



Department of Justice

Ministère de la Justice

MEMORANDUM/NOTE DE SERVICE

Security Classification - Cote de sécurité
CONFIDENTIAL - BY HAND
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Date
November 25, 1981

TO/A: ^I ~~DEPUTY~~ MINISTER

FROM/DE: A/ADM, PUBLIC LAW

SUBJECT/OBJET: "EXISTING" ABORIGINAL AND TREATY RIGHTS

REÇU
 SECRÉTARIAT MINISTÉRIEL
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Comments/Remarques

N. Ministe
 W.
 le 26 nov,

It is being argued by certain Members of Parliament and counsel for the native peoples associations that the insertion of the term "existing" in the aboriginal and treaty rights recognized and affirmed by section 35 of the Resolution in some way narrows the scope of the rights which are being given constitutional recognition and affirmation.

This, in my view, is not legally correct. Inclusion of the term "existing" simply makes explicit what was already clearly implicit in the earlier language, thus removing rather than adding any ambiguity as alleged. Quite clearly the recognition and affirmation of aboriginal and treaty rights can only mean those rights which continue to exist, since there can be no recognition of those which have legally ceased to exist prior to recognition. Consequently, whichever language is used in section 35, what is being constitutionalized are existing rights.

There seems to be a belief in some quarters that without the term "existing", the courts would be free to find that some aboriginal rights that may have existed in the past, but which have been extinguished or abrogated by proper legal means, were now revived. This is not a proper construction of the old section 34. All it did, like the new section 35 does, is say that when a claimant is able to establish the existence of a still subsisting right, one which originally existed and which has not been lawfully extinguished by the Crown or surrendered by the native peoples, then it is recognized and affirmed in whatever form and nature it takes. Neither the old section 34 or the new section 35 attempted to say what the rights are that exist -- this will be a matter for identification (by proof or agreement) in the process of future negotiations or litigation.

Seen by
 Vu par
 R. TASSÉ

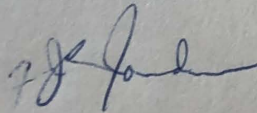
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Another point which appear to be in contention is the argument that inserting the word "existing" creates a cut-off date (i.e. the date of proclamation) which will have the effect of validating all extinguishments or abrogations of aboriginal rights that have occurred prior to this date. Again, this is a misconception. It will still be open to the native peoples under section 35, as it would have been under old section 34, to question this legal validity of prior extinguishments and abrogations. Where they can establish that these were not legally effective, then their original rights, whatever they may be found to be, will be recognized, with restoration thereof or compensation therefor as may be appropriate.

Finally, some seem to fear that by inserting the term "existing", future claims or settlements will not be possible. This is to overlook the rule of statutory construction that a law is always speaking, whenever it is invoked. Thus, twenty or fifty years hence the existing rights will still be there. If a treaty is entered into with a particular group of native peoples whereby their claimed aboriginal rights are surrendered in return for treaty rights, then on the date of that treaty those new treaty rights will be existing rights and the aboriginal rights surrendered will cease to be existing rights under section 35. At the same time, if one of the traditional aboriginal rights is established to be a right of native peoples to preserve and use their native languages in their schools and band institutions, this will continue to exist not only at the date the Constitution Act comes into force, but as well in the future unless it is subsequently lawfully surrendered or extinguished.

It might be useful to pass these points along to the Minister if questions on this matter persist in the House or Senate.



F.J.E. Jordan

c.c. Mrs. Barbara Reed
Mr. Louis Reynolds