebec and Atlantic Canada cannot, at present, be answered. The split decision of the Supreme Court of Canada in *Calder* and the rulings in subsequent decisions do not resolve the question.<sup>62</sup> Given the nature of judicial decision-making in the British tradition, a ruling in the future that aboriginal rights or aboriginal title exists in British Columbia would be a ruling that it was an "existing" right on April 17th, 1982.

No figure is in common usage to indicate the number of treaties which exist in Canada with aboriginal people. There are a small number of 18th century treaties of peace and friendship in Nova Scotia and New Brunswick. There are a large number of pre-confederation treaties and surrenders in southern Ontario. There are fourteen pre-confederation treaties on Vancouver Island. There are thirteen post-confederation treaties between the Quebec-Ontario border and the Rocky Mountains. And there is the question whether the James Bay and Northern Quebec Agreements are treaties.<sup>63</sup>

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<sup>62</sup> See Sanders, *Aboriginal Peoples and the Constitution* (1981), 19 *Alta L. Rev.* 410, at p. 411.

<sup>63</sup> The treaties are not brought together in any one publication. The post-confederation treaties are published in separate booklets by the Department of Indian Affairs. The pre-confederation treaties in what is now Ontario are published in the three volume set *Indian Treaties and Surrenders*, originally published by the Queen's Printer in 1891 and 1912 and reprinted in the *Coles Canadiana Collection* in 1971. The classic account of the negotiation of the treaties in western Canada is *Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto, Belfords, Clarke, 1880), reprinted in the *Coles Canadiana Collection* in 1971. A recent study is *Price (ed.), The Spirit of the Alberta Indian Treaties*, Institute for Research on Public Policy (1979).



Indian people have raised questions as to whether pre-confederation treaties would be covered by section 35. The Supreme Court of Canada ruled in the *Miller* case<sup>64</sup> in 1949 that liabilities of the Province of Upper Canada incurred before 1840 were not assumed by the Province of Canada and therefore were not assumed by the Government of Canada in 1867. The specific claims policy of the federal government states:<sup>65</sup>

No claims shall be entertained based on events prior to 1867 unless the federal government specifically assumed responsibility therefor.

This would not exclude all claims based on pre-confederation treaties, but would probably exclude all claims arising from breaches of such treaties which occurred before confederation. There is no reason to limit section 35 to post-confederation treaties. The *Miller* decision and the government's specific claims policy have to do with the survival of certain claims, but give no basis for narrowly interpreting the term "treaty" in section 35.

Certain Indian leaders have questioned whether section 35 would include treaties signed outside of Canada. The major concern appears to be the Iroquois and treaties signed in what is now the United States before many of the Iroquois moved into what is now Canada. To the degree to which the treaty rights involved are those of aboriginal people in Canada and to the degree that they are enforceable in Canada, there seems no reason to rule that they are excluded from section 35.<sup>66</sup>

Are the James Bay and Northern Quebec Agreements treaties? The terminology used was "agreement" not "treaty", but the choice of words should not be determinative of the status of the documents. The key factor would seem to be the fact that they were the result of agreement and not simply the result of the exercise of legislative authority on the part of the governments of Quebec and Canada. There were long negotiations. The agreements were the subject of referenda among the Cree and Inuit populations before being enacted as statutes. There seems no reason to doubt that they are treaties and included within section 35.

What is the significance of the word "existing"? The word was added at the insistence of Premier Lougheed of Alberta as a face-saving device to facilitate the reversal of his opposition to the earlier version of the section. An internal memorandum in the Attorney General's department in Alberta had noted the idea that "aboriginal rights" could include a right of self-government. There may have been a fear of an expanding understand-

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<sup>64</sup> *Miller v. The King*, [1950] 1 D.L.R. 513 (S.C.C.).

<sup>65</sup> Outstanding Business; A Native Claims Policy, *op. cit.*, footnote 61, p. 30.

<sup>66</sup> As well there may be some implications for New England treaties which included what are now Canadian Indian bands in Nova Scotia and New Brunswick. The exact implications of these conclusions cannot be spelled out without a more detailed study, but no disruptive conclusions can be expected from including treaties signed outside of Canada.

ing of the phrase, but the addition of the term "existing" would not freeze concepts as of April 17th, 1982.<sup>67</sup>

It seems to the writer that the earlier wording of the section (without the word "existing") was never intended to revive rights which had been lawfully ended. The treaties, in general, are understood to have extinguished at least some of the aboriginal rights of the Indian populations who signed them. The earlier wording of section 35 would not have been interpreted to restore aboriginal rights which had been ended by treaty. It would not have been interpreted to restore rights to reserve lands, established in compliance with treaty, which had been validly surrendered under the terms of the Indian Act with the consent of the Indian bands involved.

The problem with section 35 is the suggestion that treaty and aboriginal rights have increased legal stature in Canadian law as a result of the section. In substantive terms that is not so. Under either version of section 35 aboriginal rights were recognized and affirmed only if they existed. The issue in British Columbia remains the legal issue of whether general land legislation, enacted before 1871, could implicitly extinguish aboriginal title (the Judson thesis in *Calder*) or whether explicit legislation was necessary (the Hall thesis in *Calder*). Section 35 says nothing about this issue.

Treaty rights to hunt and fish have been limited by the Fisheries Act and the Migratory Birds Convention Act.<sup>68</sup> That had been done legally, though in breach of treaty and without consultation or compensation. The courts could have ruled that these were no longer "treaty rights" because of legal extinguishment. Alternatively they could have ruled that "treaty rights" only cease to be rights under the treaty when the Indian party to the treaty has relinquished them. The consensual loss of treaty rights (as occurred with valid surrenders of reserve lands) would be confirmed, but the non-consensual loss (as in the example of hunting and fishing rights) would not be. The addition of the word "existing" ended the possibility of such an argument.

If section 35 has no substantive impact on aboriginal and treaty rights, it must, at least, protect existing rights from further impairment. Unfortunately, writers have suggested that the section has gone too far. Hogg suggests that:<sup>69</sup>

. . . alterations agreed to as part of a land claims settlement, could be implemented only by the process of constitutional amendment.

<sup>67</sup> The reference to a suggestion that aboriginal rights included a right of self-government was apparently a reference to the writer's paper, *Aboriginal Peoples and the Constitution*, presented at a conference at the Faculty of Law, University of Alberta in February, 1981, and reprinted in (1981), 19 *Alta L. Rev.* 410.

<sup>68</sup> R.S.C. 1970, c. F-14 and c. M-12. *R. v. Sikyee*, [1964] S.C.R. 642; *R v. George*, [1966] S.C.R. 267; *R v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.).

<sup>69</sup> Hogg, *op. cit.*, footnote 58, p. 83.

A protection of property rights in the Constitution would not be construed by the courts as impairing the ability of property owners to sell their property. It is, therefore, illogical to suggest that the constitutional recognition of aboriginal rights has impaired the ability of aboriginal people to deal with those rights. Aboriginal people could enter into land claims settlements prior to section 35 and will be able to do so after section 35. What has changed is the ability of the federal government or of the federal and provincial governments together to impose a settlement on aboriginal people. That would require a constitutional amendment. Treaty rights would equally be open to extinguishment or modification with the consent of the aboriginal population involved. The treaty model is a model of consensual relations. Since many reserves are established in fulfillment of treaties it could not have been intended that every surrender of reserve lands in a treaty area was to be an amendment to section 35.

The second paragraph of section 35 defines the aboriginal peoples of Canada to include the Indian, Inuit and Métis peoples. Inuit had long been recognized as within federal legislative competence over Indians, though they are excluded from the Indian Act.<sup>70</sup> Undoubtedly non-status Indians are included within the constitutional category of "Indians" as well.<sup>71</sup> The distinctive addition in the new provisions, then, is the recognition of the Métis as an aboriginal people. The inclusion of Métis in sections 25, 35 and 37 does not, of itself, establish whether Métis come within section 91 (24) of the Constitution Act, 1867.<sup>72</sup> Section 35 is not about the division of powers between the federal and provincial governments. Its impact would be to carve out a constitutional area of powers held by the aboriginal peoples and not subject to legislative repeal by the federal or provincial governments. A kind of third order of government has been created by section 35, though that terminology was not acceptable to federal and provincial politicians during the reform period.

Section 35 does not answer the question whether Métis, in law, have aboriginal or treaty rights. Indeed, on April 24th, 1981, less than three months after the original wording of section 35 had been agreed to, the Minister of Justice wrote to the Native Council of Canada stating the governments view that Métis and non-status Indians had no valid claims to aboriginal or treaty rights.<sup>73</sup> It followed that, in the government's view,

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<sup>70</sup> *Re Eskimos*, [1939] S.C.R. 104. Indian Act, R.S.C. 1970, c. I-6, s. 4 specifically excludes Eskimos from the meaning of the term "Indian" in the Act.

<sup>71</sup> The membership system in the Indian Act is not an attempt to define the term "Indian" in the Constitution Act, 1867. The criteria for Indian Act band membership has varied over time, and current government proposals to reinstate Indian women who lost status by marriage confirm the view of the federal government that non-status Indians can be brought within federal Indian legislation.

<sup>72</sup> This question is discussed in Sanders, *op. cit.*, footnote 62, at pp. 420-421.

<sup>73</sup> Mr. Jean Chretien, Minister of Justice, to Mr. Harry Daniels, President, Native Council of Canada, April 24th, 1981.

section 35 was meaningless for those groups. Subsequently Métis launched a court case in Manitoba, challenging certain of the statutes which purported to regulate the half-breed land grants system provided for in the Manitoba Act of 1870.<sup>74</sup>

### III. Section 37.

Section 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 people 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.

A two-stage strategy emerged in June, 1980, when the first ministers agreed on a short list of constitutional matters for immediate attention, putting other matters off for a future round of reform. The concept of a future round of constitutional negotiations was reinforced in the unilateral proposals of October, 1980, which envisaged a post-patriation process to finally determine an amending formula. When section 37 was introduced in early 1981 it had a context of one or both of these second-stage constitutional processes. The accord of November, 1981, resolved the amending formula and, well before April 17th, 1982, it was clear that the political interest in a second phase of constitutional negotiations was gone. This left section 37 without a wider context.

There has been uncertainty about the relationship of section 37 to section 35. Is it the function of the section 37 meeting to define the meaning of the rights referred to in section 37? To some extent this confusion arose because federal ministers attempted to reassure the provinces that the meaning of section 35 would be determined at the section 37 conference, in which the provinces would be represented. But the wording of sections 37 and 35 is not linked. Section 37 does not refer to "existing aboriginal and treaty rights". It refers to "an item respecting constitutional matters that directly affect the aboriginal peoples of Canada. . .". This language comes from the political commitments of Prime Ministers Clark and Trudeau to involve aboriginal representatives in the constitutional reform process on matters directly affecting them.<sup>75</sup> The section arose from the recognition of the fact that aboriginal involvement had been less than promised; that there were more items to be considered than the aboriginal and treaty rights provision.

<sup>74</sup> The arguments are well set out in Sprague, *Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887* (1980), 10 Man. L.J. 415.

<sup>75</sup> See Sanders, *The Indian Lobby*, to be published in a collection of papers on the patriation process by the Institute for Intergovernmental Relations, Queen's University.

A significant number of parties, including the federal government, the government of Ontario and the three national aboriginal organizations, have approached the section 37 conference with the proposal that there be an on-going process of constitutional negotiations on aboriginal questions. The preparations for the conference have at least confirmed the view that there is considerable unfinished business in this area.

#### IV. *A Consent Clause.*

Aboriginal groups sought a consent clause which would have made them participants in any amending formula. They argued that they should be recognized as a third order of government within Canadian federalism and be participants in any amendments. A more modest position argued that aboriginal consent should be required for any amendments which affected their rights or which altered the sections which referred to them.

In 1981 Quebec referred the question to its Court of Appeal whether by constitutional convention Quebec had a veto on amendments which affected provincial powers.<sup>76</sup> Quebec argued that it was "a distinct society within the Canadian federation". It quoted the *Report of the Task Force on National Unity* that Quebec was "the stronghold of the French-Canadian people" and "the living heart of the French presence in North America". These statements were invoked as the reason for a conventional rule requiring Quebec's consent to significant constitutional change. Having established the reason, Quebec argued the history of amendments to establish that no major amendment had ever been made without Quebec's consent and that certain amendments had not proceeded because of Quebec's opposition. Ivor Jennings' description of constitutional conventions included three requirements: (a) a reason, (b) consistent precedents, and (c) a belief by the actors that they were bound by the rule. The Supreme Court regarded the third requirement as the most important, since it established whether the rule was "normative" or simply a matter of convenience or political expediency. The Supreme Court of Canada ruled that there was no evidence that politicians representing the federal government or provinces other than Quebec had accepted the existence of a convention that Quebec had a veto on constitutional amendments which affected provincial powers.

A case can be made that the principle of consensual change was established in Indian-European relations. The original reason for the practice was the need for colonists to reach a peaceful accommodation, if possible, with the populations already using the land. Later the rationale would be to allow the survival of Indian populations as distinct social and cultural groupings. This later rationale is stronger for the aboriginal

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<sup>76</sup> *Attorney General of Quebec v. Attorney General of Canada*, Supreme Court of Canada, Dec. 6th, 1982, not yet reported.

populations than for Quebec, whose distinctiveness is supported by the existence of major francophone populations in Europe and other parts of the world.

Consensual change is at the heart of the treaty policy adopted by England and other colonial powers in New England. For Canada the treaty policy became established in the Royal Proclamation of 1763. The Proclamation assumed colonial jurisdiction over Indian areas and described the tribes as living under the protection of the British Crown. Yet the only methodology of change described in the Proclamation was consensual. Following the Proclamation treaties were signed in Canada with Indian populations between the Ontario-Quebec border and the Rocky Mountains. While no treaties were signed for most of British Columbia, early instructions indicated that reserves were to be established over the lands designated by the Indian groups. Later Indians testified before a special federal-provincial royal commission charged with finalizing the reserve system in British Columbia. It cannot be argued that Indians in British Columbia consented to the loss of their traditional lands, but the process of establishing reserves was one that governments did not attempt without formalized processes of consultation. The federal government assumed unilateral legislative authority over Indian questions and demeaned the significance of the treaties as a base for Indian policy within Canada. Indians did not accept this redefinition of the relationship and continued, stubbornly, to assert the significance of the treaties and of aboriginal title claims. In the period since the second World War a process of consultations began again. The two special joint committees were vehicles of consultation. The Indian advisory councils which were established in the late 1950's were another. The Indian Act consultation meetings of 1968 and 1969 were designed as very specific consultations on legislative change. The funding of Indian political organizations, beginning in 1969-1970, is the most recent model of ensuring Indian participation in the political process of legislative and policy change. The withdrawal of the Indian Act of 1950 and the abandonment of the white paper of 1969 are negative examples, showing an effective Indian veto. The commitments of Prime Ministers Clark and Trudeau to allow Indian participation in the constitutional reform process on matters that affected them was a recognition of a political role accorded to no other "interest group" in Canada. It was a treatment of the aboriginal peoples as distinct populations, not adequately represented by the federal or provincial governments. The inability to resolve the *Lavell* issue is a very clear example. Federal ministers have repeatedly promised an end to sexual discrimination in the Indian Act. Indian organizations have repeatedly demanded an end to federal determination of membership. Without common ground for discussions, there has been no progress towards agreement. In the end, a fairly significant political concern of the federal government has met with repeated deferrals because agreement with the Indian communities has not been possible.

Any argument for a constitutional convention would fail because of the lack of consistency in the precedents and for the lack of a federal acknowledgement that the practice involved a normative rule. The point is a more modest one: the aboriginal argument for a consent clause was not a dramatic departure from elements of our legal traditions or from an increasingly consistent practice in the years since the second World War.

### V. *Self-Government.*

The federal government has jurisdiction over "Indians, and Lands reserved for the Indians". This double grant of jurisdiction has been read together by Parliament with the result that Canadian Indian legislation deals with Indian reserve communities and provides for a limited form of local self-government. A reserve system seems naturally to result in some degree of self-government. While United States law draws some comparisons between reservations and states, Canadian law compares reserves to municipalities.<sup>77</sup> In perhaps the only Supreme Court of Canada comment on the nature of reserves, Mr. Justice Laskin commented in 1973 that a reserve was:<sup>78</sup>

. . . a social and economic community unit, with its own political structure as well according to the prescriptions of the Indian Act.

The fact that most reserves have small populations places clear limits on the extent of meaningful self-government which is possible. The average band population in 1980 was 550. The Six Nations Band near Brantford has the largest population, with 10,367 members. Regional administrative arrangements have been developing in parts of the country.<sup>79</sup> The James Bay and Northern Quebec Agreements established regional Cree and Inuit governmental institutions in northern Quebec. Detailed self-government proposals have been developed on a regional basis by the Inuit and the Dene in the Northwest Territories, where something like provincial status is contemplated for two new jurisdictional units, to be called Nunuvut and Denendeh.<sup>80</sup>

The federal government has been uneasy about the development of aboriginal claims to self-determination and self-government. In 1977, in an apparent attempt to halt the development of aboriginal self-government thinking in the Northwest Territories, the federal government appointed C. M. Drury as Special Representative of the Prime Minister to report on

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<sup>77</sup> See *Whitebear Band Council v. Carpenters Provincial Council*, [1982] 3 W.W.R. 554.

<sup>78</sup> *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695, at p. 716.

<sup>79</sup> The most notable regional body is the Dakota-Ojibway Tribal Council in Manitoba.

<sup>80</sup> Arthur Manuel, in a paper prepared for the Union of British Columbia Indian Chiefs Annual Assembly in Oct., 1982, argued that the development of regional governmental bodies or a national governmental body was a pre-condition to an effective assertion of a right of self-determination in international law.

constitutional development in the Northwest Territories. The terms of reference specifically excluded "political divisions and political structures based solely on distinctions of race. . .".<sup>81</sup> At the same time the federal government announced that political questions would not be discussed as part of land claims negotiations with aboriginal groups in the Northwest Territories. In April, 1980, Prime Minister Trudeau listed the subjects which the government felt could be discussed in the constitutional reform process. He gave "internal native self-government" as one.<sup>82</sup> The 1981 government policy statement on comprehensive claims stated that land claims settlements were to deal with:<sup>83</sup>

. . . non-political matters arising from the notion of aboriginal land rights, such as lands, cash compensation, wildlife rights, and may include self-government on a local basis.

In December, 1982, the federal government announced the acceptance, in principle, of a division of the Northwest Territories along the tree line. While this statement favoured the Inuit proposal for Nunuvut, the government said the division could only occur after certain pre-conditions had been met, one of which as a settlement of land claims. This confirmed the federal government's position that a major political or jurisdictional decision, such as the division of the Northwest Territories, should not occur as part of a land claims settlement.

Aboriginal self-government was the most difficult of the aboriginal issues in the constitutional reform process. Quebec wanted the Québécois identified as a people with a right of self-determination. Such language was unacceptable to the federal government for the Québécois or other groups. But even a formula which would have described Indian governments as a "third order" of government within Canada was described by the Minister of Justice as a non-starter.<sup>84</sup> The federal reaction to aboriginal claims to nationhood and self-determination has been very rigid. To aboriginal leaders it has meant that the federal politicians remain paternalistic, no matter how much the political rhetoric has changed. To politicians the aboriginal leaders are preoccupied with political symbolism and ignore the bread and butter world of lobbying, compromise and getting programme dollars. The political and cultural differences are greater than those between the French and English.

<sup>81</sup> P.C. 1977-2227, July 19th, 1977. S. 2 (i), reprinted in *Constitutional Development in the Northwest Territories*, Report of the Special Representative (January, 1980), p. 145.

<sup>82</sup> Notes for Remarks by the Prime Minister at a National Conference of Indian Chiefs and Elders, Ottawa, April 29th, 1980, p. 12.

<sup>83</sup> In *All Fairness; A Native Claims Policy*, *op. cit.*, footnote 28, p. 19.

<sup>84</sup> Statement of the Minister of Justice, Mr. Jean Chretien, meeting of a subcommittee of the Continuing Committee of Ministers on the Constitution with representatives of the three national aboriginal organizations, Ottawa, Aug. 26th, 1980.



The truth is that we have been moving to greater local autonomy for Indian bands for years. Many bands on the prairies have never used the land holding provisions of the Indian Act. This has the result, jolting to lawyers, that there are dozens of land title systems for reserves on the prairies for which there is no legislative base and no written rules. Some bands, with an adequate local economy and a strong sense of independence, barely speak to the Department of Indian Affairs. A number of bands have already taken control of their own membership systems by a process of non-co-operation with the centralized membership registry in the Department of Indian Affairs. It may be that the reality which, in the end, will move the federal government to defer to local band autonomy will be the realization that they have lost control over most aspects of reserve life, no matter what may be said in the Revised Statutes of Canada. It may even be, in the end, that we will celebrate these acts of survival and independence as signs of health in a patient we thought we had killed.

### *Conclusions*

We are not at a stage when we can draw conclusions, but we may be at a stage when we have a sense of the direction in which we are moving. As a nation we have a history of intolerance of minorities, but, arguably, an intolerance no greater than that of the other major nations with which we are likely to compare ourselves. The modern attitudes to human rights and to minorities are largely a product of the period since the second World War. We have not simply been influenced by these trends, we have been active internationally in pressing for a more humane order. Critics on the right see our position as unrealistic. Critics on the left see it as hypocritical. In an odd way, both criticisms are correct. We can hope that we will protect ourselves from too much realism and resolve our hypocrisy, in time, by some greater consistency. Our response to the aboriginal people continues to be the most exacting test of our good intentions.

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