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CONSTITUTIONAL REVISION:
ABORIGINAL RIGHTS

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INTRODUCTION

The purpose of this paper is to provide members with background on the issue of the entrenchment of aboriginal rights in the Constitution. This paper presents the Indian, Inuit and Metis view of their place and aspirations in the Canadian federation. Since the scope of the paper cannot capture all the nuances of each group's views, it is the constitutional positions of the three national associations that are outlined here: The National Indian Brotherhood, the Inuit Tapirisat of Canada and the Native Council of Canada.

Although representatives of the aboriginal peoples of Canada have expressed divergent views on certain issues, these variations are the result of particular historical experiences and should not obscure the common starting-point shared by all. The Indian, Inuit and Metis view of themselves and their rightful place in Canadian society is based on three common principles:

a) the aboriginal peoples, which include Status and Non-status Indians, Inuit and Metis, are founding peoples of Canada;

b) the aboriginal peoples are "nations" who never gave up their sovereignty and who interacted with and were recognized by the Imperial representatives as nations;

c) this status as nations within Canada vests in them rights not held by the European immigrants.

On these primary assertions are founded the main constitutional positions.

In the first of its three parts, the paper describes the different aboriginal peoples of Canada and their historical relationship with the Crown and the federal and provincial governments. The second part presents the constitutional views and proposals of the aboriginal peoples. Government and party policy regarding aboriginal rights and the judicial status of these rights are dealt with in the final section.

SECTION I GENERAL BACKGROUND

A. Aboriginal Peoples And Associations

Though aboriginal or "native" peoples are sometimes viewed as one homogeneous group, they are as diverse in language and culture as in their histories and aspirations. The word "native" cannot be used as an all-encompassing term for it distorts and obscures the major distinctions between the 1.3 million aboriginal peoples in this country and their respective political organizations. The aboriginal peoples reject the term because it implies they are a single race rather than several nations.

There are about 25,000 Inuit (Eskimos) who inhabit the northernmost regions of Manitoba, Quebec, Labrador and the Northwest Territories, including the islands of the Arctic Ocean. One common language with variations in dialect is used by the Inuit. Although the Inuit are not "Indians" and the Indian Act excludes them, the Supreme Court of Canada decided in 1939 that the Inuit were "Indians" within the meaning of Section 91.24 of the British North America Act. Like Indians, all Inuit are listed in a central registry in Ottawa and are issued a registry number.

As no treaties have ever been signed with the Inuit, the question of their aboriginal rights is unresolved. In 1971, the Inuit Tapirisat of Canada (ITC) was established for the purpose of politically representing the Inuit to the Canadian government. The comprehensive claim entitled "Nunavut" advanced by the ITC on behalf of the Inuit calls for responsible government and provincehood within 15 years (for area claimed see Comprehensive Claims Map on page 5). The Inuit are further represented in constitutional matters by the Inuit Committee on National Issues (ICNI) which is part of ITC and was formed in 1979. Six regional associations participate within ICNI and the Co-chairmen of the Committee are Mr. Charlie Watt and Mr. Eric Tagoona.

The Indian Act (1876) exercises the legislative competence of the federal government with respect to Section 91.24 of the British North America Act. The revised Act of 1951 defines an Indian as "A person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian" (Section 2.1).* Under the terms of this definition Indians are administratively divided into separate groups: Status and Non-status Indians and Metis.

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*The 1951 Act amending the 1876 Indian Act makes no reference to "blood" in determining who is and is not an Indian. The 1876 Indian Act, which was the consolidation of all laws respecting Indians, used blood and band membership as the key criteria. The Act was last amended in 1956.

Status Indians are those who come under the terms of the Indian Act. An Indian Registry listing all who are entitled to be registered as Indians according to the Act is maintained by the Department of Indian Affairs and Northern Development. Some Status Indians are also Treaty Indians because their tribes or peoples have at some time signed a treaty with the Crown. Further differences among Indians are found in language - 10 language groups and 58 dialects - location, custom and beliefs. There are about 302,700 Status Indians inhabiting every territory and province in Canada and they are represented by the National Indian Brotherhood (NIB) whose President is Mr. Delbert Riley. The organization was established in 1970 to act as the national spokesman of the provincial and territorial Indian organizations.

The Metis and Non-status Indians are people of Indian ancestry, many of whom speak only their native languages and live according to the ways of their cultures. These people, however, do not qualify for Indian status under the Indian Act and are therefore not eligible for the same treatment by government as Status Indians. Responsibility for these people is a subject of dispute between the federal and provincial governments.

The Metis are the people of mixed European and Indian ancestry who historically lived in the Prairie provinces and Northwestern Ontario. They chose or were issued scrip* over treaty and have never had status under the Indian Act. Non-status Indians are those who have lost their status under the Act through enfranchisement, through having their registration refused by the registering federal agency, through failing to be registered in some distant past, or through marriage. There are approximately one million Metis and Non-status Indians throughout the country. They are represented nationally by the Native Council of Canada (NCC) which was founded in 1971 and is a federation of the provincial and territorial associations of Metis and Non-status Indians. Mr. Harry Daniels is the President.

B. Historical Background Of Aboriginal/Government Relationship

The aboriginal population is widely dispersed across Canada and each group is subject to the economic, social and geographical conditions of the region it inhabits. Although the arrival of the Europeans was spread over centuries and the nature of the relationships thus established varied, European contact had the common effect of drastically altering traditional life.

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*Government cash and land grants in compensation for surrender of Indian title.

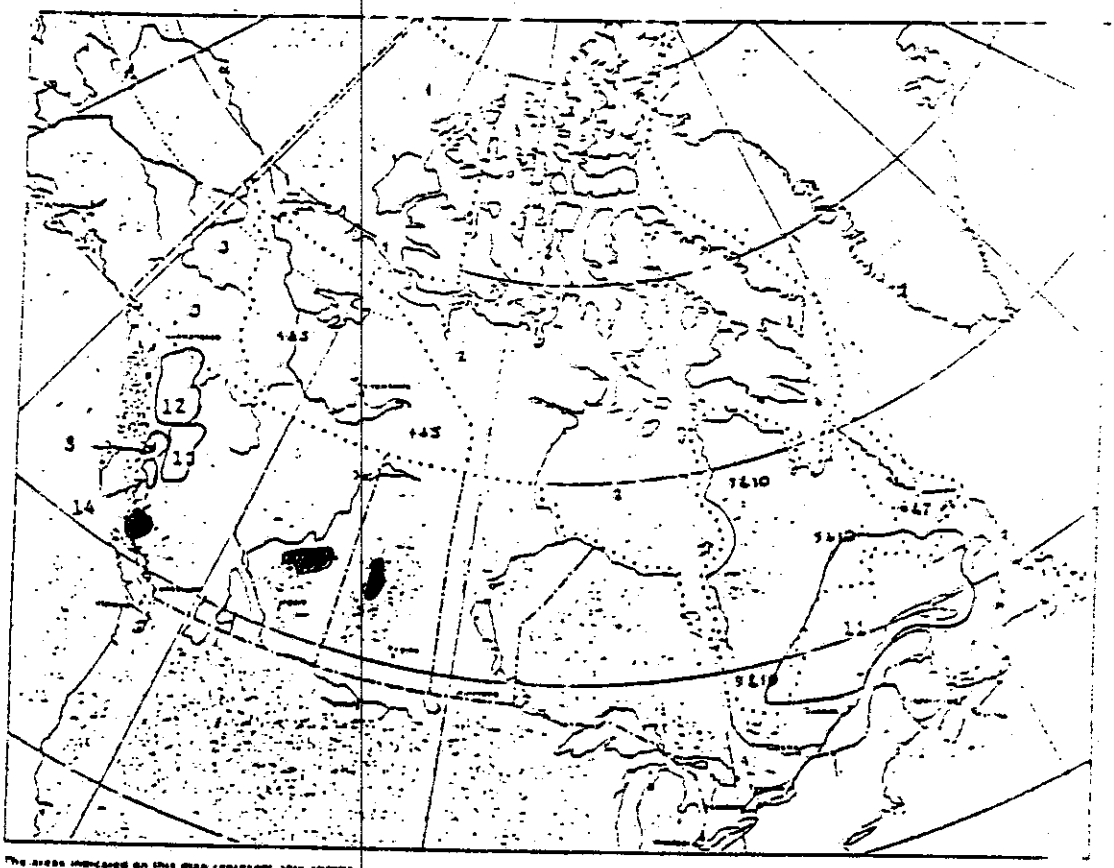
At the time of European discovery, the aboriginal peoples comprised several different tribes or peoples who were self-sufficient and self-governing within their particular territorial boundaries. With the acceleration of European settlement and activity, the aboriginal peoples were alienated from their traditional self-sustaining means as a more sedentary lifestyle of farming and permanent settlement was encouraged. The Prairie Indians, for example, were forced into agriculture after the buffalo had been hunted to near extinction by the settlers.

For the first three centuries of the European presence in Canada the basis of the Indian/Government relationship was both economic and military. The Indians supplied natural resources and geographical expertise in exchange for European goods. They were also potential allies or enemies. As the survival of the Europeans depended on securing the alliances of the Indians the practice of treaty-making began in the 1600s. These early treaties were political in nature and provided for peace, friendship and mutual protection. Land title was not mentioned in these agreements.

Beginning in the mid-1700s, a new kind of treaty that dealt with land emerged, necessitated by the westward movement of settlers. These treaties, also called surrenders, acknowledged an Indian title to the land that had to be ceded to the Crown before non-Indian settlement could take place. British policy, expressed in various proclamations, statutes and orders required British subjects to provide compensation to the Indians where settlement interfered with the Indians' traditional use and occupancy of the land. The Indian interest could be ceded only with the agreement of the Indians and then only to the Crown. The most significant pronouncement of this policy is the Royal Proclamation of 1763 which set limits to European settlement and reserved lands outside those limits for exclusive Indian use.

Obtaining the surrender of Indian title continued for a time after Confederation. Section 91.24 of the British North America Act (1867) gave the Parliament of Canada legislative responsibility for "Indians, and lands reserved for Indians." Under the terms of the 1870 Order-in-Council admitting Rupert's Land and the Northwestern Territory (now the three Prairie provinces, the two territories and the northern parts of Ontario and Quebec) into the Canadian union, Canada, on behalf of the Crown, was required to deal with all Indian claims to compensation for lands required for settlement. Consequently, between 1871 and 1923 a series of treaties were concluded in Ontario, the Prairie provinces and parts of the Northwest Territories and British Columbia. In exchange for the surrender of Indian interest in the land desired by the government, compensation in the form of reserve lands, cash payments, annuities, schools and medical assistance was provided. Hunting and fishing rights were also recognized. The terms of the Quebec Boundaries Extension Act, 1912 also provided for the surrender and compensation of Indian rights.

Between the conclusion of the last treaty in 1923 and the signing of the James Bay and Northern Quebec Agreement in 1977, however, the practice of obtaining the surrender of aboriginal interest in exchange for land was not pursued. Non-native settlement and activity increased and intensified during this period despite the fact that the aboriginal interest in large areas of the country had never been surrendered. The comprehensive claims negotiations of the present day attempt to satisfy some of those unfulfilled obligations.



NATIVE CLAIMS IN CANADA

LES REVENDICATIONS DES AUTOCHTONES AU CANADA

Covering most of the Northwest Territories, British Columbia, the Yukon, Northern Quebec and Labrador, these claims ". . . relate to the loss of traditional use and occupancy of lands . . . where Indian title was never extinguished by treaty or superseded by law."* In these negotiations, the aboriginal peoples are seeking recognition of their rights.

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*Statement made by the Hon. Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People, Ottawa, August 8, 1973.

C. The Changing Relationship

1. With The Federal Government

Historically, the relationship of the federal government with the aboriginal peoples has been an unsatisfactory one. The brief reference to Indians in the 1867 BNA Act specified neither the government's responsibility nor the Indians' rights. The Indian Act of 1876 attempted to more fully define government obligations and Indian status. The agency administering Indian affairs at that time was maintained and evolved into the present Department of Indian Affairs and Northern Development. Both the Indian Act and the Department have been severely criticized over the years by aboriginal and non-native people. Transcending this criticism, however, is a fundamental conflict over the role of the federal government.

The government has interpreted its responsibility under Section 91.24 of the BNA Act to be a legislative capacity through which the aboriginal peoples are to be integrated into the mainstream of Canadian society. To the aboriginal peoples, integration by administration is assimilation. Section 91.24, they argue, did not give the government the right to control them. They believe the federal obligation is primarily to protect their political and cultural entities and interests. Development and participation opportunities are to be enhanced on that basis. These conflicting interpretations of the federal role are exemplified by the Department of Indian Affairs and Northern Development where the Department's name appears to be a contradiction. Aboriginal peoples argue that their interests have not been and can never be adequately protected by an agency that is committed at the same time to encouraging development activity. They point out that the Alaska Gas Pipeline and Beaufort Sea explorations are continuing despite an unsurrendered aboriginal interest and unresolved claims.

The government has recognized a need for change in its relationship with the aboriginal peoples and change is occurring in the form of Indian Act revision and the negotiation of both specific and comprehensive claims. But a misunderstanding persists between the government and the aboriginal peoples as to the form, process and magnitude of change. The White Paper of 1969 which proposed the abolition of the Department of Indian Affairs and the gradual elimination of the Indian Act was symbolic of that misunderstanding. To the Indian peoples, the paper meant more than assimilation; it meant termination and they denounced it bitterly. While the Indian peoples have many specific problems with the Indian Act, it is the formal legislative base for special status. They support it in the sense that it recognizes them as peoples distinct from other Canadians. Although the government withdrew the White Paper, the Indian peoples are still concerned that their special status could be abolished by an unsympathetic government.

Concern about maintaining their status led the aboriginal peoples to a re-examination of their constitutional position in Canadian society. They have concluded that the Indian Act does not protect them in the way some believed it would. They point out that as an Act of Parliament it could be repealed or amended without their consent. A further concern that has arisen with respect to the current constitutional proposals is that as a policy based on differences between races, the Act is discriminatory and could be challenged in the courts under the proposed Charter of Rights.* As their status does not derive from the Indian Act or their racial characteristics but from their unique position as the "First Peoples" or "First Nations" of Canada, the Indian peoples assert that this status should not be subject to legislative discretion. For these reasons, the National Indian Brotherhood is refusing to participate in revisions to the Indian Act. Their position is that such changes are of little value unless their special status is recognized in the Constitution.

2. With The Provincial Governments

Traditionally, the provinces have been reluctant to assume any responsibility for aboriginal peoples. The provinces feel that under the BNA Act the federal government has a comprehensive responsibility for these peoples and provincial involvement consequently consists of the provision of services to Indians on reserves. The costs thus incurred by the provinces are either charged directly to the federal government or are the subject of special federal-provincial agreements in such areas as social welfare, child care, health care and law enforcement. Services are not always provided in a consistent manner since their availability varies from province to province and funding for some services to Indians living off reserves is uncertain.

Since some aboriginal interests, particularly the land and resource rights encompassed in the comprehensive claims, relate to provincial areas of jurisdiction, a more active provincial role may be necessary and may entail the assumption of some responsibilities. Under the provisions of the James Bay and Northern Quebec Agreement (1977) for example, the Quebec government assumed the responsibility for health services to Indians. The aboriginal peoples, however, are generally opposed to provincial assumption of responsibilities. They point out that their interests are often contrary to those of the provinces. Additionally, the

*The Supreme Court of Canada in 1973 did not rule in favour of an Indian woman (Lavell) who had charged that the Indian Act was sexually discriminatory under the Canadian Bill of Rights because the entire Act might have been found discriminatory. The Canadian Human Rights Act (1977) specifically exempts the Indian Act from its provisions.

provinces do not have a constitutional obligation to protect aboriginal interests. The federal government, on behalf of the Crown, has that obligation. Aboriginal peoples view federal efforts to transfer authority to the provinces as a shirking of the federal constitutional responsibility and an attempt to abolish their special status. If control is to be transferred, they argue, such control should go to them and not the provinces.

SECTION II THE CONSTITUTION ACT, 1980: ABORIGINAL AND GOVERNMENT POSITIONS

A. General Aboriginal Proposals

Today, the aboriginal peoples of Canada are calling for change that goes far beyond legislative revisions and increased administrative responsibilities. They are redefining their position in Canadian society and are seeking concurrent changes in the existing social, political and economic structures to establish a new and more equitable relationship between themselves and the rest of Canada. Reflecting the different backgrounds of the various groups, the nature of the proposed relationship takes varied forms. Non-treaty Indians and Inuit, for example, are attempting to guarantee their socio-economic future through the comprehensive claims settlements. Treaty Indians are seeking a modernization of the terms of the treaties in a manner consistent with the original intent and spirit of those agreements.

While the forms of expression vary, the underlying components are the same: the right to survive as distinct peoples and the right to continued special status within the Canadian framework. Without constitutional guarantees of these rights, aboriginal peoples feel they will lose their identity.

B. Constitutional Positions

The organizations representing the aboriginal peoples of Canada have expressed resentment at their "passive" role in formulating the current constitutional proposals that pertain directly to their interests. Despite this concern about the process of constitutional consultation, all three national associations, as well as several other groups, have appeared before the Joint Committee. Significantly, differences between the organizations have been largely laid aside in order to impress upon the government their collective concerns. They are all opposed to patriation until their aboriginal rights are adequately protected and a direct role for them in future constitutional discussions has been assured. The following analysis reflects the common positions of the national associations in four main areas.

1. Entrenchment of Rights

The only reference in the "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" appears in Part I, Canadian Charter of Rights and Freedoms, Section 24 under "Undeclared Rights and Freedoms":

> "24. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada, including any rights or freedoms that pertain to the native peoples of Canada."

In his letter of October 30, 1980 to Mr. Del Riley, President of the National Indian Brotherhood, the Prime Minister assured Mr. Riley that Section 24 ". . .is meant to safeguard any special rights which Native Peoples may have and leaves open the possibility of future entrenchment of such rights in the Constitution."*

The aboriginal peoples, however, were not satisfied with this assurance and remained suspicious of the federal commitment to recognition of their rights. Their main objections to the resolution and to Section 24 in particular include the following:

1. The Charter concentrates on individual rights and ignores the collective rights of groups of people (aboriginal rights are collective);

2. As the wording of Section 24 is negative rather than positive, the section does not effectively recognize, much less protect, aboriginal rights; Any future rights that may arise from land claim settlements are not provided for;

3. Section 24 does not prevent Canada from renouncing any or all of its present responsibilities for Indians;

4. The wording of Section 24 dilutes the protection originally provided in the equivalent section of Bill C-60;**

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*Similar letters were sent to the President of the Native Council of Canada and to the Co-chairmen of the Inuit Committee on National Issues.

**See page 19.

5. The term "native" is a racial definition that views people as members of racial or ethnic minorities rather than as communities with rights. Use of the term also obscures the fact that in the 1867 BNA Act the word "Indian" is used. "Nation" or "tribe" is used in the Royal Proclamation and in some treaties;

6. Section 1 may allow Parliament to override any protection in Section 24.

Positive constitutional recognition and protection of the principle of aboriginal rights is seen as a minimum indication of the government's good faith at this time. The aboriginal groups are quite willing to negotiate the specific details of such rights at a later date. As aboriginal rights are special they should be separate from general human rights provisions. Ideally, entrenchment of rights would include treaty rights and comprehensive claims agreements. Documents relating to the status and position of aboriginal peoples such as the Royal Proclamation of 1763 and the Order-in-Council of 1870 respecting Rupert's Land as well as the treaties would become part of Schedule I of the Constitution.

In response to these concerns, the Honourable J. Chrétien has introduced a number of proposed amendments to the resolution. A new section 24 drops any reference to native peoples and provides instead a general provision for the enforcement of guaranteed rights. More importantly, a new section 25 states in greater detail the rights and freedoms of aboriginal peoples:

> "25. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of
>
> (a) any aboriginal, treaty or other rights or freedoms that may pertain to the aboriginal peoples of Canada including any right or freedom that may have been recognized by the Royal Proclamation of October 7, 1763; or
>
> (b) any other rights or freedoms that may exist in Canada."

It should be also noted that Section 1 of the resolution has been amended and the 1870 Order-in-Council respecting Rupert's Land has been included in Schedule I. The amendments to the Resolution proposed by Mr. Chrétien address a number of the concerns of the aboriginal peoples but by no means all.

2. Participation In Process

In his speech to the "First Nations Constitutional Conference" on April 29, 1980 the Prime Minister confirmed the government's commitment to Indian, Inuit and Metis participation in the process of constitutional reform:

> ". . . we want to work closely with you in reforming the Canadian constitution in ways which will better secure the rights and the status of the original people of this land. . . . I want to reaffirm tonight that you will continue to be involved in the discussion of constitutional changes which directly affect you."

The aboriginal peoples have been assured that any changes in the Constitution which directly affect them would only be made after discussion with them. After patriation, in the second phase of constitutional reform, the item of native rights will be on the agenda of the First Ministers' Conference. The Prime Minister has agreed to discuss the following matters: aboriginal and treaty rights, internal native self-government, native representation in political institutions such as Parliament, and the responsibilities of the federal, provincial and territorial governments for the provision of services to native peoples. The possibility of addressing other items of direct interest to native peoples is left open.

However, the aboriginal peoples are dissatisfied with both the nature of their involvement in the process of constitutional renewal and their relegation to the second phase of constitutional reform. They are requesting a direct participation beyond the opportunity to submit briefs and have observer status at constitutional conferences. Observer status, they feel, places them in the category of ethnic minorities and interest groups and does not allow them to directly address any provincial opposition they may encounter. As founding nations of Canada, the aboriginal peoples are claiming the right to participate as partners in constitutional discussions. They are proposing the direct participation at constitutional conferences of one representative of each of the Indian, Inuit and Metis peoples of Canada for matters on the agenda that affect them.

In terms of the broader political process, the groups want some form of guaranteed representation in both Parliament and the legislative assemblies. This could be accomplished along the lines of the New Zealand Maori. The Maori have a separate electoral roll and are allotted seats through proportional representation.

3. Self-Government

The problem of Indian dependence on government resources and the need for more Indian control of Indian affairs was acknowledged recently to Indian peoples by the Prime Minister:

> "My colleagues and I believe that the key to the problem is to encourage the Indian people of Canada to assume, gradually, a greater degree of control over your own affairs - at your own pace, by your own choice, while at the same time the government maintains and reaffirms the responsibility it shares with you for the well-being of the Indian people."*

Internal native self-government is an item on the Prime Minister's discussion list. Throughout the last decade, programs to give Indians more responsibility over areas affecting them have been encouraged with the goal of establishing a stronger Indian identity within Canada. Increased responsibility by band councils** is one example. Funds administered by bands have increased from $34.9 million in 1971-72 to $227.2 million in 1978-79.*** This figure represents 1/3 of the Indian Affairs Program budget.

The aboriginal peoples argue that increased administrative responsibility does not necessarily amount to control of their own affairs. They are asking for the recognition of certain legislative capacities. Conceptions of self-government vary amongst the groups themselves, from increased band council powers to sovereignty outside the Canadian federation. The middle-of-the-road approach appears to be self-government (or Indian government) as a "third order" of government within the Canadian federation.

Self-government entails the exercise of aboriginal control over matters that directly affect aboriginal peoples in a manner similar to that under which the provinces exercise designated jurisdictions. It is a source of original jurisdiction within certain areas of competence. The aboriginal peoples see their right to self-government as deriving from their position as the "First Peoples" or "First Nations" of this country and they look to the Crown for protection of this right. The relationship with the Crown is viewed as a protectorate in which the aboriginal peoples did not give up their sovereignty but agreed simply to share the land, accepting Crown protection in exchange. On this basis the right to self-government is a natural right and not one that can derive from either the federal or provincial governments.

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*Notes for Remarks by the Prime Minister at a National Conference of Indian Chiefs and Elders, Ottawa, April 29, 1980.

**The community institutions responsible for local administration under the 1951 Indian Act.

***Indian Conditions: A Survey, Department of Indian Affairs and Northern Development 1980, p. 82.

Thus, self-government, as the exercise of aboriginal control over matters of aboriginal concern, is regarded on a par with the supremacy of the federal and provincial governments over their respective jurisdictions. Aboriginal self-government would require the alteration of some federal and provincial structures as control is desired over such matters as band membership, education, culture and language, family law, taxation, hunting, fishing, trapping and gathering, criminal law, justice and property and civil rights.

d. Amending Formula

The Prime Minister has assured the aboriginal peoples that their rights will not be affected by any other rights in the Charter of Rights and that constitutional change will be easier after patriation. The aboriginal groups, however, insist it will be harder to secure constitutional amendments in their favour after patriation. Since many of their interests compete with provincial powers, they believe recognition and entrenchment of their rights is precluded under the amending formula. Exclusion from the amendment process, in their view, could lead to the elimination of their special status within Canada. To ensure the protection of their interests (from both federal and provincial governments), the aboriginal groups want provisions in the amending formula for aboriginal consultation and consent in the areas that affect them.

SECTION III ABORIGINAL RIGHTS

A. Evolution Of Federal Policy

Although aboriginal rights are difficult to define, an aboriginal "title" to the land or "native interest" is recognized in Canadian policy and practice. The present concept of aboriginal title is less than a decade old. In 1969, as mentioned previously, the White Paper sought to do away with special status and the rights accruing from that status in order to give the Indian people an equal status with other Canadians. It was believed that the policy of "separateness" - separate legislation and administration - that had hitherto been the basis of the Indian/Government relationship had prevented the Indian people from becoming full and equal participants in Canadian society. The Indian response was that it was not special treatment per se but the administration of the treatment that was at fault. In their view, the proposed policy of equal

status and rights with other Canadians offered only assimilation because their special position as the indigenous peoples of Canada was neither recognized nor protected. They argued that their survival as unique peoples depended on the maintenance of special status and further, on the acquisition of more control over their own affairs. The White Paper was shelved and four years later the government reversed its position on aboriginal rights.

The Prime Minister acknowledged the change in government thinking in his speech to the April 1980 "First Nations Constitutional Conference":

> "At the beginning of the 1970s, my colleagues and I opposed the very idea of aboriginal rights. I said then that we could not attempt to right all the wrongs of the past. We could only attempt to be just in our time. . . .During the course of the 1970s, we changed our mind on aboriginal rights. With the help of your educational efforts and some judicial examination of the issue, the government accepted the concept of land rights accruing without treaties to the original inhabitants of this country. We began negotiating claims arising from those rights, acquired through the traditional use and occupancy of the land." *

The government formally accepted the concept of aboriginal title in 1973. The watershed was the Supreme Court of Canada's decision on the British Columbia Nishga Indian land claim (the Calder case). When British Columbia entered the Canadian union it did not recognize any Indian title to the land and assumed the land question was settled with the setting aside of reserves. The Nishga, who had been pursuing their claim since the 1890s, went to the Supreme Court in 1973 claiming their aboriginal title to the land had never been lawfully extinguished. The court split 3-3 on the substantive issue of whether the Nishga title had been lawfully extinguished. The seventh judge rejected the case on a technicality. The significance of the split decision was recognized by the government and, on August 8, 1973, the government announced its claims policy.

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*Notes for Remarks by the Prime Minister at a National Conference of Indian Chiefs and Elders, Ottawa, April 29, 1980.

B. Federal Claims Policy

The claims policy affirmed the government's responsibility as dating from the Royal Proclamation of 1763:

> ". . . the present policy statement /signifies/ the Government's recognition and acceptance of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians. The Government sees its position in this regard as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests in land in this country."*

In the 1973 policy, the government first committed itself to meeting its "lawful obligations" to Indian people in regard to unfulfilled responsibilities. This meant the government would deal with the concerns of Indian people regarding the fulfillment of treaty provisions and general government administration. This type of claim has been termed a "Specific Claim".

Second, the government agreed to negotiate settlements with native peoples in those areas of Canada where native rights based on the traditional use and occupancy of the land had not been "extinguished by treaty or superseded by law". The government recognized that the native interest in these areas had not been taken into account, had not been compensated for and had not benefitted from non-native occupancy and development. Claims of this nature are called "Comprehensive Claims". In southern Quebec and the Atlantic provinces no treaties of surrender were entered into and claims in these areas are of a "different character".

A significant component of the claims policy is government recognition that the claims involve the loss of a way of life and that settlement of the claim must contribute positively to native social, cultural and economic life. To this end, elements such as lands, hunting, fishing and trapping rights, resource management and revenue sharing, participation in local and regional governments as well as final compensation are included in the settlements. These rights are then confirmed in legislation.

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*Statement made by the Hon. Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People, Ottawa, August 8, 1973.

Since 1970 the government has provided funds to the political associations to enable them to research their rights and claims. In 1974 the Office of Native Claims was established within the Department of Indian Affairs and Northern Development to deal specifically with the settlement of claims. The first comprehensive claims settlement is the James Bay and Northern Quebec Agreement which came into force on October 31, 1977. In 1978 the government signed an Agreement-in-Principle with the "Committee for Original People's Entitlement" (COPE) of the Yukon Territory.

C. Legal Status of Aboriginal Rights

In general, the courts have been reluctant to address the issue of aboriginal rights as they consider it a political question. The aboriginal peoples consider it a question of survival. They see a contradiction between the government's acceptance of the principle of negotiating land settlements and its reluctance to entrench positively the principle of aboriginal rights. The aboriginal peoples are demanding recognition of their aboriginal right to self-determination. The government position is that, while it supports increased administration by the aboriginal peoples over their own affairs, the Crown must retain ultimate sovereignty. To the aboriginal peoples who are negotiating claims settlements this only means that the government will be able to override whatever rights have been recognized in those agreements. Confirming the rights and benefits of the settlements in legislation has no meaning if they can be abrogated unilaterally by the government. For this reason, the aboriginal peoples want the comprehensive claims agreements to become part of the Constitution. Treaty Indians want the treaties included for the same reason as the courts have established that federal legislation and regulations can override treaty provisions.

analogous to U.S. position Indonesia Australia Israel

Where no settlements or treaties have been negotiated, the legal status of aboriginal title has not been definitively addressed. The conflict between aboriginal title and the supremacy of government legislation was illustrated in early 1980 with the Federal Court case of Baker Lake v. the Minister of Indian Affairs and Northern Development.

In this case the Inuit community of Baker L[illegible] North-west Territories, sought an injunction to restrain bo[illegible] issuing of land use permits and the activities of var[illegible] mining and exploration companies on the grounds that [illegible] Lake area was subject to aboriginal title which had [illegible] expressly extinguished by legislation. The Court de[illegible] that the Inuit did hold aboriginal title to the land

it had not been extinguished. However, the Court also ruled that legislation need not be expressly designed to extinguish aboriginal title in order to have the same effect. The injunction was not granted.

> "Parliament's intention to extinguish an aboriginal title, . . . need not be set forth explicitly in the pertinent legislation. Once a statute has been validly enacted, it must be given effect, even if it abridges or entirely abrogates a common law right." *

While federal legislation can override both unspecified aboriginal title and treaty provisions, further conflicts arise at the provincial level. Two longstanding examples are the questions of Indian hunting and fishing rights and reserve land entitlements. Section 88 of the Indian Act deals with the application of provincial laws to Indians. It reads:

> "Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

Judicial interpretation of this provision in respect to hunting and fishing rights has established that the provisions of an Indian treaty prevail over conflicting provincial legislation. In general, the hunting and fishing provisions of the 1930 Natural Resource Transfer Agreements also prevail over provincial legislation. Where there are no treaties or agreements, however, the conflict between provincial game legislation and hunting and fishing rights as an aboriginal right is unresolved. Canadian case law is unclear in this regard as the appellate courts have ruled differently in different cases.

In the case of Regina v. Discon and Baker (B.C. County Court, 1968), two members of the Squamish tribe shot deer out of season and without a permit on unoccupied Crown land and were charged with a violation of the provincial Wildlife Act. Their defence was essentially based on their aboriginal right, as recognized and guaranteed by the Royal Proclamation of 1763, to hunt for food on their ancient tribal hunting grounds. The Court

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*Canada Federal Court Reports 1980, Vol. 1, Part 4, p. 521.

rejected the defence on the grounds that aboriginal rights have only been recognized in Canada when such rights are explicitly contained in a written treaty or statute. In the absence of such specific guarantees, the Court ruled that the Wildlife Act constituted a provincial law of general application as per Section 88 of the Indian Act and was, therefore, binding on the defendants. In the case of Regina v. Williams and Taylor (Ontario Divisional Court, 1979), the court ruled in favour of the defendants who were charged with a violation of the provincial Game and Fish Act. The court stated that provincial laws respecting hunting and fishing did not apply to Indians unless those specific rights had been taken away by treaty because the Royal Proclamation preserved those rights independent of Section 88 of the Indian Act.

The question of outstanding reserve land entitlements in the Prairie provinces is another illustration of jurisdictional complication for, while fulfulling treaty provisions is the responsibility of the federal government, it is the provinces who hold the title to the land that will be turned into Indian reserves. Under the provisions of the treaties signed from 1871 to 1906 between Canada and the Indian tribes of Alberta, Saskatchewan and Manitoba, reserve lands were to be set aside for the signatory bands by the federal government. While some bands did receive their full entitlement, others did not. The Resource Transfer Agreements of 1930 between Canada and the Prairie provinces acknowledged the problem and provided for its resolution. A section in each of the Agreements obligates the provinces to return unoccupied Crown lands to the federal government to enable it to fulfill its obligations under the treaties. Land selection problems occur because much of the land originally reserved under the treaties for the Indians is no longer unoccupied.

Both an unspecified aboriginal right and a specified treaty right can be overridden in various ways. Beyond the question of legality, however, there exists a human element. The impassioned pleas for entrenchment of rights are placed squarely in the context of survival as the aboriginal ways of life have been and are being seriously threatened. It must be realized that although many Indians and Inuit no longer depend on wildlife for food and clothing, there are many others who still do. Development activity in many instances crosses major traplines and hunting areas. The Inuit of Baker Lake brought their claim to court because the mining activity was driving away an important food source, the caribou. In the case of hunting and fishing rights, provincial game wardens have often confiscated meat that was to have been a main food supply for several families. Further, the aboriginal peoples feel their economic development is contingent upon the recognition of their rights to the lands and resources. They do not want to stop development but to participate in it.

D. Government And Party Commitments

In the federal government's proposals for the renewal of the Canadian federation, A Time for Action (1978), the government committed itself to full respect of native rights as a fundamental principle reflecting a basic reality of Canada:

> "The renewal of the Federation must fully respect the legitimate rights of the native peoples, recognize their rightful place in the Canadian mosaic as the first inhabitants of the country, and give them the means of enjoying full equality of opportunity."

That same year the government tabled The Constitutional Amendment Bill, Bill C-60. Section 26 of the proposal assured the native peoples they would not lose any rights acquired under the Royal Proclamation of 1763:

> "26. Nothing in this Charter shall be held to abrogate, abridge or derogate from any right or freedom not declared by it that may have existed in Canada at the commencement of this Act, including, without limiting the generality of the foregoing, any right or freedom that may have been acquired by any of the native peoples of Canada by virtue of the Royal Proclamation of October 7, 1763."

Canada's Native People: The Liberal View, a Campaign Note dated January 28, 1980 reaffirmed the commitment to safeguard Indian status and identity and to provide the means to equality of opportunity. High priority was given to the just settlement of land claims and to the consideration of Indian rights in constitutional discussions, especially in respect to the political evolution of the Yukon and the Northwest Territories. The party affirmed its belief "in the legitimate rights of native people and the recognitition of their rightful place in the Canadian mosaic as the first inhabitants of the country."

In the Statement of Principles for a New Constitution proposed by the Prime Minister June 9, 1980 on the eve of the federal-provincial constitutional conference, the federal government pledged to enshrine the rights of native peoples and reaffirmed the continued involvement of the leadership of the native peoples in discussions of constitutional changes which directly affect them:

> ". . . we are resolved to create together a new Constitution which: . . . shall enshrine . . . the rights of our native peoples. . . .
>
> The Government also proposes that the leadership of the native peoples continue to be involved in

the discussion of constitutional changes which directly affect the native peoples, in the context of the joint work on the item 'Canada's Native Peoples and the Constitution'. In addition, governments would pay special heed to representations from them on the items in the Package set out above." *

The Second Western Resolution of General Priority adopted at the Winnipeg Convention of July 1980 committed the Liberal Party to the goal of entrenching native rights:

"That the Liberal Party of Canada work toward the entrenching of Original and Native Peoples' rights by:

a) Enacting legislation with the consent of the Original and Native Peoples, that clearly provides for Canada's obligations by virtue of aboriginal and treaty rights;

b) Implementing a modern settlement policy that provides for orderly developments by enhancing and not extinguishing aboriginal, treaty and Native Peoples' rights;

c) Include the Original and Native Peoples' representatives at all levels of constitutional reform discussions;

d) Amending Liberal Party policy to recognize the true cultural, political, and legal status and rights of the Original and Native Peoples of Canada;

e) A new Canada-Indian-Den'e-Native process direct immediate economic action for mutual advancement towards an independent quality of life for all citizens of our nation."

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* House of Commons Debates, June 10, 1980, p. 1977.

CONCLUSION

Representatives of the 1.3 million aboriginal peoples in Canada have made various recommendations for redress of some of their longstanding concerns. Though some feel that their ultimate recourse does not lie with the Canadian government but with British or international tribunals, many suggest that the proposed resolution should be amended before patriation of the Constitution as a first step towards redefining the place of aboriginal peoples in Canadian society. These suggestions include:

1. Returning to Bill C-60 but referring to the Proclamation of 1763 as confirming rather than conferring rights. The word "Aboriginal" instead of "Native" is preferred. The Native Council of Canada has suggested this alternative wording:

> "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate, abridge, or derogate from any undeclared rights or freedoms that exist in Canada, including the aboriginal rights and freedoms that pertain to the Aboriginal peoples of Canada and those rights acquired by or confirmed in favour of the Aboriginal peoples under the Royal Proclamation of October 7, 1763."

2. Removing aboriginal rights from the context of undeclared rights by deleting the reference to native peoples in Section 24. Affirming positively, without specification, the existence of aboriginal rights in a separate section. Again, the word "aboriginal" as opposed to "native" is preferred.

3. Incorporating the full scope of aboriginal rights in a separate section as proposed by the associations. Appending the Royal Proclamation of 1763, the 1870 Order-in-Council respecting Rupert's Land and the Northwestern Territory, the Manitoba Act of 1870, the treaties and the comprehensive claims agreements.

On January 12, 1981, the government introduced proposed amendments which reflect a mix of the above suggestions. At the time of writing, reaction from the organizations representing the aboriginal peoples has been mixed. Elements of the proposed amendments viewed favourably by the groups include: 1) the mention of aboriginal rights in a section separate from individual rights and their inclusion under a "General" rather than an "Undeclared" heading; 2) the use of the terms "aboriginal" rights/peoples as opposed to "Native" rights/peoples; 3) the inclusion of the Royal Proclamation as recognizing rights; 4) the reference to treaty rights; 5) the appending of the 1870 Order-in-Council respecting Rupert's Land and the Northwestern Territory.

However, while the groups feel the proposed amendments are a move in the right direction, they have also expressed serious misgivings:

1) the new Section 25 mentions aboriginal rights but does not protect them because:

   a) the consent of the aboriginal peoples to amendment of the section is not stipulated. Therefore, the section could be amended in a manner contrary to their interests or even repealed;

   b) the introduction of the word "may" ("any aboriginal... rights ... that may pertain to the aboriginal peoples....") could result in the denial of the existence of these rights by the courts or the government in the future. Section 24 of the proposed resolution reads: "... any rights or freedoms that pertain...."

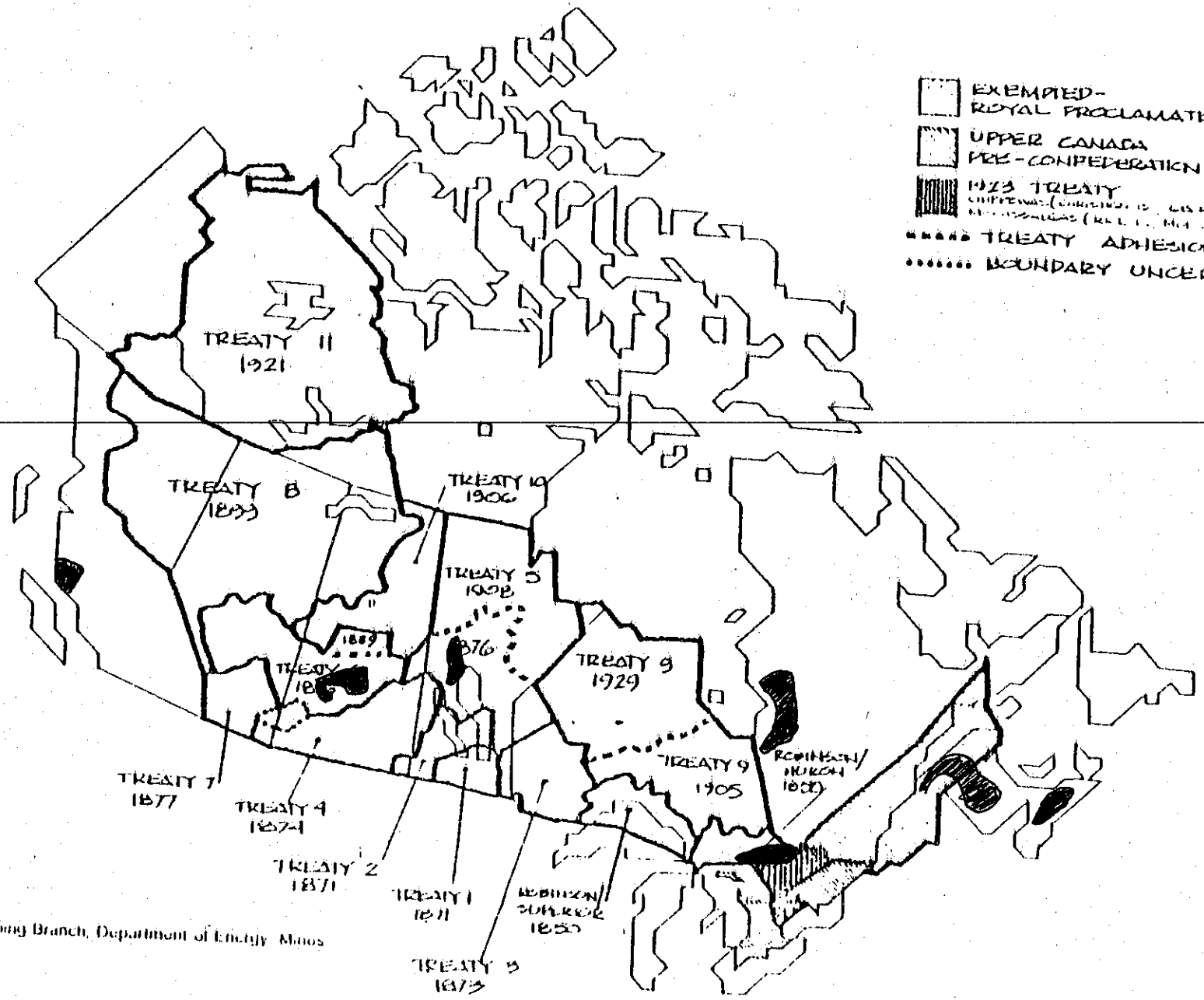
2) a direct role for them in future constitutional discussions is not assured;

3) the recognition is still negative ("... shall not be construed as denying the existence of... ");

4) no provisions are made for aboriginal consent to any other constitutional amendments that directly affect them.

It appears to the aboriginal groups that the government is reserving the right to say that aboriginal rights do not exist. Protection and thus entrenchment of aboriginal rights requires, in their view, a positive recognition that aboriginal rights exist, a government commitment to negotiate the details of such rights and a provision for consent of the aboriginal groups to amendments that affect them.

INDIAN TREATIES



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BAND GOVERNMENT ON INDIAN RESERVES

Indian self-government or community self-determination has recently emerged as a significant issue in the relationship between Indians and the Government of Canada. Over time this relationship has developed into a dependent one in which the central authority has exercised almost total control over the membership and activities of Indian bands. The Indian Act spells out the duties and responsibilities of the federal government, which, in effect, give Indians a special status in Canada. There is now "a recognition on the part of the federal government that the existing legal and political arrangements for Indians in Canada, in particular the Indian Act, are too restrictive and in need of reform."(1)

The provisions of the Indian Act reflect a belief that Indians would eventually achieve social and economic equality with non-Indians and would no longer need special status and protection by the federal government. In 1969 the Government of Canada issued a White Paper on Indian Policy which proposed the termination of special treatment. In short this paper espoused a policy of assimilation. However, the Indians saw the proposal as an abrogation of federal responsibility as well as a loss of lands and heritage, and quickly rejected it. Subsequently, the federal government abandoned its paper.

Indian dissatisfaction with their relationship to the federal government has continued. They are seeking greater autonomy, control over their own affairs, some devolution of authority and the ways and means of improving their economic state by managing their own affairs. All of these are expressions of self-government.

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(1) J. Anthony Long, Leroy Little Bear, and Menno Boldt, "Federal Indian Policy and Indian Self Government in Canada: An Analysis of a Current Proposal", Canadian Public Policy, VIII: 2 Spring 1982, p. 189.

The federal government has indicated its support for amendments to the Indian Act to provide the option of self-government at the band level for those bands wishing it. Such legislation would establish band councils as governing bodies in their own right. It would also give them a broad range of powers under which they would be responsible for their own economic, social and cultural development.

Self government has been a key element in any discussion of Indian affairs during the past decade. Long, Little Bear and Boldt reflect this effort in their conclusion: "this reoriented policy direction constitutes an attempt by the government to balance the demands by an increasing number of Indian bands for greater control over their internal affairs with a desire to retain the historic legal relationship between the Canadian government and the Indian peoples."(1)

a) Legal Status of Band Governments

At the present time band councils are seriously restricted in their ability to deal with local issues because the authority over such matters rests with the Minister. Changes to the Indian Act would establish band councils as a legal entity with certain duties and responsibilities, thus allowing local governments to respond directly to the needs of their own band members. The move to self government will fundamentally alter the relationship between the federal government and the Indian bands. What would be the nature of the relationship of the federal government to Canadian Indians and to the band government? Should the band government have some relationship with the federal government as a municipality has with the province or is this an entirely different relationship? What would be the scope and authority of the two levels of government? To what extent should all or some of the matters over which the Minister has exclusive jurisdiction be transferred to the band government? Which level of government should have jurisdiction over such items as education, health, safety, or community development, etc.? Should there be a distinction between those matters which apply generally to all Indians and those matters which apply specifically to a particular band? Should all powers not specifically listed as federal ones, be assumed to be under band government?

(1) Ibid., p. 196.

b) Accountability of Band Councils to Band Members

The Minister has indicated that each band which opts for band government would be expected to prepare its own band constitution. This band constitution would describe the structure and operation of the band council in carrying out the duties and responsibilities transferred to it from the federal government. Over two-thirds of the Status Indian population occupy reserve lands in approximately 600 isolated locations, with most communities having fewer than 500 persons. As bands are at varying levels of sophistication, a number of different structures would likely result. Basically, however, the band constitution would set out the relationship of the band government to its members. How would the constitution relate to established principles of democratic procedure such as elected leadership or regular elections? Would band constitution be required to contain certain fundamental principles? Exactly how would a band develop its constitution? Should there be a procedure to ensure the full participation of all band members in its development? What mechanism will be used for the formal adoption of it by the federal government e.g. Act of Parliament, Order-in-Council, approval by Minister? How would changes be made? Not every community would be able to assume all duties immediately; therefore, what process would be used to provide the gradual transfer of duties from the federal government to the band government?

c) Powers of the Minister in Relation to Reserve Land, Band Monies and the Exercise of Band Powers

While there has been general agreement that under the present legislation the federal government has difficulty in responding effectively to local problems, it must not, in any new system, abrogate its responsibility for the Indian people. How can the Minister ensure that band governments are carrying out the duties transferred to them? Should there be recommended standards of service negotiated in the transfer of authority from the Crown to the local government e.g. health care? What residual duties should the Minister have to ensure equitable support to bands across the country and to ensure equal access of opportunity for all band members? Over the past ten years the United States government has carried out a similar policy of self-determination, culminating in two public laws. What can be

learned from this experience? Should the central authority retain certain powers? What about resistance to such a policy?

d) Financial Transfer, Control and Accounting Mechanisms Between Bands and the Government of Canada

One of the main arguments for Indian self government has been that control over their own affairs would encourage economic development. However, bands are at varying levels of economic self-sufficiency both in terms of leadership and of resources. Changes to the Indian Act must both encourage Indian communities to grow toward more local autonomy while at the same time ensuring that the federal government is maintaining its relationship to Indian people. Should band governments have the power to raise revenues through taxes? If so, what type? Should band governments be expected to "pay as you go" or should some core funding be provided? If funding were to be provided, should it be allocated on a project basis or a block-funding basis? How will an equitable distribution of wealth be established as some bands succeed in economic development? Should the Minister have residual duties to ensure equal access of opportunity to all bands? Should there be a contingency plan to protect members from the consequences of failure? Should the operation of band government be separated from the operation of a specific enterprise on a reserve so that in the case of bankruptcy or failure the band government does not collapse?

e) Legislative Powers of Bands and Their Relationship to the Powers of Other Jurisdictions

Under the Constitution Act, 1867, matters concerning Indians are within the exclusive legislative jurisdiction of the federal government, excluding provincial legislation entirely. The legislative base for band government as well as its relationship with the federal government has already been discussed. However, the band's relationships to provincial and municipal governments are also significant issues. Exactly how would the band government relate to provincial statutes? How would jurisdictional problems between all three levels of government be resolved? Should the courts be used or should a new mechanism be established? The example of law enforcement will point out the problem. If a provincial road runs through a

reserve, should the band government have the right to lower the speed limit, should it have the right to enforce it and finally should it have the right to hold a native court before which non-native persons would be obliged to appear?

f) Accountability to Parliament of the Minister for the Monies Expended by or on Behalf of Indian Bands

Currently, the Minister has almost total control over land reserved for Indian people, the income from which is held in trust for the benefit of Indian people. Moreover, the Minister is usually involved in matters of contracting since the Indian Act does not specify that band councils have contracting powers. The incorporation of band councils as legal entitites will likely mean that band councils will be able to contract. How can the band constitution ensure probity in the use of band funds? Should the enabling legislation contain standards for financial administration and operation? Should the financial transfer be phased in so that responsible control is ensured? What type of training and management practices will be instituted to protect constituents from economic failure? Should the federal government take any steps to ensure the solvency of the local government?

Ottawa, August 27, 1982