

November 21, 1981

MEMORANDUM FOR THE MINISTER OF JUSTICE

FROM: The Deputy Minister

Native Rights and Section 34

Mr. McMurtry's letter makes four points:

1. Section 34 will give "aboriginal and treaty rights" absolute immunity from the law".

Other critics have argued that section 34 does no more than recognize and affirm the status quo and therefore gives nothing to native peoples. We reject both of these extremes of interpretation as an over simplification of a complex legal problem. The definition of these rights -- and whether they still exist in a particular part of the country -- and the degree to which they will be subject to other federal and provincial laws -- cannot be settled by generalizations but must be dealt with on a case by case basis by the courts.

2. Mr. McMurtry suggests section 34 may upset vested non-native rights -- he cites the City of Ottawa and Parliament Hill. In our view, aboriginal rights in densely settled parts of Canada were extinguished many years ago. The constitution will not be interpreted to retroactively upset the vested rights acquired by other people. Where aboriginal rights no longer exist there is nothing to be "recognized and affirmed". For this reason, in our view, the version of section 34 proposed by Alberta does not alter the legal effect of section 34 as originally proposed to Parliament.
3. Mr. McMurtry says section 34 could alter the course of current and future land claims litigation. Insofar as the defence to such litigation was based on a denial of the concept of aboriginal and treaty rights, section 34 will benefit native peoples -- and properly so. The federal government has never challenged the concept of enforceable treaty rights -- and since 1973 has accepted "aboriginal rights" as a proper type of claim to put forward in land claims settlement negotiations.

4. Mr. McMurtry says that native people will be able to "hunt and fish to their heart's content notwithstanding any federal or provincial law"

This is really an elaboration of Mr. McMurtry's first point. We believe natives hunting and fishing for food ought to have priority over non-natives who generally speaking do not rely for their food on hunting and fishing. But this does not exempt native peoples from laws legitimately aimed at conservation of the resource itself (as opposed to conservation of the resource for non-natives). Natives have never claimed the right to hunt down the last living creature. Nor does section 34 allow native peoples to embark on commercial operations involving game or fish free of government regulation.

In summary, Mr. McMurtry's letter makes numerous and sweeping assumptions about the way in which the courts will approach the solution of these problems. This is a complex area of the law. He will have the opportunity to present his concerns to the Courts. So will the federal government. So will the native peoples. There is no reason to believe the Courts will arrive at a solution that is not fair to all sides.

Some of these legal questions no doubt will be discussed at the First Ministers' Conference required to be held by section 36 within one year after patriation.



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Minister

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Attorney
General

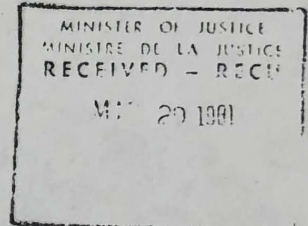
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May 7, 1981

The Honourable Jean Chretien
Minister of Justice
Justice Building
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Ottawa, Ontario
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Dear Mr. Chretien:

Now that argument before the Supreme Court of Canada on the legal validity of the proposed constitutional amendments has been completed, it is appropriate to bring to your attention certain matters of serious concern arising from the proposed entrenchment of aboriginal rights.

I

As you know, the Constitution Act, 1981 currently before Parliament provides:

- 33(1) The aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.
- 58(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
- (2) The Constitution of Canada includes
 - (a) the Canada Act;....

(The Canada Act, the proposed British statute amending the Constitution of Canada, includes the Constitution Act, 1981 as Schedule B thereto.)

In the result, it appears that every law, federal or provincial, that is inconsistent with the provision of the Constitution which "recognizes" and "affirms" the aboriginal rights and treaty rights of Indians, Inuit and Metis is of no force or effect to the extent of the inconsistency.

This may have, I suggest, very serious and unfortunate consequences for the people of Canada.

In the first place, although the nature of aboriginal rights is a matter of much uncertainty, it appears that they are property rights of a kind.

As I read the proposed provisions, it is at least arguable that these private property rights are to be entrenched in the Constitution in the sense that (in the absence of a future constitutional amendment) they cannot be taken away, or even derogated from, by any legislation ever.

This would mean, for example, that even if it were at a future date the overwhelming will of Parliament that certain lands subject to aboriginal title should be expropriated in the public interest, pursuant to a general or special statute ensuring fairness and just compensation, this could not be done. Even the Constitution of the United States with its enthusiasm for private property rights provides, in the Fifth Amendment, only that "no person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation". The right of property is qualified; it can be derogated from if due process of law is afforded and it is subject to expropriation procedures that are fair and result in just compensation.

I would be surprised if there is any nation in the world in which any private property right enjoys under the national constitution the absolute immunity from the law which is apparently contemplated for aboriginal rights in Canada. (It is perhaps surprising that those members of the joint committee who were so vigilant to defeat a proposed amendment which would have entrenched a qualified general right of property were willing to support this unprecedented elevation of one particular private property right.)

The potential effect of these provisions on any future negotiations for the settlement of Indian land claims based on aboriginal rights is obvious.

Second, the entrenchment of aboriginal rights in the Constitution in the manner contemplated has the potential of working a very serious injustice against many people and of creating serious disruption in the life of the country.

To take an example, a band (or bands) of Indians in the Ottawa valley has, we are told, a claim of aboriginal title to a large part of that valley in Ontario. If the Indians were able to substantiate their claim, the main defence of private property owners in, for example, Ottawa or Pembroke (and of the federal Crown in respect of, for example Parliament Hill), would be The Limitations Act. That is, they would assert that they and their predecessors in title had been in open, notorious, continuous occupation of the land for at least ten years (in many cases for more than 150 years) and had therefore extinguished the aboriginal right by adverse possession.

It is perhaps an arguable question as to whether The Limitations Act and its predecessors apply in the case of aboriginal title in view of section 91(24) of the B.N.A. Act, 1867. But at least the argument is available and a court might be constrained to accede to it in order to avoid dispossession of the inhabitants of, for example, the City of Ottawa.

Now, pursuant to the proposed entrenchment, it appears that The Limitations Act would not apply.

Third, the proposed entrenchment would probably alter the course of current and future land claims litigation to the detriment of the people of Canada by retrospectively changing the law many decades after the original events in question occurred and would undoubtedly encourage such litigation based on perceptions of the newly established constitutional rights and, by calling in question the validity of land grants made pursuant to various pre-confederation, federal and provincial laws, would contribute to a general climate of uncertainty and disruption affecting the lives of many Canadians.

Finally, the proposed entrenchment would profoundly affect the question of whether any Indians are subject to game and fish legislation. Whatever else they may encompass, it is clear that aboriginal

rights include a right to hunt, trap and fish. In general, the current legal position appears to be that aboriginal rights to hunt, trap and fish are subject to federal legislation and, if our interpretation of the Kruger case in the Supreme Court of Canada is correct, to provincial legislation. Treaty rights are subject to federal legislation but, by virtue of section 88 of the Indian Act, are not subject to provincial legislation.

If the proposed entrenchment becomes part of the Constitution, both aboriginal and treaty rights will prevail over both federal and provincial legislation. And, if a current Ontario Divisional Court decision to the effect that aboriginal hunting and fishing rights exist unless they are expressly taken away in a treaty were upheld, the effective result would be that all Indians in Canada could hunt and fish to their hearts' content notwithstanding any federal or provincial law prescribing, for example, prohibited areas, seasons, bag limits or licences.

II

It is clear that the native peoples of Canada have legitimate aspirations for the future and also have sincerely felt grievances arising from certain events and circumstances of the past and present.

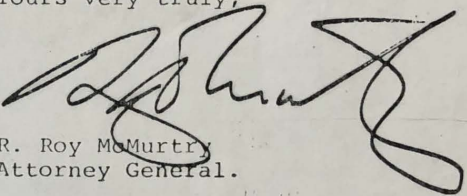
Fulfillment of these aspirations must be facilitated and fair resolution of these grievances must be addressed.

But I suggest that this must be accomplished in a way that will not lead to unfairness, disruption, uncertainty and division in Canadian society, continuing unnecessary litigation and unrealizable expectations on the part of native peoples. It is my view that there is a substantial danger that the current provisions, if adopted and continued in their present form, will give rise to such results in some measure.

Accordingly, I urge you to seriously consider amendments to the aboriginal and treaty rights provisions to remove the dangers inherent in the provisions as they now exist and to ensure the interests of the native peoples in a way that is equitable for all Canadians.

Please provide me with your views at your very earliest opportunity.

Yours very truly,

A handwritten signature in black ink, appearing to read 'R. Roy McMurtry', written in a cursive style.

R. Roy McMurtry
Attorney General.

The Honourable Roy McMurtry
Attorney General of Ontario
18 King Street East
Toronto, Ontario
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Dear Mr. McMurtry:

Thank you for your letter of May 7, 1981, in which you raise concerns about provisions in the revised Constitution Act 1981 concerning aboriginal and treaty rights.

In view of the all-party agreement respecting the future progress of this matter in Parliament, I see little likelihood of further amendments to these provisions.

I have noted your view that as a consequence of section 34(1) (formerly Subsection 33(1) of the proposed Constitution Act, 1981) aboriginal and treaty rights may enjoy "absolute immunity from the law." As the Constitutional Resolution is presently under review by the Supreme Court of Canada, it would be premature for me to attempt to respond in detail to the particular issues you raise.

I have, however, asked my officers to review your letter on this subject, and to ensure that your concerns are included in the work that is proceeding with respect to the Constitutional resolution. I expect that I will be in touch with you further on this matter at a later date.

Yours sincerely,

Jean Chrétien

Ian Binnie/cc

c.c. The Honourable John C. Munro