Compilation of primary documents to assist in interpreting the meaning of Section 25 (Indigenous Rights) of the *Constitution Act, 1982*

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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 now exist by way of land claims agreements or may be so acquired.

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[1] Coming soon.

PART 1:

Previous Attempts at an Indigenous Rights Clause

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1763: Royal Proclamation[2] (HERE)

> And whereas it is just and reasonable, and essential to our interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.
>
> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.
>
> And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.
>
> And, We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.
>
> And whereas great Frauds and Abuses have been Committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order,

[2] The Royal Proclamation of 1763 (UK) is inserted here as it is explicitly mentioned in the Section.

> therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose; And we do, by the Advice of our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside, and also give Security to observe such Regulations as We shall at any Time think fit, by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade:
>
> And we do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all our Colonies respectively, as well those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited in case the Person to whom the same is granted shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.
>
> And we do further expressly enjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the use of the said Indians, to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisions of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper guard to the Colony where the Crime was committed of which they stand accused, in order to take their Trial for the same.

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1978: Bill C-60, An Act to amend the Constitution of Canada with respect to matters coming within the legislative authority of the Parliament of Canada, and to approve and authorize the taking of measures necessary for the amendment of the Constitution with respect to certain other matters (HERE)

> 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.

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10 October, 1978: Report Recommendation on Bill C-60 (HERE)

> Recommendation 9.
>
> […]
>
> Clause 26, providing that the Charter shall not derogate from existing rights and freedoms, is a useful one, but, in singling out the native peoples for special mention, might unintentionally restrict their rights by referring only to the rights and freedoms they may have acquired by virtue of The Royal Proclamation of October 7, 1763. In our view, it would be preferable to omit the reference to this particular document.

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5-6 February, 1979: Federal-Provincial Conference of First Ministers on the Constitution, *Federal Draft Proposals Discussed by First Ministers* (HERE)

> H. Undeclared Rights
>
> 1. Protection of any undeclared right existing at any time, including those that may pertain to native peoples.

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PART 2:

Successive drafts of Section 25 of the *Constitution Act, 1982*

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4 July, 1980: Rights and Freedoms within the Canadian Federation, Discussion Draft, Tabled at the Meeting of the Continuing Committee of Ministers on the Constitution (8-11 July, 1980)

> **Undeclared Rights**
>
> 17. Nothing in this Charter abrogates or derogates from any right or freedom not declared by it that may exist in Canada, including any right or freedom that may pertain to the native peoples of Canada.
>
> **General**
>
> […]
>
> 19. Nothing in this Charter abrogates or derogates from any right or freedom not declared by it that may exist in Canada, including any right or freedom that may pertain to the native peoples of Canada.

(Source: Meeting of the Continuing Committee of Ministers on the Constitution, *Rights and Freedoms within the Canadian Federation, Discussion Draft. Tabled by the Delegation of the Government of Canada*, 4 July 1980, Doc 830-81/027 (Montreal: 8-11 July 1980). Click HERE.)[3]

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22 August, 1980: "Discussion Draft"[4]

> 25. The enumeration in this Charter of certain rights and freedoms shall not be construed to exclude, or to derogate from, any other rights or freedoms that may exist in Canada, including any rights or freedoms that may pertain to the native peoples of Canada.

(Source: Robin Elliot, "Interpreting the Charter—Use of the Earlier Versions as an Aid", *University of British Columbia Law Review* (1982), p. 23. Click HERE.)

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[3] Original not currently available. Discussion draft found in Anne Bayevsky, *Canada's Constitution Act 1982 & amendments: a documentary history* (1989).

[4] Elliot calls this the first version of the Charter.

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2, 5, or 6 October, 1980[5]: Draft Tabled in House of Commons and the Senate

> 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[6] in Canada, including any rights or freedoms that pertain[7] to the native peoples of Canada.

(Source: Canada, Parliament, "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" in Sessional Papers (1980). Sessional Paper 321-7/20. The text is found on p. 3. Click HERE.)

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12 January, 1981: Draft Submitted to Special Joint Committee on the Constitution by Jean Chrétien

> 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.

(Source: Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 36 (12 January 1981). The text is found on p. 11. Click HERE.)

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13 February, 1981: Draft Tabled in the House of Commons[8]

> 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[9] to the aboriginal peoples of Canada including

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5 Date for this draft is uncertain. Elliot places it as October 5. Parliament was only opened on October 6, 1980 when it was tabled. As for the October 2 date, it refers to "The document entitled 'Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada' published by the Government on October 2, 1980" which appears as the title of every issue of the Special Joint Committee on the Constitution.

6 The word "may" has been removed from the previous draft.

7 *ibid*.

8 The wording never changes after this draft.

9 The word "may" has been removed from the previous draft.

> (a) any rights or freedoms that have been recognized[10] 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.

(Source: Canada, Parliament, *House of Commons Journals,* 32nd Parl, 1st Sess, 1981. The text is found on p. 1249. Click HERE.)

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23/24 April, 1981: Draft Submitted to Supreme Court for *Constitutional Amendment Reference*

> 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.

(Source: Canada, Parliament, *House of Commons Journals,* 32nd Parl, 1st Sess, April 23, 1981. Click HERE & Canada, Parliament, *Journals of the Senate*, 32nd Parl, 1st Sess, April 24, 1981. Click HERE.)

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November 18/20, 1981[11]: "November Accord Version"[12]

> 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.

(Source: Canada, Parliament, *House of Commons Journals,* 32nd Parl, 1st Sess, 1981. The text is found on p. 4007. Click HERE.)

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10 *ibid.*

11 Elliot has the date as November 18. Source is from November 20.

12 As titled by Robin Elliot, *op cit.*

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December 2, 1981: Final Version

> 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.

(Source: Canada, Parliament, *House of Commons Journals,* 32nd Parl, 1st Sess, 1981. Click HERE.)

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PART 3:

Debates on Section 25[13] and Indigenous Rights in the Canadian Parliament, First Ministers' Conferences, and the UK Parliament

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Key for Special Joint Committee Entries

	Liberal Party
	New Democratic Party
	Progressive Conservatives
	Witnesses

Federal-Provincial Conference of First Ministers on the Constitution, Federal Draft Proposals Discussed by First Ministers (click HERE)

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April 29, 1980, Debate in the House of Commons, p. 510 (click HERE)

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May 12, 1980, Debate in the House of Commons, p. 960 (click HERE)

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August 26, 1980, Sub-Committee of the Continuing Committee of Ministers, Presentation by Harry Daniels, Native Council of Canada (click HERE)

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[13] The reader should note that this Section was originally numbered 24 and referred to as such throughout the proceedings.

August 26, 1980, Sub-Committee of the Continuing Committee of Ministers, Presentation by Del Riley, National Indian Brotherhood (click HERE)

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August 26, 1980, Sub-Committee of the Continuing Committee of Ministers[14], Indians and the Current Constitutional Discussions (click HERE)

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October 16, 1980, Debate in the House of Commons, p. 3752 (click HERE)

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October 17, 1980, Debate in the House of Commons, p. 3778 (click HERE)

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October 20, 1980, Debate in the House of Commons, pp. 3862-3863 (click HERE)

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October 22, 1980, Debate in the House of Commons, pp. 3944, 3954 (click HERE)

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October 23, 1980, Debate in the House of Commons, pp. 4005, 4029, 4043-4045 (click HERE)

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October 30, 1980, Debate in the House of Commons, pp. 4291-4293 (click HERE)

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November 12, 1980: Senator Lucier & John Chrétien, speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (click HERE to view the Special Joint Committee, Issue 3, then scroll to p. 32)

> **Senator Lucier:** […] My second question to the Minister is, Section 24 concerning the protection of the rights and freedoms of native people. It seems to me a rather negative statement. It really says that the rights that they now have will not be jeoparized.

[14] Unconfirmed part of the same committee, but the date and document number would indicate that it is.

I am just wondering if there could not be something more positive than that to protect the native people. There really seems to be nothing in there that would protect what they feel are very genuine concerns of theirs.

I wonder if anything can be done to make it more positive than tojust say that we will not do anything to hurt you.

Mr. Chrétien: What we are trying to do in. I think it is Section 24 we want to protect all the rights of the natives. The problem is, some are arguing at this time it is in a negative way rather than in a positive way. Exactly the reason why we are doing that is to make sure that all the rights be protected because in Canada we still need some clarification to come to an agreement about native rights.

I have been working on that problem myself for many years and there is the right based on the treaty, the right that was

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given to the natives at the time of the royal proclamation of 1762 or 1763 by King George II and the instruction he gave to his colonies at this time to settle the rights of the natives, there is the question of the rights that have been either abandoned by some of them or have been taken away by different actions of governments in the past.

It is a very complex issue, and in having this Clause drafted that way we wanted to make sure that we were not creating any prejudice to their rights, so we say all the rights they have today will not be changed by this bill.

If we were to move into an affirmative declaration of the rights at this moment, if the Committee wants to make the change, it could be that in affirming the rights we could make an error.

Now, negatively, we are telling them there is no way we want to take any rights away from you, but if you start to affirm them you might leave some rights outside of the affirmation and that is why the drafter decided to proceed by the negative route.

As you know, we have agreed with the provinces that in the future when we resume the negotiations on the constitution we will have an item, the Natives and the Constitution. There are many aspects of it that have to be clarified and in fact we have provided the natives with substantial funds lately in order to study that and to try to find the proper text to protect their rights under the Constitution. In proceeding in a negative way as we have done we were making sure that we were not causing any prejudice to their rights. The Committee can look into the matter, but we felt that it was the safest way to proceed.

It is extremely complex, and I do not have to tell you how complex.

Some of the questions that I have tried to resolve in 1969 have not been resolved as yet and they looked so simple when I approached them at that time. For instance. the question of the women who marry white men loose their Indian status, but after eleven years of discussion with the native

organization and the bands and so on we have not been able to arrive at a concensus with them. Some want to keep the old way. and some want the women not to lose their rights.

The question that this Committee and Parliament will have face some day is should we impose a solution. In 1969 I started to debate that with them because I was appalled myself at that time that when a woman was married to a white man I had to sign a paper that meant that she was disenfranchised. I had no flexibility, the law forced me to sign that paper, but I have never been comfortable with it.

This has been going on with the Indians for a long time and to incorporate that type of problem in one of the clauses could be very dangerous, to try to solve it in six lines; so in having a negative presentation like this we are trying to protect and

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keep their rights as they are without prejudicing them in any way.

James Manly, Jean Chretien, & Jake Epp, p. 67

Mr. Manly: Thank you, Mr. Chairman, I would like to ask the Minister some questions.

On Friday, November 7, at his weekly press conference, the Prime Minister said I am convinced there would never be an entrenched charter of rights, particularly there would never be entrenched educational language rights if it were not done now by the national parliament the last time, as it were, that we had a possibility of proceeding in this way to amend the constitution.

In other words, once we have a constitution in Canada, whether it be with the Victoria formula or any other formula, we will never get anything saying that all Canadians are equal

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because there will always be some provinces—and then he goes into some detail about the different provinces.

A week earlier in a letter to the president of the National Indian Brotherhood, and similar letters were sent to the leaders of the Inuit and the Native Council of Canada, he said I believe that Canadians with new found pride in their own constitution and in their new maturity as a country will be more than ever generous in considering the needs and wishes of our first citizens. In short, I believe that Constitutional change after patriation will become easier rather than harder.

To me, this is a very evident contradiction between what he sees as being necessary to do now while there is an opportunity in terms of language rights and things that he cares about. As far as the Native people are concerned he sloughs them off with the suggestion that it will be easier after we have the constitution in Canada.

I would like to ask you, through the Chairman, what factors are there that will make it easier for the Native people to have their rights entrenched after patriation rather than before, as compared with language rights.

Mr. Chrétien: If you read Article 24 of the Charter we say that the rights that the Natives have . . .

Mr. Manly: I am not talking about Article 24. I am talking about the Prime Minister's response to the Indian people and the Native people who are concerned about their rights that they feel are not covered in Article 24.

Mr. Chrétien: I think that they are covered.

Mr. Manly: But the Prime Minister was responding . . .

Mr. Chrétien: We say that there is nothing in this Charter that will infringe upon the rights of the Natives. I explained this afternoon at length that some say this is a negative affirmation of their rights; we say that nothing in this Charter will take away any rights of the Indians. The Indians and the Inuit and the status Indians, their rights are flowing from different sources. It is not a right that we are creating for them. They have rights. We say that their rights will not be infringed upon by the constitution. The rights of the Natives are flowing from the treaty rights. That is a right; it is written in the 11 treaties that we have in Canada. Their rights are flowing from the Royal Proclamation of 1763.

This is when the king at the time said no people shall move in the colonies and not settle the rights of the Natives when arriving, and it is based on those things that the rights of the Indians exist.

The problem we are having is the definition in front of the Court of what they are. The treaty rights have been debated in Court many times and some of the treaties have been open for re-negotiation like Treaty 11, and we have recognized the rights of the Indians.

Those who never had a treaty have a different kind of rights based on the Royal Proclamation and it is based on that, that we are sitting at this moment trying to make a deal with the

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Indians in the Yukon for example, who are not covered by any treaty. In the MacKenzie Valley, they are covered by Treaty 3, 8 and 11.

The Inuit people never signed a treaty with the Crown and we have entered into negotiation with them. We have recognized that they have aboriginal rights, and it is why we said in Section 24 that rather than have a positive definition of their rights, they are better protected by Section 24 because the Indians have told us that they would like to work on some of their rights to clarify them, so while we are doing that, we are not diminishing their rights.

Mr. Manly: The point is, Mr. Chairman, that Mr. Trudeau was responding to a clear expression of concern by the Native people that section 24 did not meet their rights. He was responding to their concern such as they have over section 25 that says that any law that is inconsistent with the provisions of this Charter is to the extent of such inconsistency inoperative and of no force or effect.

There is no guarantee of their treaty rights or of their aboriginal rights in this Charter and I simply think that you have failed to deal with this inconsistency.

Mr. Chrétien: If you want to take the responsibility of trying to define their rights precisely in section 24, I have dealt with the problem quite extensively myself and it is extremely complex and there are a lot of issues that are still debated.

Mr. Manly: Absolutely.

Mr. Chrétien: Not only between the government and them, but between them, they are extremely difficult. For example, the fact that when an Indian woman marries a white man, she loses her Indian status. This problem was in front of me in 1969 and I tried to resolve it and they said, no, do not touch it, it is our tradition. After 11 years we have not come to terms with them.

If you are telling me today to impose on them a solution and they are the rights of the people who have been disenfranchised through the Indian Act…

Mr. Manly: I am not suggesting that you impose upon them a solution. It was promised to the Native people that they would be fully involved in discussions and participation in all constitutional changes that affected them, and they have not been involved in the drawing up of the charter of rights.

I would like to ask you about the document that is entitled Briefing Material on Canada's Native People and the Constitution, and on page 2 of that document which was leaked earlier it says:
No answer to the concerns of Native people is likely to be found wholly satisfactory.

However, there are a number of things which should be said that might reduce the intensity of Natives campaigns for public attention and even win a few Native spokesmen to the government's side.

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I would like to ask the Minister why is the government directing its attention and its energies to try to reduce the effectiveness of the Native peoplc's campaign to win public sympathy for their concerns rather than to meeting the needs of the Native people and to sit down and meet with them and deal with their concerns.

Mr. Chrétien: At the time of the constitutional debate this summer I met with the Native leaders, the three organizations, the Inuit, the National Indian Brotherhood and the Council of Natives and met—I do not know the term.

Mr. Epp: Native Council of Canada.

Mr. Chrétien: We have debated that problem with them and in the light of that discussion they said we would like to prepare our position.

in 1979. in February of 1979 the Prime Minister, Mr. Trudeau, insisted with his colleagues, the provincial premiers, that there shall be a special item that was called The Native and the Constitution. This summer we decided to fund the Natives to prepare their agenda and their work. We will be debating that in future discussions.

In the meantime we claimed that through Section 24 we are protecting their rights.

I just want to tell you that what we want is to maintain all the rights that they have and at the same time to give the Natives sufficient time to develop their position and to present it to the National Government and to the different provincial governments,

The federal responsibility in Native matters is well known and since 1969 we have started to negotiate some of those claims.

Mr. Manly: What is there in the proposed constitution that indicates where responsibility for Indian people lies?

Mr. Chrétien: As you know, responsibility for the Natives in Canada under the constitution is divided between the National government who, under the constitution, is responsible for the registered Indians, and in Northern Affairs, we have had the responsibility up to the time that it becomes a province, that is to say, in the North.

Mr. Manly: Where does your responsibility lie under this constitution?

Mr. Chrétien: Well, it is exactly the same as before.

Mr. Manly: Where is that indicated in the constitution? What in the constitution indicates that?

Mr. Chrétien: There are clauses in the constitution dealing with the Indians which are still there—Section 24, for instance; their rights remain the same. So that the registered Indians will remain a federal responsibility; the northern Natives will remain a federal responsibility; and, of course, the Metis and the non-status and the enfranchised Indians are considered under the Law as provincial citizens.

Robert Bockstael & Jean Chretien, p. 84

Mr. Bockstael: Under clause 24, I have had native people in my constituency come forward and I have tried to reassure them that by adopting the new constitution, what existed in the B.N,A. Act, the Treaties that are in force, are not abrogated, and that they are as assured as they always have been of their rights. even if we do repatriate and amend this constitution . . .

Mr. Chrétien: That is exactly as I see the situation, the rights of all the native Canadians, either flowing from Treaties or the Royal Proclamation, are assured to remain as they are, and not being changed by the adoption of this Charter of Rights. its clause 24.

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> There is only one aspect that l have some problems with, which is the non-diserimation aspect of the charter, how that will affect the lndian Act in relation to the status of the women who marry white men. This problem will not be resolved and it might be that in the delay of three years as proposed in this charter of rights, in relation to the non- discrimation clause, that we might be forced to legislate in the Indian Act in relation to the rights of the Indian women, despite the fact that in 1969 I promised the Indians that we were not to change it without their advice and consultation.

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November 13, 1980, Debate in the House of Commons, pp. 4688-4689 (click HERE)

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November 20, 1980, Debate in the House of Commons, pp. 4909-4916 (click HERE)

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November 25, 1980: Senator Asselin & Irene Chabot (President, Association culturelle franco-canadienne de la Saskatchewan) speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (click HERE to view the Special Joint Committee, Issue 12, then scroll to p. 22)

> **Senator Asselin:** […] I would like to ask you a question on the division of powers. Under our Constitution, it is the provinces who are responsible for education and, in this proposed resolution, the federal government would indirectly appropriate this provincial right through Sections 22, 23 and 24. In your opinion, must the jurisdictions remain as they are now? Must the provinces remain masters of education in their own house or should the federal government get involved in that area?
>
> **Mrs. Chabot:** We would like these rights to be entrenched in the Constitution while recognizing that it is the responsibility of the provincial government.

George Braden (M.L.A., Leader of the Elected Member of the Executive Committee, Government of the Northwest Territories), p. 59

> **George Braden (M.L.A., Leader of the Elected Member of the Executive Committee, Government of the Northwest Territories):** […] Section 24 of the proposed Constitution Act provides:
>
> 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 people of Canada.
>
> *[Page 60]*

> in my view, the wording of this provision is general and vague. If enacted in its present form, I suspect that its real meaning will not be clear until it has been tested and defined more clearly by the highest court in the land.
>
> However, that aside, the Legislative Assembly and the Government of the Northwest Territories are of the view that Native rights should be clearly and categorically set out in any constitution of Canada, rather than being given no more attention than a passing reference in a provision dealing generally with acquired rights and freedoms. Native people in Canada have enjoyed a special status which must be clearly recognized in the constitution of Canada. As Mr. Justice Berger stated in his report on the Mackenzie Valley Natural Gas Pipeline, on page 23.
>
> Special status for native people is an element of our constitutional tradition, one that is recognized by the British North America Act. by the treaties. by the Indian Act and by the statement of policy approved by Cabinet in July, 1976.
>
> We, in the Northwest Territories, are acutely aware of the need for the special status for the Native people. We have a sizeable population of Dene. Inuit and Métis. Our legislation recognizes their special status and the need to protect their way of life. As Mr. Justice Berger has stated, special status for Native people is an element of our constitutional tradition. We would not want to demolish that constitutional tradition which is so unique to Canada, and yet the proposed Constitution Act, 1980 makes just a passing reference to it.
>
> I would therefore submit that this Committee give very serious consideration to the entrenchment of Native rights and freedoms and the recognition of their special status in the proposed Constitution Act, 1980.

George Braden, p. 85

> **Mr. Braden:** […] I think the Government and Legislature of the Northwest Territories are perhaps in the vanguard of their perception at this point in time of native rights and aboriginal rights. We realize that the courts have addressed this issue a couple of times and have made some decisions about surface rights to resources which we could consider as part of original or native rights.
>
> There is even a lot of controversy about the use of the term "aboriginal rights", Well, Mr. Chairman, we are not hung up on that and we think that the rights of the native people can be negotiated and defined between the native organizations and the Government of Canada process which is taking place right now.
>
> I would suggest to Mr. Ittinuar that there are probably some areas where they would like to see changes made, but it is beyond the jurisdiction of the Government of Canada. I would suggest that there are probably other areas where they would like to see changes made which the Government of Canada may refuse to respond to.

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November 27, 1980: Senator Lucier & Hon. C.W. Pearson (Leader, Government of Yukon) speaking in the Special Joint Committee of the Senate and House of

Commons on the Constitution of Canada (click HERE to view the Special Joint Committee, Issue 14, then scroll to p. 39)[15]

> **Senator Lucier:** […] I am just wondering if Section 24, as it is written, does not go about as far as you can go with protecting the rights of the native people when you say you are not going to take any of their rights away. I wonder if you would not get into some kind of trouble if you tried to entrench them right now without really knowing what they are.
>
> **Mr. Pearson:** I do not think there is any doubt, Mr. Chairman, that there are going to be real problems created. As I said before, I do not profess to know the answer to this problem. It has been around a long time.
>
> Mr. Chairman, I just think that is a basic fundamental principle that has been lost in the shuffle, and that is the Indian people of Canada have, in fact, had certain rights, under what was the constitution of Canada, the BNA Act and they are going to be losing all of those rights and have no recognition at all under the new constitution. I just question very much the propriety of such an amendment.

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November 28, 1980, Debate in the House of Commons, pp. 5145-5146 (click HERE)

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December 1, 1980: Eric Tagoona (Co-Chairman, Inuit Committee on National Issues), speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (click HERE to view the Special Joint Committee, Issue 16, then scroll to p. 5)

> **Mr. Eric Tagoona (Co-Chairman, Inuit Committee on National Issues):** […] In order to trace our history to the modern day, it is essential to have some appreciation of the relationship which existed between the aboriginal peoples and the Imperial Crown.
>
> Our status as a nation is given some legal confirmation and protection in the Royal Proclamation of October 7, 1763.
>
> *[Page 6]*
>
> This constitutional document, which states our special and unique historical relationship with the Imperial Crown, has been called both an Indian bill of rights, and a charter of Indian rights, due to its fundamental importance to aboriginal peoples in Canada.

[15] The text from a "First Errata" from Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 26 (Dec. 15, 1980), pp. 7-8.

> While the Royal Proclamation. by nature. is not a law of the Imperial Parliament, it does have the same legal effect as a statute. Furthermore, its provisions relating to aboriginal lands still have the full force of law in Canada.
>
> As indicated in our brief to the Foreign and Commonwealth Affairs Committee of the British House of Commons, the Royal Proclamation clearly reflects several basic principles that underline the relationship existing between the aboriginal peoples of Canada and the Imperial Crown. These principles:
>
> (1) recognize the aboriginal peoples as nations;
> (2) imply the necessity of mutual consent to alterations in the relationship;
> (3) confirm and protect the aboriginal rights in and to lands in Canada covered by the Royal Proclamation;
> (4) imply a right of aboriginal self-government in those areas not ceded to the Crown.
>
> As evidenced by the Royal Proclamation, the aboriginal peoples of Canada interacted with Imperial representatives very much like nations in the international sense. This status as nations within Canada vests in us rights not held by others who later immigrated to Canada. As original inhabitants, such rights flowed as a natural consequence from our historical status and position.

Eric Tagoona, p. 7

> **Mr. Eric Tagoona (Co-Chairman, Inuit Committee on National Issues):** […] 2.1 Lack of Status in Proposed Resolution
>
> The proposed resolution in its present form provides no definition for the status of aboriginal peoples in Canada. Apart from the oblique reference to the rights or freedoms that pertain to the native peoples in Section 24, there is no indication in the resolution that the aboriginal peoples have an intrinsic right to their own identities within Canada. By failing to include the principles which form the basis of our special status, the proposed resolution may in effect assist only those who favour the elimination of such status. If the constitution does not specifically provide for affirmation of such status, it may be assumed that it no longer exists.

Eric Tagoona, p. 9

> **Mr. Eric Tagoona (Co-Chairman, Inuit Committee on National Issues):** […] Today we seek self-government within the Canadian federation.
>
> For instance, the Inuit of the Northwest Territories have proposed a Nunavut government in a detailed proposal, a copy of which is available. The main thrust of this proposal is to create a new territory above the treeline which would become a province after an orderly transition period. The Nunavut government would initially have powers similar to the existing government in Yellowknife. All residents could vote, the government would be for all those in Nunavut, and Nunavut would adhere to the highest standards of human rights.

Miss Mary Simon (Member, Inuit Committee on National Issues), p. 14

Miss Mary Simon (Member, Inuit Committee on National Issues): [...] 4.5 Undeclared Rights and Freedoms

Section 24, as amended, provides:

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 of freedoms that exist in Canada, including the aboriginal rights and freedoms that pertain to the aboriginal peoples of Canada and those rights acquired by

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or confirmed in favour of the aboriginal peoples of Canada under the Royal Proclamation of October 7, 1763.

In discussing Section 24 of the Proposed resolution we find it particularly useful to compare this section with the equivalent provision found in the federal government's constitutional amendment Bill C-60. tabled in Parliament by the Prime Minister in 1978.

It should be observed that the present wording in Section 24:

not . . . denying the existence of

dilutes the protection originally provided in the equivalent section under Bill C-60, In this regard, it is arguable that, while the Charter may not in the future deny the existence of certain aboriginal rights and freedoms, it could abridge or otherwise modify their meaning or import. Secondly, the rights of aboriginal peoples under the Royal Proclamation was specifically referred to under Bill C-60 but significantly has been omitted from section 24 of the proposed resolution. In both these instances, the federal government's intention to dilute our protections as evidenced in Section 24 is clearly unwarranted. Our proposed amendment, therefore, purports to correct these weaknesses.

A further element which we have added to Section 24 is a specific reference to the fact that the rights and freedoms of aboriginal peoples referred to in Section 24 are aboriginal in nature. If Canada is truly committed to negotiate constitutional protections for aboriginal rights, then the resolution should at least refer specifically to aboriginal rights if not define them. It has been suggested by certain government officials that one does not put a term in the constitution if the meaning has not been made perfectly clear. We cannot accept this rationale. The terms generally found throughout Canada's constitution are characteristically broad and general in nature and subject to considerable interpretation both judicially and politically.

Due to the lack of time to negotiate constitutional protections and to clarify the exact nature and scope of aboriginal rights, it is our position that the amendments in the prepatriation stage should at least make reference to this most crucial element of our position as original inhabitants. To deny us a specific reference to our aboriginal rights in Canada's constitution indicates to us that political commitments by governments to negotiate such rights in the postpatriation stage are of little consequence.

Miss Mary Simon (Member, Inuit Committee on National Issues), Jake Epp, & Charlie Watt (Co-Chairman, Inuit Committee on National Issues), p. 17

Miss Mary Simon (Member, Inuit Committee on National Issues): [...] Conclusions and Recommendations

1. Inuit have, and must continue to have, a homeland within Canada. This is our birthright. It is also our right in law, as reflected in the terms of the Royal Proclamation of 1763.

2. Our status as Inuit within Canada must not be altered without our consent.

3. Aboriginal rights are an inseparable part of our indentity as Inuit.

4. The right to our identity is enshrined in international law, and this principle has been accepted by the Government of Canada.

5. There are constant pressures of assimilation in the existing political, legal and economic make-up of Canada which seriously threaten to erode our identity.

6. The proposed resolution further compromises Inuit status by refusing to recognize our status within Canada.

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7. The proposed resolution compromises Inuit status by ignoring the necessity of obtaining our consent in relation to further changes in our status.

8. The proposed resolution leaves little real opportunity for obtaining constitutional amendments in our favour in the postpatriation period.

9. It is therefore critical that prepatriation amendments in favour of aboriginal peoples be obtained which give some indication of our relationship with governments in Canada.

In this regard we therefore propose:

10. That our right to Inuit identity be enshrined as a principle in the proposed resolution.

11. That, in accordance with this principle, the future of Inuit in Canada be premised upon the principle of self-determination within the Canadian federation.

12. That within this context, the Government of Canada commit itself to negotiate a framework of constitutional rights and protections for aboriginal peoples.

13. That our aboriginal rights, as an inseparable part of our individual and collective identities, must not be subject to extinguishment by Parliament.

14. That the participation of the aboriginal peoples of Canada in future constitutional conferences as promised by the Government of Canada be formalized in the proposed resolution in a manner similar to the commitment made to the provinces.

15. That any further amendments to the constitution that make specific reference to the aboriginal peoples of Canada should not be permitted without the consent of those aboriginal peoples so affected.

16. That the Royal Proclamation of 1763 and the Order-in-Council respecting Rupert's Land be included in Schedule 1 of the proposed resolution so as to be clearly recognized as part of the constitution of Canada.

17. That mobility rights in the Charter be further limited so as to protect the cultural, economic, social and environmental interests of the aboriginal peoples, particularly in light of special needs and conditions in the northern regions of Canada.

Mr. Epp: Thank you, Mr. Chairman.

I would like to express my thanks to the Inuit Tapirisat of Canada and their representatives here this evening for their balanced brief, for their view of the area where they have lived for thousands of years, and also the excitement they have and that they have brought here to share with us as they see the development of that area of Canada to the larger Canadian Confederation.

I would like to start my questioning, Mr. Tagoona, with specifically two sections. One, Section 24, and number two, I

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would like to get into the self-determination question. Section 24, as you are aware, does attempt to, in rather loose language, and those are my words, in rather loose language define it as including any rights or freedoms that pertain to the native peoples of Canada.

I would like your view whether, first of all, you feel that Section 24, apart from the additional sections that you want to include, for example the Royal Proclamation of 1763, just to name one, whether Section 24 in fact does guarantee the present status quo?

Mr. Watt: Mr. former Minister of Indian Affairs, in regards to your question concerning Section 24, whether the provision that has been outlined in the resolution would adequately, given the provisions for the native peoples, be considered as a part of the resolution, Mr. Epp, no, it does not give us adequate provision in order for the native peoples to feel that they are adequately included in the resolution because the aboriginal rights are not mentioned in the resolution itself, neither the real proclamation of October 7, 1763 is included, which again we stated in our brief that in Bill C-60 was included. We are wondering why it was excluded this time around when it was taken into consideration when Bill C-60 was drafted.

Mr. Epp: Do you feel that Section 24, Mr. Watt, by interpretation of the courts, because that section would be open to the interpretation of the courts in the future, whether in fact the courts through interpretation could in fact reduce the status quo, by that I mean reduce rights that you now enjoy?

Mr. Watt: Yes, it would reduce the—right now, at this point in time, it is very, very difficult for the native people to feel that they have adequate protection, at this point in time, under the status quo, because whenever the aboriginal rights concept is brought up, whether it is in the courts or in negotiations, government or the developers are always arguing that the aboriginal rights have to be defined.

Jake Epp & Mark R. Gordon (Coordinator, Inuit Committee on National Issues), p. 19

Mr. Epp: I take it, then, from your answer, while we do not have an experience relative to the courts deciding on constitutional issues, that your experience to date in protection of aboriginal rights over and against other countervailing claims in the north, be they development or whatever, that in fact your experience with the courts has not been positive.

I would like to direct your attention, sir, to Section 24 and Section 50 and specifically Section 50. As you know, Section 50, either under Section 41 which is the amending formula which requires the regional majority, or Section 42 which requires the referendum system, that in either one of those procedures Section 24, though it is limited in its protection to you at the present time, that it can remove any rights that are guaranteed in Section 24.

Are you satisfied that your rights, whatever they may be and no matter how they might be enshrined, that they should be subject to an amending formula, either under Section 41 or Section 42?

Mr. Mark R. Gordon (Coordinator, Inuit Committee on National Issues): Yes, this is our belief, that if the aboriginal rights are at the sole discretion of the federal and provincial governments and legislatures, it could be very conceivable that for the development interests in our area, that we could be legislated or our rights could be amended out of existence. We feel that if anybody is to deal with this specific area in the constitution, that we should be the first people to deal with this specific provision and we would be willing to discuss these provisions with you.

Mark R. Gordon, p. 24

Mr. Gordon: To define aboriginal rights in this brief time that we have is almost impossible, to try and encompass all the concepts involved in what we call aboriginal rights, but basically what it means to us is the right to live as a distinct society within Canada, with the right to go within Canada and the rights to our lands and to our heritage.

These rights encompass areas of our culture which would include even areas of family law or our particular notion of collective property rights in and to the lands.

There is not enough time to try to include everything that could possibly be included in this but aboriginal rights are not an outright claim on the entire territory, so we can exclude everyone else. We are only asking the right to be able to exist in dignity and as an organized society with the opportunity to grow with other societies in Canada.

David Crombie, Mark R. Gordon, Charlie Watt, p. 28

Mr. Crombie: The most fundamental part of your brief deals with the proclamation of 1763. Indeed, recognition of that clear, unequivocal and unambiguous recognition of the rights contained in the proclamation of 1763 is fundamental to the whole of your argument.

Can you elaborate on why the absence of the proclamation 1763 is significant to you, the fact that it is not in the schedule? What does that mean to you?

Mr. Gordon: We find it quite unusual that in the first proposal of the government they included it in Bill C-60, and then specifically excluded it in the second proposal, the one which is in front of us now.

Our argument hinges around this, because this is a historical recognition of our rights and special relation. This is the only reference which we could find in the history books which were written by your society in their dealings with us. If there was more we would have included more.

Mr. Watt: In the proclamation of 1763, when the Imperial system was in place, that is before I became colonized, King George III, according to a proclamation of 1763, recognized the fact that there was the possibility of nation-within-nation concept surviving side-by-side.

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But, again, if you were to read the British North America Act of 1867 and put the two together and try to arrive at some consensus from them, what is our interpretation now?

In 1867, what happened was that the concept of nation-within-nation was deleted and we became subject to the federal government.

Again, there are interpretations to be made. Was it solely that we were to be subject? Was that concept of nation-within-nation still possible?

But, in order to minimize any scaring of you people by talking about nation, it is necessary to mention that when we speak of the nation concept, we understand that within our own terminology; it is as people; Inuit is a nation. There are two alternatives there, and that is where we always have difficulty in understanding which is which.

Do you follow?

Mr. Crombie: I do.

The need to maintain the legitimacy of the concept of nation contained in the proclamation of 1763 was somewhat embodied in a section in the old Bill C-60, to be exact, Section 26 of that Bill.

Does Section 26 of old Bill C-60 come close to your explicit understanding of the legitimate protection of the concept of nation?

Mr. Watt: That is correct, yes. It would be a benefit to the native people in order to highlight what was the original interpretation of the proclamation of 1763 in order to put ourselves in a position to negotiate with the Government of Canada.

Mr. Crombie: I understand.

One final question, if I may, Mr. Chairman. It relates to page 9 of your brief. At the top of that page, the last sentence says:

In addition, the Prime Minister has confirmed his commitment to involve the aboriginal peoples of Canada in the next constitutional conference of First Ministers by including native peoples and the constitution as an agenda item.

Two questions in that connection. One, have you received confirmation of that commitment? Secondly, has there been any discussion on the working out of an agenda which is satisfactory to you?

Mr. Gordon: We have received a letter stating that he would undertake to do so, but as to additional confirmation I do not know of any.

Mr. Crombie: Are you satisfied with the nature of te commitment, which is fundamental to my question?

Mr. Watt: Mr. Crombie, no; we are not satisfied with the commitments he has made. In order to put the commitment to use, he is going to have to be prepared to accept the aboriginal rights in principle being enshrined within the resolution.

This is why on a number of occasions I have myself requested to meet with Mr. Trudeau and I have tried every avenue possible to get to him, and for some reason I have been blocked. Why, I do not know.

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December 2, 1980, Debate in the House of Commons, pp. 5256-5257, 5272 (click HERE)

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December 2, 1980: Bryce Mackasey, Charlie Watt (Co-Chairman, Inuit Committee on National Issues), & Mark R. Gordon (Co-ordinator, Inuit Committee on National Issues) speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (click HERE to view the Special Joint Committee, Issue 17, then scroll to p. 8)

Mr. Mackasey: […] For instance, you were concerned I think earlier about Section 24 and I think you expressed your concerns quite validly, but let me read again for the record what the Prime Minister says on page 2 of his letter dealing with Section 24, which is in there.

The Prime Minister says:

In the "Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada," you will note that under Section 24, any rights or freedoms that pertain to the Native Peoples of Canada shall not be abrogated by the introduction of a guarantee in the "Charter of Rights and Freedoms" of certain rights and freedoms for all Canadians.

This section is meant to safeguard the special rights which Native Peoples may have and leaves open the possibility of future entrenchment of such rights in the Constitution.

Would you care to comment?

Mr. Watt: That could very well be the good intention of the federal government to attempt to enshrine the aboriginal rights, but our arguments to that precise area is that we felt that since they are only talking about denying the existence of any other rights for freedom that exist in Canada, including any rights or freedoms that pertain to the native peoples of

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Canada, that precise area does not go far enough. We felt that is watered down because that aboriginal concept is not even included in there and also the reference that should be highlighted in the resolution, it is in Schedule 1, that is the Royal Proclamation.

Mr. Mackasey: I appreciate that.

Mr. Watt: I refer you to the wording of your resolution.

Mr. Mackasey: And I think your pertinent observation will be brought to the attention of the Minister when he appears before us next week, or whatever.

Your concern, your reservation, I think we are both agreeing that whether it is achieved or not by Section 24, the Prime Minister of Canada on his own stationery, signed by himself, at least interprets Section 24 to provide that kind of safeguard. In making that point, it is obvious that he is dedicated to the preservation of what rights have been acquired and what appear in legislation.

Mr. Gordon: One of the worries that we have about this provision is that it does not deal with the contradictions that would lie when dealing with our concept of aboriginal rights, vis-à-vis the other areas of the proposed resolution.

Yesterday we mentioned the fact that the equal rights provision could be in contradiction with our right to be able to provide food for ourselves. We want it to be a bit more clearer and not to be left to the interpretations of the courts when this is finished.

Mr. Mackasey: Which I think is the point the Prime Minister makes in his letter and in his answers from the House, is that we have got to, in some form, first of all agree to what those rights are, how are they defined. For instance, when you quite properly talk about the Proclamation of 1763, I think the words you used in your brief, insofar as it touches on the rights of the aboriginal peoples of Canada, at the moment you say so far as it touches on the rights of the aboriginal peoples of Canada. You infer that not everything does and sooner or later, insofar as it touches on the rights of the aboriginal peoples of Canada, those rights will have to be clearly spelled out, clearly enunciated, clearly understood, clearly accepted by the various governments before they are enshrined in the constitution.

I think that is the Prime Minister's point. He is afraid of enshrining at this moment in the constitution general phrasing and then finding later on the interpretations of a court are much too restrictive, which I think is your own fear.

However, I think what the Prime Minister is saying, he would like those rights to be more specific after discussions. Would you not agree with that?

Mr. Gordon: Yes, they should be definitely much more specific after we have had the opportunity to discuss that with you, but we think some very basic elements and basic principles have to be recognized at this time in order for us to have a meaningful discussion.

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Now, Section 24 does not allow, as it now stands, for us to represent our views directly and does not allow us to participate in any amendment to the constitution when it is dealing with us. The procedure that we suggest in the brief dealing with amendments must be included in order for us to be an equal partner in the discussions. If the amendment provision is not put in, we will not be able to voice—well, we will be able to voice, but not to have a say in our rights.

Charlie Watt, p. 14

Mr. Watt: […] There is another area of concern to us. We are gradually being assimilated into the existing system, rather than contributing to the system, I do not think we should be looked at in that way, nor do I think that in the long run you are going to succeed in assimilating the native people. We are prepared to use all modern techniques, technologies, to our benefit, and, again, to the benefit of the rest of Canada.

Instead of putting us into the welfare case, put us in a position where we can be productive. That is the point we are trying to put across.

For that reason we say—without political institutions, without an economic base—this does not mean anything at all to us, that is, if we are going to be wholly dependent upon government handouts. If we are not going to be able to rely on our own resources, on ourselves, which can be our economic base, then it is very difficult as an area to survive, not only because of being ethnic groups, such as the Inuit, or the Indians, but because of the lack of delivery of services which are to be provided to the native people, and because we are dependent upon government handouts.

Jim Hawkes, Charlie Watt, & Mark R. Gordon, p. 18

> **Mr. Hawkes:** You are a minority group, a charter of rights is supposed to protect minorities and you do not feel very well protected by this Charter, is that what you are saying?
>
> **Mr. Gordon:** Well, I believe that the minority groups are protected quite well in this package as it now stands if your minority group is European in origin because this proposal endorses the European values and European systems. Since our culture and our system is completely different, we believe that there should be a way for us to integrate it into this package.
>
> **Mr. Watt:** Especially when you are aboriginal inhabitants of this country.
>
> **Mr. Hawkes:** Thank you. My last question, could I just take you to page l6 where you deal with the mobility rights section. If I understand your criticism correctly, you are, like most Canadians, in favour of a system that would encourage mobility of labour because it would be good for the economy, but when you look at the specifics of your personal situation, you find this section to be inadequate for a couple of reasons; number one, it does not protect you from massive invasion, so it needs to be changed in that direction; it does not protect you economically adequately in being able to have first call on some jobs and some training. I think I see those two threads. I have raised the issue very briefly with the Minister of Justice and our time ran out, but I direct your attention to clause 3(b) which is one that people have not paid much attention to. But it seems possible to me that in law someone could sue to stop the expenditure of public money for social purposes, and I am wondering for instance, if the legal advice you have might indicate that some of your people who may be wanted to come south of 60 for a period of training and that in the ordinary case public funds would be used to assist in that, whether or not somebody could sue in a sort of reserve discrimination sense and stop the expenditure of public money for the kinds of training programs that people might need and want.
>
> Have you got concerns about that particular part of the mobility section which is before us. Have you looked at that and does that concern you?
>
> **Mr. Gordon:** In the specific example that you site here of people coming down south for training, I think that would be adequately covered in Section 24 as it now stands where it deals with the disadvantaged groups being given the opportunity to be able to be given programs and social assistance.

Marlene Pierre-Aggamaway (President, Native Women's Association of Canada) & John Fraser, p. 67

> **Ms. Pierre-Aggamaway:** Okay, what we have said is that we believe that the constitution of Canada, not the charter of rights must state that the aboriginal people belong to sovereign nations and by putting this statement in the constitution we feel that the Government of Canada, by doing so, will ensure that the aboriginal people will be recognized as sovereign nations and as a third order of government.

The way it is now, rights can be denied by Parliament but if they are entrenched, they cannot be tampered with. We want to be recognized in the same way as it is being presented, there being two founding nations of English an French and also Indian government.

Mr. Fraser: Okay, let us see if I have got your point. Are you saying to me, and I think you are, that you represent the original peoples of this country and that as a consequence of that, that you have certain inherent and historical rights, some of which were confirmed by heatres and some of which have been granted by agreements since then, but that what you are really after is a recognition of your identity as a people within the total Canadian community and the people with whom the rest of us in our dealings with you must reach substantial agreement if the actions of the rest of the community impinge upon your identity and your rights as a people, as part of the Canadian family, but as a distinct people within that family. Is that what you are getting at?

Ms. Pierre-Aggamaway: Yes, nationhood within nation.

Mr. Fraser: All right. Now, let me understand the word "nation". As I take it, what you mean is nation in the sense of the people, not nation in the sense of necessarily a political entity. Can you help me on that?

Ms. Pierre-Aggamaway: I hope I said third order of government and I am not sure what you are getting at, but what we are stating is that we would act as a third order of government to make agreements with your government for certain kinds of whatever.

Mr. Fraser: Okay, when you talk about a third order of government, I gather, because your brief is very broad, you talk not, for instance, just as the Inuit did of their own people in a specific, but very large region of the country, you are speaking now of native peoples, aboriginal rights, Métis, status Indians, others, all of the native aboriginal family wherever they may be in Canada.

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Ms. Pierre-Aggamaway: Yes.

Mr. Fraser: When you say that you wish that native family within the context of Canada to be treated as a third order of government, I have a little bit of difficulty here. I do not have any trouble understanding the concept of nation and the sense that members of your nation may be anywhere in the country at any given time and I do not have any difficulty in understanding the concept of government to some degree in certain regions where it is practical to have native or original peoples government; for instance, like Nunavut, which is the proposal of the Inuit, But I have a little difficulty understanding quite how you would govern for your people, where your people are scattered throughout an area in which there are already municipal and provincial and federal government levels. Could you address that?

Ms. Pierre-Aggamaway: I am not in a position at this point to share with you on divisions that we have of how our government would work. We are charging our people to do that for us and in that way I cannot be more specific.

Mr. Fraser: All right, that is fine, but am I right in assuming that however you mean the term "government" your fundamental concern is that you must be seen by the rest of us to be an entity,

to be a group that recognizes itself as a group and that the actions that we take, or for that matter, the actions that you take, must be done on the basis of a partnership between yourselves and the rest of your fellow Canadians wherever they may be?

Ms. Pierre-Aggamaway: Correct.

Mr. Fraser: You agree with that. Now, I said I would try and stay away from legal language but I draw your attention to something which the Inuit brief this morning said and I will just read it and see if I can relate what you were saying to what they were saying because I think you can. I do not think you have the brief in front of you but it is on page 19 and it says that they propose a new section should be added to this constitutional proposal, and they said that

Within the Canadian federation, the aboriginal peoples of Canada shall have the right to their self-determination, and in this regard the Parliament and the provincial legislatures, together with the Government of Canada and the provincial governments, to the extent of their respective jurisdictions

And these are the important words,

are committed to negotiate with the aboriginal peoples of Canada mutually satisfactory rights and protections in the following areas

And then a number of things are itemized. Now, I come to the words,

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are committed to negotiate with the aboriginal peoples of Canada mutually satisfactory rights and protections in the following areas

And I think Mr. Watt said that the rights and the obligations had to have some on-going life to them, and that if there were to be changes or additions or variations, then what our friends who were in front of us this morning and last night were saying is that there must be a commitment to negotiate mutually satisfactory rights and protections.

Now, without trying to trying to pin you down on too much detail, can you say that, and I think you are, but can you say that you are generally supportive of that approach?

Ms. Pierre-Aggamaway: Yes. When we said that we believe that the aboriginal people have the right to negotiate as sovereign nations with governments of Canada to change, alter or amend aboriginal rights through treaties and agreements, we see this as a third order of government which would allow negotiations for changes in the distribution of powers and authority, or definition and exercising of rights through the setting out of mutually agreeable legal documents. That is what we interpret, from our standpoint, what that means.

Margaret Mitchell & Marlene Pierre-Aggamaway, p. 72

Mrs. Mitchell: Finally, Section 24, the very important one: again, the Status of Women Advisory Council suggested-and these were women lawyers, I am pleased to say-that there be an addition to that section to the effect that provided that such rights or freedoms pertain equally to native men and women.

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Now this broadens it very much, to make sure that the things which have happened under Section 12(1)(b) of the Indian Act do not occur again under a revised constitution.

Our concern is that Section 24 really as it now stands reaffirms the status quo, which means discrimination against women who marry non Indians.

Do you agree with what the Council have proposed there?

Ms. Pierre-Aggamaway: Again, since we are being asked to comment on Section 24, the undeclared rights and freedoms, we see that section as providing no guarantee whatsoever for the protection of the aboriginal people of the country.

Now, I am about as much a lawyer as you are.

Mrs. Mitchell: I am not a lawyer.

Ms. Pierre-Aggamaway: Exactly.

I can only say in respect of this particular section, which does not define native people, their rights or freedoms, which does not even state that there are native rights, but merely that the charter should not deny those rights, the section cannot be seen as guaranteeing or entrenching.

Also, by putting it in the Charter of Rights, there is no acknowledgement that native people have the right to self-determination or self-government however we may propose it should take place.

So the undeclared rights of the section just are not satisfactory at all.

I would like to add one supplementary statement. By having the only recognition for native people in that particular section, in times of strife, for instance, the Government of Canada can remove any part of the Charter of Rights without our consent or acknowledgement. That cannot be stated to be any protection for native people.

Rose Charlie (Western Vice-president, Indian Rights for Indian Women), p. 86

Ms. Rose Charlie (Western Vice-president, Indian Rights for Indian Women): […] Section 24, the only one that includes reference to the native peoples of this country, could be construed as supporting the defensibility and legality of section 12(1)(B) of the Indian Act. Under that section of that Act, Indian men have rights denied to Indian women. We are unequivocally opposed to this.

Mr. Harry Daniels (President, Native Council of Canada), p. 109

Mr. Harry Daniels (President, Native Council of Canada): […] The proposed resolution as it now stands does not provide any definition of our rights and freedoms. It does not protect our supposed participation in constitutional renewal. And it does not offer to our people any hope that our rights and our participation will be enshrined in the future.

make it clear that the Charter is not intended to affect any rights and freedoms not specified in it, including those of the native peoples.

On the surface this section is aimed at the very minimal goal of avoiding conflicts between the individualistic provisions of the Charter and the collective nature of whatever rights exist for native peoples. But it fails in this goal by only protecting rights from denial, as the wording in the clause indicates. This wording would not only permit any legislative or constitutional provision nor a part of the Charter to deny the rights alluded to. It would also permit any diminishment short of outright denial by the Charter itself.

We find no comfort in the last part of the clause, which reads:

The sole mention of native peoples in the document is, of course, in Section 24, which reads:

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.

Aside from our dismay at not even being asked to assist in drafting the section, we view the section as an unqualified failure. It fails both in the wider sense of what must, at a minimum, be entrenched in the constitution to assure our rights will be recognized and protected and in the narrower

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sense of failing even to achieve what the government would wish us to believe the section accomplishes.

The intent of the section, according to

Rights or freedoms that pertain to the native peoples.

First of all, it is not clear what rights the section refers to. By avoiding the more relevant phrasing, "aboriginal rights and freedoms", the clause could easily be seen to refer only to rights all Canadians share. Secondly, the clause does not say how whatever rights which exist and pertain to Native peoples are to be defined and recognized. Here the sections on constitutional conferences and amending procedures might have avoided this problem by providing lo¡ our participation— but they did not. Finally, the clause suggests that a cut-off date for our rights exists, with all of the rights which might emerge out of post-patriation negotiations being subject to diminishment or even denial by the Charter.

Other than the Charter of Rights and Freedoms, the most distressing aspect of the proposed resolution is the complete exclusion of the native peoples from the procedures for constitutional

conferences and lor constitutional amendment. We have always argued that any amending formula must include special provisions for those sections of a new constitution directly related to native peoples. It has become clear that the amending formula as it now stands in the resolution precludes the future entrenchment of native rights in the constitution by making these rights in the constitution by making these rights subject to the approval of the provincial governments, none of which has endorsed the concept of aboriginal rights. This concern was reinforced on October 15 when Premier Hatfield of New Brunswick, to date the only Premier to agree to appear before our Constitutional Review Commission, stated that native people should be treated no differently than any other group in the constitutional renewal process. Speaking on the intent of the drafters of Confederation, the Premier stated,

Clearly the intention of the governors in that part of what is now Canada was to assimilate the Native peoples. I therefore think that in fact that did happen, and did become the fact in Canada, and I therefore cannot argue that either the Métis or the nonstatus Indians have any particular claim that is different from that of any other group of people in our own country.

With these attitudes emerging from the provinces, it becomes obvious why the recognition of aboriginal rights, our inclusion in future conferences, and the entrenchment of native consent provisions in an amending formula are so necessary.

It is with this same reality in mind that we seriously question the Prime Minister's assurance to native leaders that,

constitutional change after patriation will become easier, rather than harder

In fact, the recently leaked document from the federal-provincial relations office stated quite the opposite:

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Entrenching (native) rights will be enormously difficult after patriation, especially since a majority of the provinces would have to agree to changes which might benefit native peoples at the expense of provincial power.

The concerns of aboriginal people extend beyond what the government has included in the proposed resolution to what the government has left out, In Section 52(1) of the proposed resolution, a list of documents appearing in Schedule I to the Constitution Act is referred to in a fashion which can only be interpreted so as to exclude from the constitution of Canada any document not so appended. In common with NIB and ICNI, we are profoundly distressed over the absence of those constitutional documents which have stood in the past as confirming or recognizing aboriginal rights.

Canadian history records a legal and political tradition of recognition of the aboriginal rights of mixed blood people.

In the 18th Century our aboriginal title to land was recognized in the Articles of Capitulation of 1760 and Belcher's Proclamation of 1762.

> The most important pre-Confederation confirmation of our rights is the Royal Proclamation of October 7, 1763. It stands as the cornerstone of constitutional recognition of native rights and accordingly must be included in the Schedule. As we made clear in our brief before the British Select Foreign and Commonwealth Affairs Committee, the Royal Proclamation provides the first confirmation of our special status within North America, the first confirmation of the requirement for mutual consent in altering our relationship with non-Natives, and the first confirmation of our inalienable rights to our lands.

Mr. Harry Daniels (President, Native Council of Canada), p. 114

> Section 24 as amended provides for:
>
> 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.
>
> The Committee will note the resemblance of this section to the drafts of Clause 26 of Bill C-60, tabled as the constitutional amendment bill in 1978. Our strong preference lor this wording has already been outlined, and is supplemented by the brief presented to you by the ICNI. A final consideration is that this new wording would ensure that all undeclared rights, non only native rights, would be strengthened.

Ian Waddell & Vic Savino (Legal Counsel, Native Council of Canada), p. 122

> **Mr. Waddell:** Well, let me make this I think my last question, then. Let us focus down in Section 24, that is the section that says 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.
>
> Now, people will say: well, there is your protection there, including any other rights that pertain to the native people, but
>
> [Page 123]
>
> just specifically again, I know you said it in your brief and you just said it a moment ago, but what specifically do you criticize about the so-called protection in there and how would you change it to make a real and better protection?
>
> **Mr. Savino:** Well, the Charter of Rights clearly, as it is now drafted, is intended to protect civil liberties, political rights, those kinds of things. Now, the mere mention of rights and freedoms that pertain to the native people of Canada I do not think is sufficient to preserve the rights contained in the BNA Act, 1871, from amendment, through the amendment process, by this Government and the Government of Manitoba.

> So I think it is vital, and it is stated in Mr. Daniels' brief as well, that if we are going to have a Section 24 to protect the rights, the aboriginal rights of the aboriginal peoples of this country, that that section be very specific that that is what it is intended to do. What you have there is a very ambiguous section which leaves courts in the position of being able to interpret it in the wrong way. If that is what you really mean, then why do you not say it expressly?

Senator Roblin & Harry Daniels (President, Native Council of Canada), p. 130

> **Senator Roblin:** Yes, I recognize your appeal for more time on page 11, and I think that is a valuable point.
>
> I would like to move on to another aspect of your brief. Perhaps we could turn to page 13 so as to make the point.
>
> You refer to the aboriginal peoples of Canada and define them as meaning Métis, Inuit and Indian peoples of Canada. I will come back to that in a moment.
>
> But you say that these people should have—and this is your recommendation 3(f) the right of self-government of the aboriginal peoples of Canada.
>
> [Page 131]
>
> Can you help me with that concept? Self-government usually implies not only people, but territory. That is the way it is usually related. Yet, we know that aboriginal people are very widely dispersed throughout the Canadian society. They are not all in one place, and are not easily isolated from the rest of the community.
>
> How far would you go in relation to this right of self-government in relation to the wide spread dispersal of aboriginal people in the country?
>
> **Mr. Daniels:** Well, we included that after talks with the NIB and ICNI to shore up and support their notion of self-government.
>
> We are mainly concerned with our self-determination in this country within the political process.
>
> We have to support our brothers and sisters on these and other subjects which are of mutual concern.
>
> Self-government for us would have to come through negotiation with the federal government. At that time as I slated earlier, Mr. Senator, we are working on our definition of that, and we want to get that clear in our heads before making a truly definitive statement on self-government.
>
> But as you know the Métis and nonstatus people are still in the process of attempting to deal with the government for the resolution of all particular rights and freedoms as we see them in Canada and to enter into the negotiation stage for a settlement of land and/or compensation.

> At that time once we have agreed on the process we will get further into the self-government aspect.
>
> **Mr. Roblin:** What, you are telling me is that this is a negotiable item at the present time. Mr. Daniels: At the present time.

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December 9, 1980: Ms. Tamra Thomson (Ottawa Caucus, National Association of Women and the Law) speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (click HERE to view the Special Joint Committee, Issue 22, then scroll to p. 61)

> **Ms. Tamra Thomson (Ottawa Caucus, National Association of Women and the Law):** […] I would like to move now to Section 24, which guarantees certain undeclared rights and freedoms, specifically those of native persons. Now, we are very concerned about this section because we feel that the stated intent of this section is to maintain the status quo of native rights in Canada. This of course would carry over the discrimination which is inherent in the Indian Act, which discriminates against Indian women who marry non-Indian men.
>
> This section is not adequate to overcome that discrimination. We feel that it must be changed to include that such rights pertain equally to native men and native women. That was just a very brief rundown of Section 24.

Ron Irwin & William Black (Member of Executive Committee, British Columbia Civil Liberties Association), p. 127

> **Mr. Irwin:** One last question. You suggest at page 11 that Section 24 "preserves only those rights presently established bylaw".
>
> Now, it is my understanding that, and I will read it:
>
> "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."
>
> Now, presently established by law means to me some type of adjudication. I take it you do not mean that?
>
> **Mr. Black:** No, one of our concerns with regard to Section 24, perhaps I can illustrate when you compare the language of Section 24 with Section 22. Section 24 says the guarantee of rights and freedoms denies any rights that exist in Canada. When you look at a comparable provision with regard to language rights in Section 22, it says nothing derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter.

We would suggest that language along the lines of Section 22 and incorporated into Section 24 as well would be appropriate.

Mr. Irwin: There must be 40 native claims presently under negotiation and you are the first to suggest that maybe there is nothing there unless there has been some adjudication or settlement before patriation. You are not suggesting that, are you?

Mr. Black: We are not in a position to say what the courts would do. What we are concerned about is that every step should be taken to make sure beyond doubt if possible, that rights are not accidently taken away by this Charter from native people, not that it would happen for sure.

Warren Allmand, Jim Sinclair (President, Association of Metis and Non-Status Indians of Saskatchewan), & Rob Milen (Legal Counsel, Association of Metis and Non-Status Indians of Saskatchewan), p. 142

Mr. Allmand: Well, Mr. Chairman, through you to Jim Sinclair and the other members of the delegation, Mr. Sinclair, you have spoken very passionately about the need for a land base to develop your economy and the need to have the freedom to run your own affairs on that land and with your people so that you can begin to do the things that you wish to do for yourselves.

If I understand you correctly, and I want to make this clear, you believe that it would help if we changed Section 24 of the constitutional proposals, change them in such a way that we would recognize right in the constitutional proposal, recognize your right to a land base, your right to run things yourselves on those lands, your right to organize your own people and have, with respect to those lands, your own, I suppose you can call it government, but your organization, government, whatever you want to call it? Am I correct in saying that you would like Section 24 amended to entrench those rights right in the constitution now in very simple terms?

Mr. Sinclair: Right. we would like to see them in the—well, right now what we have got for the constitution is to get the foot in the door, but we are prepared, when the constitution comes back, a further deal on entrenching those rights, but what we are looking at now is involvement, to make sure that we are involved and then we will take the battle forward, and I feel that the battle really is not in a sense with this Committee because we are missing the bigger guys up there, if you want to call them that, or bigger guy, but the thing we want to do is bring the constitution home so that we can deal with it.

I want to say this to the Committee, and I want to expand on this a little bit, that people like yourself, Mr. Allmand, who have put up a fight for native people and got burned because

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of it, when you were Minister of Indian Affairs that happened, if you had put up a fight for the nonstatus Indians as you did for the treaty Indians you would have had us here on Parliament Hill marching on those steps if you had got put out for fighting our cause, and I want to say that, but again that is what has caused a lot of people not to take up our fight because when they stuck out their necks they get burned, and I do not believe any man should stick out his neck in isolation.

There has to be a group of people get together and deal with this problem and not make it a one man situation.

Mr. Allmand: Some people have said that we cannot put the term aboriginal rights in the constitution now because it is not well defined, and if it is not well defined, putting it in just like that, let us say confirm your aboriginal rights, your land rights, to put it in simple terms like that might go against you in the future, but there are many other people that say: look, just put it in like that and you will define it in the future, it will be defined if you have to go to court to do it or if you have to negotiate to do it, but you would like it in just very simple terms right now?

Mr. Sinclair: Yes. What I am afraid of is if we get into anything too big, changing paragraphs or changing too much of the constitution now, we are not going to get anything in the constitution. What I am saying is that what I want to specify at this time is that we have rights, get those recognized; we are saying Metis, Inuit, Indians and others, we are making sure of that.

When we bring the constitution home then we know we have our place at the table, or whenever we get the agenda, I suppose, and we are going to have to fight that one out, too, when the constitution comes back.

Mr. Milen: Mr. Allmand, we believe that by putting the word "aboriginal" there it sufficiently opens the door for us to go and do our homework, to prove to the government of Canada, or if necessary to the courts, what rights we have. We feel that would sufficiently open the door for the Indian, Inuit, Metis or nonstatus peoples, whatever, to then convince the government to go sit down with their people community by community, provide all the historical research.

We ask you, we believe, a very simple thing, by putting the word "aboriginal" there. Then we have got to do our homework. It is not good enough to put the word "aboriginal" in there, then we have got to go back and it may take years to get all that evidence, we are trying to get that evidence now, but then our homework really begins because we are prepared to take our case to the Canadian government, the Canadian people, or failing that, to the courts.

Rob Milen, Bryce Mackasey, & Lorne Nystrom, & Jim Sinclair, p. 146

Mr. Milen: That is all we ask, just that there be something clear that exists now under Section 91(24) of the BNA Act and something clearer than exists under the present Section 24 of the Charter.

Mr. Mackasey: Thank you very much.

The Joint Chairman (Mr. Joyal): Thank you, Mr. Mackasey. Mr. Nystrom, followed by Senator Lucier.

Mr. Nystrom: Thank you very much, Mr. Chairman. I want to welcome the group of fellow Saskatchewanites here this evening as well and perhaps ask the legal counsel, Mr. Milen, a question.

He says he wants the rights of the native people recognized in the constitution. I wonder if you could elaborate, Mr. Milen, a bit more about what you mean by that. How do you want those rights

recognized? Can you offer us a bit more precise wording of what would be useful for your organization?

Mr. Milen: May I direct you, sir, to page 3 of our brief where we just simply say that the wording that should be used, the present phrase, native peoples of Canada under present Section 24, be broadened and it be broadened to read instead of the native peoples of Canada the Indian, Inuit Metis and other native peoples of Canada, We feel that that wording is sufficiently broad to then permit our organization to put forward who are those Metis or other native peoples. We feel that that wording is sufficiently broad that the problem under the existing Section 91(24) of the BNA Act 1867 is that it refers to Indians and lands reserved for Indians. The present Section 24 of the Charter is most unhelpful because of using the word Indians we go to the word natives and we feel that the categories must be broadened, it must be expanded.

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Mr. Nystrom: If this were enshrined in the constitution, how long would the organization take in your mind to define what is Metis, what is nonstatus?

Mr. Milen: Perhaps I would ask Mr. Sinclair or Mr. McKenzie to answer that, Mr. Nystrom.

Mr. Sinclair: That is going to take us—the federal government is going to give us an answer in terms of whether we feel we have any rights or not next February. We have done a claims research and presented it to the federal government and in my last meeting with Jean Chrétien when we asked him for a Royal Commission he told us to go back to the province and deal with the province. I had an argument with him over who is responsible. I said, you are going to make me deal with the province in terms of whether we have land rights or not, and yet you are going to make a decision on this next February, make that decision as to whether we have land rights or not. So I said what you are doing is passing the buck, and I think again we are going to have to sit down and we are going to have to work on a time frame, We are ready to move within two years.

Mr. Nystrom: I wonder if I could again ask the legal counsel a question. I think you understand, Mr. Milen, what the amending formula is here, that to get an amendment through our constitution once this becomes law we need the approval of the federal government, the province of Quebec, the province of Ontario, two Western provinces and two Atlantic provinces, and I think I agree and concur with many of the things that Mr. Sinclair has said tonight about the attitude of many of the white governments towards their native people, and it seems to me there are many road blocks here in terms of getting constitutional amendments accepted even if you are recognized in a constitution.

Have you thought about amending the amending formula or suggesting to this Committee some changes in the amending formula where there could be direct involvement of native people in the amending formula with the federal governemnt. or direct involvement with the native people in the provincial governement involved.

Mr. Milen: I concede, Mr. Nystrom, that our thinking on that particular point is not very well thought out. We have directed our energies to requesting before this Committee the amendment to Section 24. We are very, very frightened that when the constitution comes home that in trying to skate between the provinces and the federal government it is a little like getting caught up

> between the dance of the elephants, and we have not in fact directed our particular energies to looking at what would be a satisfactory amending formula in terms of dealing with Indian, Inuit, Metis and nonstatus people but we say two things. We believe corrective measures should be taken now within Section 24 of the Charter but certainly to see that those rights are never taken away unilaterally by federal and provincial governments, that perhaps something could be put in the amending formula that no amendments be made to affect the status of the Indian, Inuit, Metis or nonstatus people without their consent.
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> *[Page 148]*
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> Other than that we have not followed the process logically further and we have not thought it out further. We have been frankly caught a little bit for time, and I am sorry that our homework has not permitted us to be more specific and more helpful to you.
>
> **Mr. Nystrom:** Do you have any more thoughts on what the aboriginal rights may be. Mr. Sinclair mentioned land. You make up roughly 10 per cent of our provinces and you share roughly 10 per cent of the land of the province. Is there more to aboriginal rights than land. Are you looking at other things in new treaties or new pacts, or new compacts that could be signed between the Metis people and the government of Canada.
>
> **Mr. Sinclair:** That has all to be worked out. That is part of the items for the agenda when you bring the constitution home. I think that immediately our people should have the right to hunt and fish on their own land; that should be allowed now, not something that should wait for the constitution to come home. I think that is important. I think development should stop even though it is going to be hard to stop it simply because the land will all be taken up in the next few years and we will have nothing left. Those are our feelings in terms of . . .
>
> **Mr. Milen:** Let me add further to this, sir. One of the reasons that we have found it very difficult to lay out with particularity the nature of our rights within our new Section 24 is that frankly that we have not completed all our homework in that regard. Some of the process is under way, some of it is much further, but we have been as an association of the Metis and Non-Status people, for the last 113 years trying to get the recognition that those people have got some rights, and not until there is some recognition perhaps built into the constitution as we suggest then we can get onto the business of saying what is the nature of our aboriginal rights, what is the scope and what are we asking. We have been for altogether too long directing all our energies to the fact that we believe there should be some recognition of those rights.

Senator Austin, p. 151

> **Senator Austin:** If I were to say to you that, and speaking personally, should the government proceed without any additions to Section 24 or any enhancement of the definition of aboriginal rights, I would believe that the government should proceed very, very quickly with follow-up action, so that at some point in time entrenchment of rights is achieved.

Jim Hawkes, Jim Sinclair, Rob Milen, Senator Austin, p. 151

Mr. Hawkes: Are you not concerned, though, Mr. Sinclair, that once you put a clause like this in the Charter that in effect you have turned jurisdiction over to the courts and they will in fact define. I wonder about a situation. for instance, if you buy some of that land, if you negotiate an agreement, then people sue to be included within the definition of Metis because you

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have found a lot of oil or some other kind of resource on that land, and that the courts might uphold those claims, is that a concern at all or not?

Mr. Sinclair: The concern that we have, it is like going from the fox to the wolf, who is going to be tougher on us, the courts or the politicians. Like I say, that is going to be another road but I would personally feel that something should be enshrined in the constitution that we could at least take to the court because if we leave it to the whims of the politicians who will change it because the majority says so, and you get elected by the majority, we are in trouble.

[…]

Mr. Milen: I would just say, sir, that our proposed amendment to Section 24(2) providing that Parliament shall have the legislative authority will provide us with legal authority in terms of dealing with the federal government and providing the federal government with the responsibility of making decisions and making whatever legal agreements are necessary.

Failing that then there is the court, but we feel that the proposed Section 24(2) of the Charter as we propose will help clarify the problem to which you refer.

Mr. Hawkes: In other words you are saying you would turn it back to Parliament and Parliament in turn could put that responsibility on behalf of the leadership of the Metis nation to define it, but that would be a choice that you would put back onto Parliament rather than onto the courts. That is really what you are saying.

Mr. Milen: We are saying that some government has to have the legal responsibility of dealing with the Indian, Inuit, Metis, and nonstatus peoples of Canada, and have to be responsible for making legal arrangements with them, and that is the Parliament of Canada.

Senator Austin: And have the ability to make those arrangements?

Mr. Milen: That is right, and that is why it says that the Parliament of Canada shall have the legislative authority.

Senator Austin: So you would have for example in Saskatchewan the jurisdiction necessary to implement those agreements transferred from the legislature of Saskatchewan to the Parliament of Canada.

Mr. Milen: We think so. Legally, yes.

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December 15, 1980: Donald Rosenbloom (Legal Counsel, Nishga Tribal Council) speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (click HERE to view the Special Joint Committee, Issue 26, then scroll to p. 14)

Mr. Donald Rosenbloom (Legal Counsel, Nishga Tribal Council): Thank you, Mr. Chairman.

I would like to deal with the constitutional proposals as they are before you in this Joint Committee. I will be dealing with three separate issues as we see it. Those issues are as follows:

Firstly, an analysis of Section 24 of the Charter; secondly, the issue as to whether aboriginal title should be entrenched in the constitution; and the third issue, if there is to be an entrenchment of that principle, should it be done before or after patriation.

The Nishgas wish to go on record as strenuously objecting to the Charter of Rights and Freedoms as presently drafted and before you. We say to you, Mr. Chairman and members of this Committee, that it is pathetic that after more than 100 years of the Indian people having a special constitutional relation ship with the federal government, that the present proposed constitution is silent in respect to that relationship that they have had with Canadian society.

The purpose of a constitution, as we see it, is to protect the interests of the individual and of minority groups that are subject to discrimination and subject to being easy targets for abuse; but what do the Nishgas find for themselves in the present proposals that are before you? There is only one reference to native people in the proposed constitution act, and that one reference, Mr. Chairman and members of the Committee, is of course Section 24 of the Charter, and I would like to read that section because I suggest to you that it deserves very careful scrutiny by this whole Committee before this Committee makes its recommendation to the Parliament of

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this country. Section 24 of the Charter reads as follows, and I quote:

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.

That is Section 24 and that, I suggest, is the only section that refers to the native people.

Now, the question is this: what is the meaning of Section 24 and what does it confer to the native people? The Nishgas take the position that that Section is meaningless and is, indeed, a sham. It does not confer any rights whatsoever to the native people of Canada, and indeed, to the Nishgas who are before you tonight.

An analysis of Section 24 in the Charter, I submit, is that it is simply saying to the native people that although the Charter and the constitution generally will not entrench any native rights or interests, Section 24 is supposed to comfort the Indian people that whatever rights they may have

outside of the constitution, at common law, that those rights will not be abrogated by any of the sections that are within the Charter of Rights and Freedoms.

That is all, I submit, Section 24 says, and it is very clear. It is telling the Indian people that their rights shall not be enshrined within the constitution but that the constitution, at least, will not be interpreted by the courts in any way to abrogate whatever rights they may have today at common law or tomorrow at common law.

Now, we had always perceived that a constitution was to be an affirmative declaration of an individual's rights in a society, but Section 24, members of the Committee, and the Charter generally, offers no affirmative declaration whatsoever of protections to the Indian people. It does not confer to the Indian people any affirmative declaration of rights or protections, and we say that that runs contrary to the traditions of what a constitution and a Charter of Rights is supposedly to confer to the citizens and minority groups of a community or of a nation.

The Charter only tells the native people of Canada that the courts are not going to interpret the Charter to abrogate their interests at common law. Now, this, I submit, is an intolerable situation to the Nishgas. If Indian rights, particularly aboriginal title, are rights that fall outside of the constitution, then you are telling the native people that they must fall back on the common law as it is today for whatever protections they are going to have.

Now, that means that it is tossing the whole subject of aboriginal title, and you are tossing the native people, out into the political winds, subject to the whim and fancy of future governments, of the courts, and of the white majority society that the native people live with. If you accept the interpretation that I am putting before you of Section 24, then you must ask this question as a Committee: if you are not enshrining the rights within the constitution and you are telling the Indian people they are going to have to live with whatever rights the

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common law has declared, then the question is this: what is the state of the present jurisprudence in this country on the subject of aboriginal title.

That is the question, and I suggest to you, with respect, that the Nishgas can speak more definitively on the subject of present jurisprudence in the country than anyone else because they have been litigants in the courts on this very subject.

The present state of jurisprudence in Canada on the subject of aboriginal title is in a confused and most unsatisfactory state. The highest court of Canada, in ruling on the Nishga case, deadlocked itself on the very substantive issue of aboriginal title. The Nishgas, in taking their historic case to the Supreme Court of Canada, had obviously desired a definitive judgment from the highest court in the land that would finally put to rest and resolve the subject of aboriginal title and the long outstanding dispute on land in British Columbia, but the court split, and as Mr. Gosnell has already stated, it split in such a way that of the seven members presiding on the bench, in that decision, three judges ruled that the Nishgas indeed had aboriginal title and continued to this day to have aboriginal title. That judgment, the very famous judgment of Mr. Justice Hall, concurred in by the now Chief Justice Laskin and by Mr. Justice Spence, all made a strong declaration that the Nishgas

to this day maintaining their aboriginal title because they had never extinguished that title by way of treaty.

Three other judges sitting on the case ruled that although the Nishgas had at one time aboriginal title to those lands, they held that that title had been extinguished by colonial legislation passed prior to British Columbia joining Confedera tion in 1871. The legislation they spoke of were the routine enactments of the Forestry Act, the Fisheries Act, the Mineral Act, and a number of other statutes. None of those statutes spoke in express terms of extinguishing aboriginal title to land.

Now, there were three judges that held that the Nishgas maintained their title to this day, three judges of the highest court held that the Nishgas had had their title but it had been extinguished, and the seventh judge, who had the deciding vote as Mr. Gosnell has already pointed out, chose not to decide the case on the substance, but, rather, dismissed the action on the basis the Nishgas had not received the permission of the provincial government of British Columbia to sue the Crown in this action. That was a law in British Columbia that no longer exists, which required one to have a fiat before proceeding against the Crown in a legal action.

That seventh judge never spoke on the substantive question of aboriginal title and it is for that reason that the Supreme Court of Canada is said to have deadlocked itself three to three on the fundamental question, the doctrine of aboriginal title.

Now, this is the common law that we have to rely upon at this moment. This is the common law that this proposed constitution tells us to rely upon as opposed to a constitutional enshrinement of the principle, and I can say to the Committee that the subsequent jurisprudence in Canada after the Nishga case, which was rendered by the Supreme Court in 1973, that no cases since that time have made a definitive pronouncement

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on the subject of aboriginal title. So we are in a state of confusion and uncertainty when we deal with the jurisprudence today on this very subject.

Now, since the Supreme Court of Canada judgment in 1973, there have been negotiations carried out between the Nishgas, the provincial government and the federal government. Those negotiations have been fruitless. They have been fruitless for one reason: the provincial government of British Columbia refuses to recognize the concept or doctrine of aboriginal title. It is as plain and simple as that.

So we say to you in regards to Section 24 of the proposed constitution: you are forcing the Indian people to fall back on the common law and the judicial pronouncements on their rights, and by doing that you are casting our first citizens of this country into the uncertain winds of judicial and political process, indeed at present into the winds of an area of jurisprudence of which there is no definitive judicial pronouncement. We, therefore, wish to state emphatically to you, this Commit tee, that Section 24 is meaningless in its present form, it misleads the Canadian public into thinking that the Charter is actually conferring rights to the native people and it is not.

I now come to the second point, that deals with the subject of entrenchment of the principle of aboriginal title. If indeed you recognize the need to enshrine the principle of aboriginal title into

the constitution, then we ask of you to make a recommendation to Parliament that provides for a provision within the Charter that expressly states and pronounces that the Indian people maintain aboriginal title to the lands they inhabit until such interests are extinguished by treaty.

One of the most disturbing aspects of the government's refusal to entrench aboriginal title in the proposed constitution up to this point is that the government has done so against the advice of many major studies on constitutional reform of the last few years.

I refer you in particular to the Canadian Bar Association in the 1978 report which that Association put out entitled "Towards a New Canada".

In that report the Canadian Bar Association said—and I quote:

In particular, we must scrupulously abide by our agreements with native people and recognize their claims as they are established. Indeed, constitutional recognition of our commitment to abide by our obligation should be expressly set forth in the constitution. In taking this action we are responding to the claims of simple justice.

Now, the Pepin-Robarts Committee went even further in its recognition of this simple justice. It said—and I quote:

Canadian policy has traditionally accepted both the special status of native people and their permanent attachment to the land.

The Committee's report went on—and I quote:

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"We believe that it is now appropriate that specific attention be paid to the constitutional position of the first Canadians. More specifically, both provincial and federal authority should pursue direct discussions with representatives of Canada's Indians, Inuit and Métis, with a view to arriving at mutually acceptable constitutional provisions that would secure the rightful place of native people in Canadian society."

There is no acceptable solution to native people that does not recognize aboriginal title. Not to include it in the Charter of Rights and Freedoms is to abandon forever the prospect of reaching this mutually acceptable solution spoken of by the Pepin-Robarts Commission.

The government's present position with this proposal which is now before you of not entrenching aboriginal title in the constitution is even more difficult to understand in the light of the government's previous willingness to entrench recognition of the Royal Proclamation of 1763, a document wholly concerned with aboriginal title, when the government made its 1978 constitutional amendment bill proposal to Parliament.

The Royal Proclamation of 1763 was part of that proposal in 1978 and that document, of course, is the strongest declaration of aboriginal title known to the Canadian native people.

The proposed Charter in its present form, by ignoring this whole subject of aboriginal title, flies in the face of all these contemporary proposals on constitutional change to which I have just referred.

We say, Mr. Joint Chairman and members of this Commit tee, that to entrench the concept of aboriginal title or the doctrine of aboriginal title in the constitution, will finally force the provincial Government of British Columbia to recognize the Nishga title to the land and to participate meaningful in a negotiation process leading to the settlement of this long outstanding dispute.

Such an entrenched provision will lead to a just and equitable settlement of the Nishga claim.

As both the federal government and the opposition parties in the federal House have all expressed frustration over the provincial governments unwillingness to recognize the aboriginal title doctrine in British Columbia, you, as a Committee and the Parliament of Canada, have a golden opportunity to rectify that problem by enshrining the principle in the constitution which, in turn, will hopefully lead to a settlement of the land question of the Nishga's and of British Columbia's natives generally.

We perceive that you and the Parliament hold what may be the last key to the Nishga people being treated with justice by the white majority of our nation.

Now, the Prime Minister and the present Minister of Indian Affairs, Mr. John Munro, have said this to the native people. They have said to the native people, both in the House of Commons and before parliamentary Committees as well as outside the House in their speeches—they have called upon the native people to be patient and to wait until patriation of the

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constitution at which time the Prime Minister and the Indian Affairs Minister have said,

"We promise you that once the constitution is patriated the issue of native rights will be the first order of business at the First Minister's meeting held after patriation."

That has been their position up to this point. But we want to direct your attention very clearly to the fallacy of such direction. Such a position is at best, members of the Committee, politically naive, or at worst, misleading and fraudulent.

We say that for this reason: the facts are simple. Constitutional amendment after patriation will require the consent of the provincial governments of this country under the amending formula that is proposed or any of the amending formulae proposed.

We ask you this. Accepting the fact that once there is patriation of the constitution that any amendment to the constitution will require the consent of the provinces of this country, then will the province of British Columbia ever consent to the entrenchment of the doctrine of aboriginal title into the constitution?

We can tell you, the Nishga Tribal Council can tell you better than anyone else in this country, that the province will never agree to that principle, and thus they will veto the enshrinement of the principle or doctrine into the constitution. The Nishgas can tell you about that better than anyone else for this reason. First, the history of all the political administrators in British Columbia, from

colonial days through to the Liberal government, provincially; conservative governments provincially; Social Credit governments provincially; the New Democratic government provincially; through to the present social credit administration in Victoria—not one administration in the Province of British Columbia has ever recognized the concept of aboriginal title; not one has ever recognized the doctrine of aboriginal title.

To suggest that we patriate the constitution and then seek the consent of the provinces of Canada defies and ignores the history of the provincial government and its relationship to the native people of Canada and focusing on British Columbia it defies the history of administrations in British Columbia at Victoria and their position on the doctrine of aboriginal title.

There will never be consent from the provinces to enshrine the principle and it is for that reason that we use our words cautiously when we say that the suggestions of the Prime Minister and that of the present Minister of Indian Affairs that Indian people should patiently wait until patriation, is, indeed, a suggestion which has to be a sham.

There will be no entrenchment after patriation.

The claim to aboriginal title to land is based on the time immemorial occupation by the Nishgas of the Nass Valley. At no time were the Nishgas the subject of conquest; at no time were they the subject of treaty. The Royal Proclamation of 1763 set out how governments were to respect the concept of native ownership of lands unextinguished by treaties.

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Territory upon territory, as you colonized this land, treaties were signed; but you neglected to make settlement with the Nishgas, thus forming the grounds for the claim to ownership of the lands that the Nishgas inhabit.

It is with incredible dismay and great disappointment, Mr. Chairman, that we determined that the Indians' special rights and interest were completely ignored in the proposed constitution, even though the federal government had recognized the Nishgas' just claim since 1973 when Mr. Jean Chrétien made his announcement reversing what had been up to that point federal policy.

You, as a Committee, and the Parliament of Canada, hold the onerous responsibility of charting the future course of aboriginal title and the issue of aboriginal title in this country.

The Nishgas' destiny is in your hands. Aboriginal title must be entrenched in the constitution before patriation. To suggest it will happen after the constitution is brought home is to ignore the political reality, history and relationship of provincial administrations in British Columbia to the Indian people.

Therefore, to make such a suggestion is to mislead the Canadian public and, indeed, the Indian people about what will really happen after patriation.

The Indian people know better than anyone that the government is really telling them that their special rights and interests will never be enshrined in the constitution.

> If aboriginal title is not entrenched constitutionally at this time, there will never be a settlement of the British Columbia land question. That is the stark reality of the situation.
>
> It is that legacy that you will leave to this nation.
>
> We say, in conclusion, that we plead with you to recommend to Parliament that aboriginal title be a right conferred in the Charter to all nontreaty native people of Canada. Such an entrenchment of Nishga interests would give us the iron-clad protection that the Nishgas, as a minority in Canadian society, deserve and expect from a new Canadian constitution.

Jake Epp, Donald Rosenbloom, Chief James Gosnell (President of Nishga Tribal Council), Chief Rod Robinson (Vice-President, Nishga Tribal Council), Percy Tate (Executive Assistant to the President, Nishga Tribal Council), p. 21

> **Mr. Epp:** Looking at Section 24—and we have not had great faith in the drafters; but maybe they did have some hidden motive when they put it down to Section 24 and related it to Section 91/24. I would like to ask you whether the assurances—and the Minister has constantly said to us, and that is both the Minister of Justice, whose responsibility this proposed resolution is, and the Minister of Indian Affairs and Northern Development, that all the rights of the Indian people or native people now enjoy or have protected under Section 24 of the proposed Charter, and my personal view on a reading of that section is no; but I would like to ask you if there would be no change in amendment form along the lines you have suggested, namely that such interests are extended by treaty, in other
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> words that there be a process of treaty negotiation, are you better protected under Section 9124 than you are with Section 9124 patriation and the proposed Charter Section 24? In other words, you have to look at the whole process, obviously.
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> **Mr. Rosenbloom:** If I may answer that, I would say that Section 9124 of the BNA Act has given us no protection whatsoever on the subject of aboriginal title.
>
> **Mr. Epp:** That is my point.
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> **Mr. Rosenbloom:** As a result I say to you that we are not pleased with the state of the law as it is at present with the BNA Act; but we are obviously also not pleased with the proposed constitution as we have it before us.
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> We have a golden opportunity, here, for the first time to draft a constitution which meets the needs of the native people and responds to the question of justice for the native people of this country who are still holders of the aboriginal title.
>
> I say with regard to Section 24 that I am not seeking an amendment of that section in the sense that I would like to add or take words away, but I am simply suggesting that Section 24 is completely meaningless. We would like to have it deleted and a new section substituted. We would like it so that it does not mislead the Canadian public nor the native people about giving them something

in the Charter and then hopefully adding a provision to the Charter which truly is the provision enshrining Indian interests—and I speak, obviously, in particular of the doctrine of aboriginal title.

Mr. Epp: Two weeks ago when the Indian National Brother hood was meeting, especially with a number of Indian Chiefs from British Columbia, that province being well-represented at these hearings, the doctrine was put forward—it was not new, but probably received new expression—the doctrine of self- determination of nationhood: can you explain for the benefit of the Committee, in terms of the Nishga people, what or how you would interpret aboriginal title and define for us aboriginal title in those two parameters, namely, self-determination and self-government?

Chief Gosnell: Mr. Chairman, aboriginal title, as we interpret it—and anyone can interpret what is aboriginal title: aboriginal title is what we are setting out right now. Without this land there cannot be a title. Aboriginal title, as we define it, is that we own the land lock, stock and barrel, and if there is no settlement of our land claims, there cannot be any self-government. It would be impossible.

That is why we said at the outset that, in order to survive, what we are seeking here is a right to survive. We cannot survive without an economic base, and you cannot have an economic base without a settlement of the land question.

Mr. Epp: For example, would you take the concept of self-government, or self-determination as you call it, to the point where the Indian people on lands that would be deeded to them by treaty would in fact extend to the position of having the ability to legislate laws as well?

Chief Rod Robinson (Vice-President, Nishga Tribal Council): Yes, I would like to answer that, Mr. Epp. In our position

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paper we did not say we were going to completely dominate. We wanted to share. We wanted self-determination in local government; self-determination in regards to our own resources; we want to share with the people; we want our land claims to be settled, so that we could live side-by-side with the rest of the people in Canada—the sharing of our resources.

Mr. Epp: If I understand you clearly, I can go along with the position you took, namely that when you look at self-determination or self-government, you look upon it as determination at a local level.

I hate to bring up 1967 again on the white paper, because that obviously conjured up certain impressions immediately in the native people.

But if I understood you correctly, you are looking at it at the local government rather than as another level or third level of government. Am 1 correct in saying that?

Mr. Percy Tate (Executive Assistant to the President, Nishga Tribal Council): I would like, if I may, to respond to that.

> Section 91(24) does not guarantee us to be citizens of Canada. It does not guarantee us in sharing our burdens or aspirations with the rest of Canada.
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> We are seeking an end; we are seeking to be a part of Canada. It seems like it is taking too long for the non-Indian people to allow us to be part of Canada which we owned in the first place.
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> It seems like there is a state of confusion, as our lawyer has just stated.
>
> So that without strength in Section 91, will there ever be a guarantee that we can share the burdens of Canada with you, Sir?
>
> This is what we mean by self-determination.

Rod Robinson, p. 24

> **Chief Robinson:** Mr. Chairman, it sounds like we are a bunch of separatists, we are not talking about separatism in any form. What we want is to be a part of Canada. We want local government but within a framework of the Canadian government. That is the reason why we want the aboriginal rights entrenched so that we can be recognized, not only the two founding nations as they call them, they completely forgot about the Indian. So if you can entrench our aboriginal rights in the constitution then we will be a legal entity, we will be able to have our own self-government but within the frame work of the constitution, not as separatist.

James Fulton & Donald Rosenbloom, p. 24

> **Mr. Fulton:** […] What I would like to do first is to try and wake the Committee up a little bit as to what the history of title is so that we all have something about when we are thinking about what a good amendment would be for Section 24.
>
> If we go back to the 11th and 12th Centuries in Great Britain, for example, from where we adopted our common law in that period of time, when title was being formulated what would happen is a county court judge would travel around and have a kind of community meeting when he got out of his carriage and someone would say well, this goose pond was my great-grandfather's and that stone fence over there was where my great-grandmother used to plant a few herbs; that fence line keeps our cow in and it always has, and they would pay the county court judge and they would receive title.
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> Now, in the 1700s and 1800s as various immigrants moved west across Canada and, for example, into British Columbia, the British Government recognized the Russian involvement in trading in the panhandle area and various treaties were made and agreements were made and along the 49th parallel agreements were made because the Americans were there. Within the context of British Columbia and most of Canada a sort of tacit agreement was reached, it was not title but a tacit agreement was reached between the native people and the
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immigrants as they moved along. It was based on power, blood and guts. That carried on for some considerable period of time, and nine years prior to Confederation the Nishgas began their long journey to be here today. Thirteen years before British Columbia entered Confederation they began that very long journey.

I would like to remind members of this Committee of some very important things that I think as members of Parliament and members of this House we tend to forget. It was not until 1963 in this country that Indian people were allowed to vote, 1963. That is a tribute to a Western society; I think it is something we should dwell on when we are thinking of rewriting Section 24. Earlier in this century it was illegal for groups such as Nishga to even discuss land claims even in their own homes, anywhere, it was illegal in this country for them to do that. I think we are aware of the mortality rates, the statistics that relate to native people in this country and as members of this Committee we have to k ourselves quite seriously exactly what are we proposing in Section 24 and why should aboriginal title be entrenched in there in a most serious way.

The first question I would like to ask to both Chief Gosnell and to Mr. Rosenbloom is in relation to what Section 24 really is, which is really a vacant balloon in relation to rights for native people, and the principle of aboriginal rights is not entrenched at this point in time exactly how long in relation to what has occurred to date would you expect it to be before there was any fundamental movement either through the courts or through Parliament again.

Mr. Rosenbloom: There will never be a movement through Parliament because the constitution, once patriated, will always be subject to the amending formula, and the amending formula will always recognize the right of the provinces to veto. That being the case, unless there is a change of heart provincially, we will never have the opportunity again to appear in Ottawa to make the submission we are making today. That is the whole thrust of our intervention before your Committee, that this is the last chance we all have to entrench the principle of aboriginal title.

I answer Mr. Fulton by saying that indeed I cannot speculate as to when the Supreme Court of Canada might make a ruling that is definitive and is in favour of the Nishgas. It may be tomorrow, it may be the day after, but the point that we make to you is that if Section 24 is as we have analyzed it before you and if all Section 24 does is tell us that we have to rely on our common law rights, then you are really telling the native people that their rights will not be enshrined in the constitution but rather they will be subject to the whim and fancy of the courts today, tomorrow and 100 years from now; and none of us can ever speculate as to when the courts might make the judicial pronouncement that we, the Nishga Tribal Council, expected when they launched their action in the court over a decade ago. Thank you.

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Mr. Fulton: If I might go on with the second question, **I** think it is something that I would like to hear several of the Council members respond to. The proliferation certainly around Parliament and I found in many areas of the country of the idea that if aboriginal title is settled all of a sudden real estate companies are going to go bankrupt, various cities are going to be expropriated, the economy is going to go into a slide, there are all sorts of rumours being circulated through out this country and here on Parliament Hill as to what it means if aboriginal title is entrenched and perhaps Chief Gosnell and Chief Robinson could respond in terms of the example of the Nishga claim, just exactly what does it mean in terms of your traditional tribal territory, what does it mean to Canadian

Cellulose, to the Aluminum Company of Canada, to all of the developments that have gone on there, to the other towns that are there. Does it mean what a lot of the rumour machine would like members of Parliament and members of the Canadian public to believe? Have we been misled? I have heard many times, for example, the City of Penticton would suddenly be gobbled up in a land claim and there would be enormous social dislocations.

Could you respond in terms of development and in terms of how you view the Canadian fabric and the role you would play in it upon negotiation of land claims settlement?

James Fulton & Donald Rosenbloom, p. 27

Mr. Fulton: One final question, Mr. Chairman.

I understand from what Chief Robinson and what Chief Gosnell said, that, touching back on the question that Mr. Epp raised, is that the federal and provincial legal systems would still have paramountcy but the concept is to have resource sharing and utilization in terms of the land base. In looking at Section 24 as it is now written, and perhaps if both Mr. Rosenbloom and the Council could respond to it, if the idea in terms of this resolution is to cast native people and the concepts of aboriginal title and rights back on to the common law, and with all due respect, do I hear you correctly in saying that perhaps the only time to go forward with further cases in relation to aboriginal title is when the mosiac or the composition of the Supreme Court changes or when different parts and segments of aboriginal title and rights are to be tested through the courts, and perhaps counsel could indicate to the Committee through the same answer as to what kind of a block the Nishga people found in pursuing this through the two provincial courts and on to the Supreme Court?

Mr. Rosenbloom: Well, let me first respond to your last point, which was what sort of block we encountered.

In the B.C. Supreme Court, where the action was launched, the court of first instance, Mr. Justice Gould of that court held that the Nishgas had had aboriginal title but that title had been extinguished by these colonial enactments that I referred to earlier in my submission.

The B.C. Court of Appeal, on appeal, went much further against the Nishgas than the trial judge did. The B.C. Court of Appeal held that the Nishgas had never had aboriginal title.

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that such a concept was never recognizable at law, so that where the trial judge had held there was title earlier on but had been extinguished by colonial enactment, the B.C. Court of Appeal held that aboriginal title was not something to be recognized at Law, period, and therefore the subject of extinguishment was not really an issue or did not have to be an issue.

The Supreme Court of Canada went back to the position really taken by the trial judge in terms of the three judges that decided against the Nishga. The three judges held that Mr. Justice Gould's position was the correct one, that was that title had existed but was extinguished by colonial statute, and the three other judges, of which Mr. Justice Hall wrote the definitive judgment, those

three judges of the court held that there was a doctrine of aboriginal title recognized in our British common law and that title continued to this day in respect to the Nishgas because the Nishgas had never extinguished that title by way of treaty or surrender.

Does that respond to your question, Mr. Fulton?

Mr. Fulton: Yes, Mr. Rosenbloom. Perhaps you could respond a little further.

What I was getting at was is if the Parliament of Canada expects through Section 24 native people throughout Canada to settle their aboriginal title and rights through the courts, if they expect to ever have it settled after spending tens if not hundreds of thousands of dollars to reach the Supreme Court of Canada, they can just keep their fingers crossed and, with all due respect, trust that the composition of the court will be such that there will be more, either more like thinking justices as Mr. Justice Laskin and Mr. Justice Hall as opposed to the other side of the trial?

Mr. Rosenbloom: Well, I agree with that, and I will go one step further: in a number of learned journal articles that have been written about the *Nishga* case, and obviously these articles are easily obtainable, a number of scholars in the area of jurisprudence have written that the Supreme Court of Canada deadlocked itself with a purpose; that purpose was that they felt the issue of aboriginal title was not in fact a matter that should be decided in the courts but rather should be decided in a political forum. The court just over there looked your way, Mr. Fulton, and looked to the Parliament of Canada to seek a political solution to a political issue.

So we suggest that in reading the scholars who have written about the Nishga judgment, that really the Supreme Court of Canada was telling us something and we come before you today to enforce what the Supreme Court said, and that is that this is truly a political issue that has to be settled in a political manner through an entrenchment in this constitution that you have the luxury of dealing with today.

Frank Oberle, p. 31

I could not agree more with what you have said about Section 24, in fact I have questioned the Minister in Committee, pointing out quite clearly to him that it would take at least four and a half years after the resolution has been returned

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from Britain before any changes can be made to the constitution, and I am talking of course of the amending formula which will undergo a two-year waiting period during which we will try and find an improved version to the Victoria Charter, then the prospect of a referendum. At least four and a half years if not six years, and it is just simply dishonest, in my opinion, and I agree with you wholeheartedly, to say that there would be immediate action with respect to Indian rights. There will not be immediate action because there has not been any action since 1973 when the concept of aboriginal title was first mentioned in Parliament. So let us not be fooled by that, there has to be action now.

Frank Oberle & Donald Rosenbloom, p. 33

> **Mr. Oberle:** I would say this, that some of us have a better perception of what the term aboriginal title means. I would daresay if you go around the Committee here everyone would come up, likely, with a different version of what aboriginal title means. There is no jurisprudence, the courts have never decided what it means, what aboriginal title means, and **I** daresay it means different things to different Indian groups in different parts of the country as well. So the entrenchment of aboriginal title, there has got to be a definition to it, or are you relying on the Declaration of 1763 to define the term aboriginal title?
>
> **Mr. Rosenbloom:** I would like to respond to that, Mr. Oberle, because **I** think you have raised a very fundamental question that I am sure is on the minds of everyone in the Committee, and that is that if the concept of aboriginal title has not been defined from A to Z, would it be dangerous to enshrine the concept or the doctrine in the constitution? That certainly has been spoken about in this Committee and outside as being a dangerous situation.
>
> Clearly, once you enshrine the doctrine of aboriginal title, there will be judicial interpretation made on the meaning of that term. We concede that once there has been an entrenchment of the principle, that principle will require continuous interpretation by the judicial bodies of this nation, but that is no different, Mr. Oberle, from the requirement to continuously go through a definition process in terms of freedom of speech, freedom of assembly, freedom of religion, issues about whether under freedom of religion Jehovah's Witnesses can refuse to have their children take blood transfusions; issues about freedom of assembly, whether that freedom entitles a group to obstruct traffic through a roadway. Every day in this country the courts are being called upon with the present Bill of Rights to define what is meant by the principle as it is placed in the Bill of Rights. Indeed, if you look at the history of the United States with their Constitution and their rights enshrined in a
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> document, the courts are being called upon to give an interpretation.
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> It is the essence of this country that the courts go through an interpretation process, a definition process to refine principles that are placed in documents and in legislation in a general way. We do not pretend that the courts will not be called upon to take your move one step further, but we say that it is false to say we cannot enshrine the principle of aboriginal title in the constitution because we are not completely sure of all its elements for definition, but you are willing to enshrine all the other freedoms as listed in your Charter that I suggest are equally vague, that equally will call upon the courts of this nation to interpret, and we say that we just want equal treatment in terms of aboriginal title with all the other freedoms that are in their present day form in the Charter as the Charter is before you.

Senator Goldenberg & Donald Rosenbloom, p. 34

> **Senator Goldenberg:** […] I want to congratulate the representatives of the Nishga Council on the very forceful presentation they have made. It could have only one result and that is arouse our sympathy and understanding.

My question is to Mr. Rosenbloom. I well understand your reaction to Section 24. Now, as Mr. Rosenbloom mentioned in the course of his presentation, there was a different wording in

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Bill C-60. Section 26 of Bill C-60 was much stronger, it reads like this:

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.

There is no reference to the Royal Proclamation in the Charter under discussion. My question to whichever of you gentlemen of the delegation would like to reply, is this: assuming—and I am not prophesying—that for some reason or another the aboriginal rights are not entrenched at this time, would you not prefer a provision similar to Section 26 of Bill C-60 to the provision of Section 24 in the Charter under discussion?

Mr. Rosenbloom: Section 26 of the 1978 bill does make reference to the Royal Proclamation of 1763, a proclamation which is, of course, a major document on the subject of doctrine of aboriginal title.

But we are also not happy with Section 26.

I only refer to Section 26 of the 1978 bill because at least that Section did make reference to the Royal Proclamation; but it is not an acceptable solution to the problem.

It is not responding entirely to the concerns we have expressed in our submission. The reason is this honourable Senator, that there is a judicial debate in Canada as to whether the Royal Proclamation of 1763 even applies to my clients, the Nishga tribe.

Senator Goldenberg: Well, three judges said it did and the other three said it did not.

Mr. Rosenbloom: It is a moot issue, because of the dispute as to whether the lands in the Nass Valley were terra incognito at the time of the passage of the Royal Proclamation in 1763.

So we do not want to rely on the Royal Proclamation of 1763 for the rights of our aboriginal title.

We say further that Section 26 of the 1978 bill is still a negative rather than a positive declaration of rights. It is still basically saying that the bill is not to be interpreted in court as having abrogated any rights the native people might have at common law. It gets us back to the problem we speak of when we are dealing with the present proposals before you. It is a negative statement and is not an affirmative declaration of rights and still requires us to fall back on the common law.

We fell back on the common law and went to the Supreme Court of Canada, and as the honourable Senator has quite

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rightly pointed out, there was a split even on the issue of the application of the Royal Proclamation of 1763.

So, we would ask you to consider that Section 26 of the 1978 bill is not responding to our satisfaction to the problems as we have set them out in our submission.

Senator Goldenberg: I fully understand your reply, Mr. Rosenbloom.

I did not think it would. But I was really asking whether, if the worst came to the worst, you might not have a preference for the wording of Section 26 in the 1978 act to the wording in Section 24?

Mr. Rosenbloom: The answer is that I always have a preference to only have one foot in the grave as opposed to two.

Senator Goldenberg: That is exactly what I was hoping you would reply. Thank you.

Appendix "CCC-4"—Submissions of the Nisha Tribal Council…, p. 12

The Canadian Constitution, 1980

The history of our people, and our struggle for recognition of aboriginal title, brings us to our reason to make this historic mission to Ottawa and to appear before the Canadian Charter of Rights and Freedoms as presently drafted. It is pathetic to think that after our people have had such a long history of a special constitutional relationship with your government, this proposed Constitution for our country is silent about our distinct special role in your society. We thought the purpose of a constitution is to protect the interests of the individual, of minorities, especially groups that were easy targets for abuse and discrimination. What do we find for ourselves with the present proposals?

We discover only one reference to native people in the proposed Charter. To our astonishment, that reference, found in Article 24, simply tells us that the Charter of Rights and Freedoms will not be interpreted in such a way as to deem any of our common law rights to have been taken away. We always perceived that a nation's constitution and charter of rights should be an affirmative declaration of an individual's rights and protections in a society. Article 24 and the Charter generally offer us no affirmative declarations or protection.

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The Charter only tells us that the courts will not deem any

provisions of the Charter to be taking away whatever rights we may have at common law. This situation is intolerable to us. To tell us that our only rights are those outside of the Constitution is to tell us that we must fall back on the common law as it is today or might be tomorrow. It tosses us out into the political winds, subject to the whim and fancy of future governments, the courts, and the white majority of our society.

Any student of the present jurisprudence on aboriginal title in this country, especially anyone who has analyzed the judgment of the Supreme Court of Canada in our case (Calder et al v. Attorney-General of B.C.), will immediately recognize that this area of law is presently in a confused and unsatisfactory tory state. Yet the Charter, as presently drafted, only tells us that, unlike other Canadians, our special rights must be left in the uncertain winds of judicial and political process, indeed at present, into the winds of an area of jurisprudence in which there is as yet no definite judicial pronouncement.

We seek an expressly stated provision in the Charter which pronounces that Indian people maintain aboriginal title to lands they inhabit until such interests are extinguished by treaty.
One of the most disturbing aspects of the government's refusal to entrench aboriginal title in the Constitution at this point is that it has done so against the advice of many major studies on constitutional reform of the last few years.

For example, the Canadian Bar Association, in its 1978 report entitled "Towards a New Canada", wrote:

"In particular, we must scrupulously abide by our agreements with native peoples and recognize their claims as they are established. Indeed, constitutional recognition of our commitment to abide by our obligations should be expressly set forth in the Constitution … In taking this action, we are responding to the claims of simple justice."

The Pepin-Robards Committee went even further in its recognition of this simple justice. "Canadian policy has traditionally accepted both the special status of native people and their permanent attachment to the land." The Committee's Report went on:

"We believe that it is now appropriate that specific attention be paid to the constitutional position of the first Canadians. More specifically, both provincial and federal authorities should pursue direct discussions with representatives of Canada's Indians, Inuit and Metis with a view to arriving at mutually acceptable constitutional provisions that would secure the rightful place of native people in Canadian society."

There is no acceptable solution that does not recognize aboriginal title. To not include it in the Charter of Rights and Freedoms is to abandon forever the prospect of reaching this "mutually acceptable" solution.

The government's present intransigence is even more difficult to understand in light of its willingness to entrench recognition of the Royal Proclamation of 1763, a document

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wholly concerned with aboriginal title, in its 1978 "Constitutional Amendment Bill".

The proposed Charter, in its present form, by ignoring the whole subject of aboriginal title, flies in the face of all of these contemporary proposals on constitutional change.

To entrench the concept of aboriginal title in the Constitution will finally force the provincial government to recognize our title to the land and to participate meaningfully in a negotiation process leading to the settlement of this long outstanding dispute. Such an entrenched provision will lead to a just and equitable settlement of our claim. As both the present government, and the opposition parties, all express their frustration over the provincial government of British Columbia's intransigence in refusing to recognize the concept of aboriginal title, you as members of the Committee, and the Parliament of Canada, have this precious opportunity to finally force the provincial government of British Columbia to recognize our special rights and to negotiate towards a settlement. We perceive that you and the Parliament hold what may be the last key to our people being treated with justice by your society.

In calling for the entrenchment of aboriginal title in the Constitution, the Prime Minister and the Indian Affairs Minister John Munro tell us to patiently wait for patriation of the Constitution. They then tell us that we will be the first order of business when the first ministers sit down to discuss constitutional amendment after the Constitution is in Canada.

Such a position is at best politically naive, and at worst misleading and fraudulent. The facts are simple. Constitution al amendment after patriation will require the consent of the provincial governments. As British Columbia is the only province with large tracts of untreated land, entrenchment of aboriginal title in the Constitution would require consent of the Province of British Columbia. To suggest that that consent would be forthcoming defies and ignores the history of our relationship with the provincial government from the beginning. Indeed, this history dates back to colonial administrations. One theme remains constant in the colonial governments' policy 1849-1871, through the period of Liberal, Conservative, New Democratic and Social Credit provincial administrations. No government in British Columbia has ever recognized the concept of aboriginal title. No government in British Columbia has ever recognized we have special proprietary interests in our land. Over and over again the present Social Credit government in Victoria states in unequivocal terms their refusal to recognize the concept of aboriginal title.

Do we not have reason to assume that this government, which will be called upon to consent to a constitutional amendment after patriation, will vehemently resist entrenching our title within the Constitution? If they are not even willing to recognize informally our title for purposes of our present negotiations, how can anyone expect them to consent to the enshrinement of our title constitutionally?

The claim to our land is based on our time-immemorial occupation of our Valley. At no time were we the subject of conquest. At no time were we the subject of treaty. The Royal

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Proclamation of 1763 set out how governments were to respect the concept of native ownership of lands unextinguished by treaty. Territory upon territory, as you colonized this land, treaties were signed. But you neglected to make a settlement with our people—thus forming the grounds for our just as rightful claim to ownership of the lands we inhabit.

It is with incredible dismay and great disappointment that we realized that our special rights and interests were completely ignored in the proposed Constitution, even though the federal government has recognized our just claim since 1973. You as a Committee, and the Parliament of

Canada, hold the onerous responsibility of charting the future course of the aboriginal title issue in this country. Our destiny is in your hands. Aboriginal title must be entrenched in the Constitution before patriation. To suggest that it will happen after the Constitution is brought home is to ignore the political reality of our history and relationship with the provincial administrations in British Columbia. To make such a suggestion is to mislead the Canadian public and indeed our people about what really will happen after patriation. Such a suggestion will not pacify our people. We know, better than anyone, that the government is really telling us that our special rights and interests will never be enshrined in the Constitution. If aboriginal title is not entrenched constitutionally at this time, there will never be a settlement of the British Columbia land question. That is the stark reality of the situation. It is that legacy that you will leave to this nation. That in turn will leave a festering sore of discontent that we, the Nishga nation, are resolved never to let you forget.

We plead with you to recommend to Parliament that "aboriginal title" be a right conferred in the Charter to all untreatied native people of Canada. Such an entrenchment of our interests will give us the iron clad protection we as a minority in Canadian society deserve and expect from a new Canadian Constitution.

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December 16, 1980: Sykes Powderface (Vice-President, National Indian Brotherhood of Canada) speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (click HERE to view the Special Joint Committee, Issue 27, then scroll to p. 82)

Sykes Powderface (Vice-President, National Indian Brotherhood of Canada): […] We have heard no one try to defend our exclusion from the process. No one can deny that the constitutional proposals affect us.

The reference to native peoples in Section 24 means that the government has conceded that we are affected by the Charter of Rights and Freedoms and that a special provision is necessary.

The fact that Indian rights, in general, are excluded from this Charter is not a neutral fact. It says a great deal about political priorities in Canada. The Indian questions that the political leaders of Canada have said are of great importance are relegated to what everyone must concede is a highly

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uncertain second round of negotiations, in which the role of Indian leaders is no more certain or defined than it has been over the past two years.

In spite of our basic objections to the kind of process that we have experienced and continue to have, we will speak specifically on the provisions in the proposed resolution. We do this with some reluctance, but we recognize that there are risks to our people if we do not point out the problems which are obvious, at least to us.

> Now, amendment: we are concerned with any amending formula for the Canadian constitution. We want our special constitutional position to be maintained and amplified. We fear, and with good reason, that governments may try to eliminate the constitutional basis for our separate existence within Canada. You may say that we have nothing to fear, but we, of necessity, take a long range view of these questions.
>
> Mr. Trudeau's government proposed "termination" in its White Paper of 1969. The long term assumptions of Euro-Canadians have usually been that the Indian tribes would die out or assimilate into the larger society.

Sykes Powderface, p. 85

> **Sykes Powderface (Vice-President, National Indian Brotherhood of Canada):** […] We have to be very careful to ensure that our collective rights are protected.
>
> The Canadian government has understood that this problem exists and bas included Section 24 in the proposed resolution. It provides that the Charter of Rights does not deny the existence of any rights or freedoms that pertain to the native peoples of Canada. We are unhappy about this provision for a number of reasons. It is negative, not positive. We have consistently worked to have treaty and aboriginal rights positively entrenched in a new constitution.
>
> Instead, we have been given only a limited and negative provision. Our rights are now to be described as undeclared rights and freedoms. There seems an implicit onus on us to prove our rights.
>
> Indeed, Prime Minister Trudeau bas said, as much in a letter dated October 30, 1980:
>
> You will have to persuade the government of Canada that the special rights you claim are reasonable and that they should be guaranteed in the constitution.
>
> Section 24 is limited to rights and freedoms "that exist" in Canada. This seems to mean that there can be no additional rights or freedoms recognized in the future, without their being subject to challenge under the provisions of the Charter of Rights. This is particularly paradoxical because the present government of Canada has appointed representatives to negotiate land claims settlements with the Nishga tribe and with other groups in the Yukon and Northwest Territories. If settlements emerge from these. negotiations, there could be major problems with. the Charter of Rights. At least Section 24 should apply both prospectively and retrospectively.
>
> There is another problem with Section 24. While it would probably protect the reserve system, it would probably not protect other parts of the Indian Act. We could expect to have the Laval and Canard cases relitigated. The Charter could be used against any proposals to have bands and tribes establish their own systems of membership. The ability to have special legislation for Indian populations must be maintained. Section 24 does not acheive that goal.
>
> Section 15(2) is designed to ensure that affirmative action programs will not be invalidated by the Charter of Rights.

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This is an important provision. As you may know, the Alberta appeal court has ruled that affirmative action programs in the oil sands projects are invalid because of Alberta's Individual Rights Protection Act. That case is presently on appeal to the Supreme Court of Canada. Section 15(2) mistakenly sees special programs as simply designed to better the conditions of disadvantaged persons or groups. While it is true that Indian people are a clearly disadvantaged group in Canada today, that will not always be the case. There must be provisions that will allow band enterprises to preferentially hire band members, whether or not the band is disadvantaged. The important value is not relieving poverty, but the survival of the tribes as distinct political, social and economic groups within Canadian society.

William T. Badcock (Legal Counsel, National Indian Brotherhood), p. 87

Mr. William T. Badcock (Legal Counsel, National Indian Brotherhood): […] The important part of our proposed amendments is the addition of a new Section 23A, which is designed to provide for recognition, confirmation and protection of aboriginal rights and freedoms. There are explanatory notes along with the text of our proposed amendments. Because of the restrictions of time I propose just to go quickly through what the sections themselves say.

Section 23A(1): For the purpose of this act the aboriginal peoples of Canada includes the Indian peoples of Canada.

Section 23A(2): The aboriginal rights and treaty rights of the aboriginal peoples of Canada are hereby confirmed and recognized.

Section 23A(3): Without limiting the rights of the aboriginal peoples of Canada all rights confirmed or recognized by the Royal Proclamation of October 7, 1763 shall continue in force and the said Proclamation shall be deemed to be part of the Constitution of Canada so far as it touches on the rights of the aboriginal peoples of Canada.

To this extent we propose that the Royal Proclamation of 1763 be added to Schedule l of the proposed resolution to be the first document itemized prior to the British North America Act of 1867.

Section 23A(4): Within the Canadian federation, the aboriginal peoples of Canada shall have the right to their self-determination, and in this regard Parliament and the legislative assemblies, together with the government of Canada and the provincial governments, to the extent of their respective jurisdictions, are committed to negotiate with the aboriginal peoples of Canada mutually satisfactory constitutional rights and protections in the following areas: inter alia: a) aboriginal rights; b) treaty rights; c) rights and protections pertaining to the aboriginal peoples of Canada in relation to Section 91(24) and Section 109 of the Constitution Act, 1867; d) rights or benefits provided in present and future settlement of aboriginal claims; e) rights of self-government of the aboriginal peoples of Canada; j) representation of the aboriginal peoples of Canada in Parliament and, where applicable, in the legislative assemblies; g) responsibilities of the aboriginal peoples of Canada and the provincial governments for the provision of services in regard to the aboriginal peoples of Canada; h) the right to adequate land and resource base and adequate

revenues, including royalties, revenue sharing, equalization payments taxation, unconditional grants and programs financing, so as to ensure distinct cultural, economic and linguistic identities of the aboriginal peoples of Canada.

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Section 23A(5): a) Every treaty and agreement validly entered into between Her Majesty and any of the aboriginal peoples of Canada and every treaty and agreement with the aboriginal peoples validly authorized by Her Majesty shall continue in force after the coming into force of this act and all such treaties and agrement shall be deemed to be part of the Constitution of Canada. b) No treaty or agreement with any of the aboriginal peoples of Canada, or any provision or term thereof, shall be diminished or abrogated by either Parliament or any legislative assembly, nor shall any act of the Parliament of Canada or any legislative assembly be construed or applied so as to diminish or abrogate any provision or term of any treaty or agreement with any of the aboriginal peoples of Canada without the consent of those aboriginal peoples party to the treaty or agreement.

Section 23A(6): No aboriginal right shall be subject to extinguishment by Parliament of Canada or by any legislative assembly.

Section 23A(7): No lands, waters or resources of the aboriginal peoples of Canada shall be subject to expropriation under any law of the Parliament of Canada or any legislative assembly without the express consent of those aboriginal peoples holding such lands, waters or resources.

Section 23A(8): The free movement of aboriginal persons with their personal goods and possessions guaranteed by the Treaty of Amity, Commerce and Navigation, 1794, and known as Jay's Treaty, between Her Majesty the Queen and the United States of America, shall apply mutatis mutandis to all the aboriginal peoples of Canada and the United States, and no Act of Parliament or any legislative assembly shall be construed so as to diminish this right.

Then Section 24 of the proposed resolution will follow from there, Subsection (1) saying: 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.

Section 15 we propose to be amended such that Section 15(1) will read:

Everyone has the right equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.

Which is the same as it is now.

Subsection (2): The section does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups or the recognition of the aboriginal and treaty rights of the aboriginal peoples of Canada.

Section 32, subsection 2 is to be amended to read: Such constitutional conferences and all such future constitutional conferences shall include the direct participation of representatives of the aboriginal peoples of Canada for matters on the agenda which affect them.

> Then finally Section 51 A, subsection 1: Nothing in Parts IV and V shall be construed as permitting any amendment to any
>
> *[Page 89]*
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> constitutional provision that affects the rights, freedoms and privileges of any of the aboriginal peoples of Canada without the consent of those aboriginal peoples of Canada so affected.
>
> And one final comment. As well as the addition of the Royal Proclamation of October 7, 1763 to Schedule 1, we also propose that the order of Her Majesty in Council admitting Rupert's Land and the Northwest Territories to the union dated June 23, 1870 also be added as probably Subsection (2) I believe.

Senator Austin, p. 96

> **Senator Austin:** [...] The nub of it for me—and I will not take up the time of the Committee with flourishes of rhetoric; but I will go to what I think is the key problem and something which you were responding to a moment ago when Mr. Manly put a question to you about the issue of when your rights would be entrenched.
>
> You are very much aware that at best Section 24 of the present joint resolution seeks to be a sort of without prejudice kind of clause. Whether or not it does it well, its intention is to say, "This joint resolution is without prejudice to aboriginal claims or without prejudice to the points of substance that are ongoing between the levels of government in Canada and the various native communities."

Senator Austin, Delbert Riley (President, National Indian Brotherhood), & Doug Saunders (Legal Counsel, National Indian Brotherhood), p. 98

> **Senator Austin:** [...] Is there some way in which we could recognize your existing rights better than we do in Section 24? I know you have suggestions in your documents.
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> **Mr. Riley:** Yes; follow our suggestions.
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> *[Page 99]*
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> **Senator Austin:** Well let us say, for instance, that we cannot follow them all. Would you accept, for example, a movement back to the Bill C-60 language which refers to the Royal Proclamation of 1763 which Mr. Badcock spoke about a few minutes ago? Would you go back to that language as an improvement over what we now have?
>
> **Mr. Doug Saunders (Legal Counsel, National Indian Brotherhood):** I think the position on the Bill C-60 language was made clear at the time and has been reiterated now. The idea of a positive reference to the Royal Proclamation of 1763 is seen as very important. And what was a mistake in 1978 with Bill C-60 was to refer to the Proclamation as a source of rights rather than the recognition of rights which would have locked us again into some quite unfertile historical argument.

George Watts (Chairman, Nuu-Chah-Nulth Tribal Council), p. 126

Mr. George Watts (Chairman, Nuu-Chah-Nulth Tribal Council): […] I think that it is important and significant that this Committee and the Parliament of this country listen to what we have to say. I guess that for the very reason that you have started out with here and that you cannot say our name and the only people that can say our name are our own people, the NuuChah- Nulth people, I think that it is important that we exist as a people and that our language continues on in this country because it is not by accident that we are here.

I would first of all like to talk about who we are. The Nuu-Chah-Nulth people are the people of the West Coast of Vancouver Island. Today, we have 15 bands and we have some 4,200 people that belong to our Tribal Council.

Our people are here today to present something to this Committee because we feel that the issue that you are dealing with, the Constitution of this country, deals with our very existence as Indian people. We feel that, in view of the history of the government-Indian relations in this country, we had to be here, we had to come here to state how we feel and where we see ourselves in this Constitution.

I do not think that we want to get into a discussion of history; that is well documented in this country, but we do want to tell you what it does mean to us as lndian people, the Constitution.

You know that this government has been involved for over 100 years now in trying to determine what is best for lndian people through their lndian Affairs program, through the Indian Acts, through various other acts of Parliament in different relations through different departments of this government.

What I have to say to this Committee is that no act of Parliament, no lndian Act, no Indian Affairs departments will ever help us or determine us to be Indian people.

Our existence as Indian people depends on us and only us.

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What we are saying to you is that our place in the Constitution can only set the stage for us to exist as Indian people. We do not want any kind of programs, cultural programs to guarantee that we exist as Indian people. My people still have our way of life. We still have our own laws. We still have our own culture. We have our own language. We have our own societies.

The time has come for the government of this country to now recognize that and to quit attempting to try to change us, to make us better Canadians. We are prepared to be Canadians. We want to be Canadians but we can only be Canadians and good Canadians if we are allowed to be Indians and the only way that we can be allowed to be Indians is if you allow us to have our land and our sea and our resources because that is where our history as Indian people lies.

It would be like taking people from the plains and placing them out in the ocean and asking them to exist as people. Well, the same goes for us. We are people who grew up, we are people whose

traditions lie with the sea resources and the land adjacent to the sea and we are now asking for the government of this country, for the Parliament of this country to recognize where our rights are, where our history lies and how we can exist as Indian people and, therefore, as good Canadian people.

I was brought up by my father to know what the Parliament of this country did to our people, and I think that it was for a very good reason that he taught me about what you did with our Potlatch because the Potlatch is at the core of our society. It is everything that we stand for and everything we are, and your Parliament tried to do away with that by law. Well, it did not do away with it because you just cannot do away with us. You could either shoot us if you want to but you just cannot do away with us by passing legislation.

Jack Woodward (Legal Counsel, Nuu-Chah-Nulth Tribal Council), p. 128

Mr. Woodward: Thank you, Mr. Chairman.

We have come here to draw your attention to the specific inadequacies of the constitutional proposal as it affect native people and to propose some solutions.

We are somewhat heartened in this effort to find that the groups which have appeared before us have studied the pro-

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posed constitution and have independently reached the same conclusions as we have about the problems in this document.

It was impossible for all of the groups to meet and to coordinate a common position because of the shortness of time and the difficulties of geography but the remarkable consistency of the briefs and the presentations before this Committee should emphasize to you that this is a real problem and that a grave injustice may very seriously occur if this constitution was to be adopted unchanged.

At the heart of the natives' submissions is the idea that native rights are already a part of the constitution of Canada and that this status quo will be upset by the introduction of a new document which makes no explicit entrenchment of those rights. That is the point, the fundamental point we wish to make.

Consider Section 52 of the proposed constitution. For the first time in Canadian constitutional history, the constitution will be defined, a nice tidy definition referring us to a schedule which sets out what is and, therefore, by implication, what is not in the Constitution. This section is of course necessary to the scheme of the Act because you have to know what documents are subject to the amending process and which are not. If a law applicable within Canada is not subject to this constitutional amending process, then it is simply a matter within the legislative powers of either Parliament or a legislature acting alone.

The point of drawing up this list is to set out clearly what is beyond the whim of a single government of the day, whether federal or provincial.

Now, in the marginal notes to section 52 which I must remind the honourable members is not a part of the legislation, we find the words:

The Subsection does not exclude other acts and orders from also being a part of the constitution.

In our submission, this is simply wishful thinking on the part of a confused constitution writer. The subsection most certainly has the effect of excluding documents not on the list from the crucial requirement that they be put through the amending process in order to amend or repeal them. That is the heart of this constitution. You make it very hard, although still theoritically possible, to get rid of some fundamental laws. That is what the charter of rights and freedoms is all about.

Among those fundamental laws which must be entrenched and which must be placed beyond the powers of any single government acting alone are the fundamental laws which set out the rights of native people.

What are those laws? Firstly, there is the doctrine of aboriginal title; secondly, there is the guarantees, the set of guarantees provided by the Royal Proclamation of 1763.

With respect to the doctrine of aboriginal title and the Royal Proclamation of 1763, we submit that they are at the present time part of the constitution of Canada. The former is a common law principle of binding constitutional effect. The

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latter is a constitutional document which predates Confederation but which persists as part of the Canadian constitutional law. These two fundamental laws are explicitly intended to protect Native people from the abuse and displacement they could expect with the invasion of the Europeans. It is the protection of a minority, exactly the kind of purpose for which we have designed constitutional entrenchment, the concept of constitutional entrenchment.

I want to say a word about the Royal Proclamation and its historical significance which will perhaps make clear the reason we reached the conclusion that you; your Committee, the Parliament of Canada is bound to include it and its principle in the definition of the constitution, section 52.

The Proclamation—and I recommend that you all obtain a copy and read it—it can be found in the Constitutional Appendix to the Revised Statutes of Canada, in your office. It was issued as a result of the Treaty of Paris of 1763, al the conclusion of the Seven Years War.

In the United States, that same Seven Years War called the French and lndian War, the British had two allied enemies on this continent during that war, the French and the Indians, and when it came time to make peace in the vast new territories acquired by the British, the British Government—and I say the British Government, not just the King because this Proclamation was issued by advice and consent—it required a royal guarantee for both the former enemies if they were to avoid interminable guerilla warfare in the territories.

To the French was granted the self-governing colony of Quebec; to the Indians, an explicit recognition of and guarantee of their aboriginal title, explicit protection of minority interest, as the

foundation of a new peace in the expanding British Dominion. That is what the Royal Proclamation of 1763 was all about.

The process which began in 1763 has evolved dramatically for Quebec. All of the fundamentals of a self-governing minority are preserved in each successive constitutional document: in the Quebec Act of 1774, in the BNA Act of 1867.

For the Indians, there have been a series of treaties, according to the terms of the Proclamation whereby aboriginal title is purchased from the Indians. For those Indians who have not signed treaties, the Proclamation most surely applies as their continuing royal guarantee.

In any case, we wish to make clear and we support the principle enunciated this afternoon by the National lndian Brotherhood that the doctrine of aboriginal title existed as a constitutional principle of the common law prior to 1763. The Proclamation merely reiterates the principle and provides some machinery for giving it effect.

Now, when we, in our modest way, analyze the proposed constitution to determine if these fundamental laws were

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recognized and entrenched, and, of course, we found that they were not, it occurred to us that there might be some other fundamental constitutional provisions in the same category, namely, doctrines of the common law or constitutional documents which do not necessarily apply just to Native people but which apply to Canadians as a whole and if one doctrine or document could have been overlooked, perhaps others could also have been overlooked.

We perhaps face the grave danger that some of the very underpinnings of our constitution could be impliedly repealed by the passage of this constitution act. We bring this matter to the attention of your Committee because the Nuu-Chah-Nulth people are Canadians just as they are Native Canadians.

Can the Committee assure itself that all of those laws which are part of the constitutional law of Canada by virtue of our inheritance from Britain will be preserved? Is there not a danger, as we point out in our brief, that the effect of Section 52 will be to repeal the old, the unusual perhaps, the unwritten, but to repeal part of the constitutional law of Canada?

We have illustrated this point with an example from Magna Carta. We asked, what would become of the constitutional right to a speedy civil trial as guaranteed in Magna Carta.

Here is yet another example. The Great Charter of King John guarantees that no fine shall be so large as to deprive a person of his livelihood. That is a provision of Magna Carta. It is reiterated in the Bill of Rights, the Bill of Rights of 1687. That provision does not appear in the charter of rights and freedoms. It has been left out.

Is it, therefore, about to be lost to Canadian constitutional law?

Ladies and gentlemen, the procedure that has been adopted by this government for the consideration of the new constitution of Canada has been so rushed and so sudden that this type of question has hardly been explored.

Enough then of the constitution and the definition of the constitution. We return, as all the other native groups have, to Section 24.

Section 24 is intended as a saving clause. A citizen with an undeclared right is supposed to be able to stand up in court and point to Section 24 and say, see, here it is, I am allowed constitutional protection for my rights even though they were not mentioned in the Charter and any judge who hears that plea will have to determine if in fact Section 24 accomplishes what the hopeful litigant says it does.

Unfortunately, we are of the opinion that Section 24 says absolutely nothing, whether one is a Native person or not. If a right or freedom is not included in the Charter, then it is excluded from the requirement that any abridgment or amendment of that right through the constitutional amendment process. It is, therefore, a matter wholly within a provincial or the federal sphere of jurisdiction. These undeclared rights and

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freedoms are quite simply unprotected rights and freedoms. They depend on the sufferance of the government of the day.

There is nothing new to this proposition. As a trite example, did anyone suppose that their right to drive a car being an undeclared right or freedom would somehow gain constitutional stature through this section? The simple fact is that from now on a right or freedom is either constitutionally protected or it is not. Section 24 does not add to the list of constitutionally protected rights in the slightest. Nobody for one moment suggested that enactment of the charter would cancel out all of our driver's licences. That was not a danger. Section 24, in our submission, is meaningless.

It has been discussed over the last couple of days that Clause 26 of the old Bill C-60 might be an appropriate improvement on the existing Section 24. The specific mention of the Royal Proclamation and rights acquired under it is certainly more detailed than the original situation of a vague reference to unspecified rights and freedoms.

But let us go back to first principles to understand the meaning of this proposed section. The mere fact that Section 26 provides that the rights are not to be abridged in no way entrenches them in the charter. Those rights, even though recognized by Section 26, remain unprotected rights. It is not acceptable to the Nuu-Chah-Nulth Tribal Council, it is not acceptable, I submit, to most of the native people of this country that Section 26 be used as a substitute for Section 24 because it has the same defect; it fails to entrench the rights acknowledged by the Royal Proclamation of 1763 as constitutionally protected rights.

Moreover, Section 24, as it now stands, with the inclusion of a reference to "the native peoples of Canada" may pose a very real danger for native people for three reasons.

In the first place, we had the problem hinted at a moment ago. Since this is to be the only place when native people are mentioned in the Charter, a judge might conclude that it is only with respect to the kind of rights contemplated by Section 24 that native people can have a special right. As I have just pointed out, Section 24 deals with rights which are not entrenched and only with such rights.

The obvious conclusion for the judge to reach is that no native rights are entrenched rights. It is, of course, utterly unacceptable to native people that that might be a potential conclusion of future litigations.

The second danger is that the paramouncy of the entrenched provisions of the charter would have the effects of whittling away at native rights when they appear to conflict with an entrenched right. For example, Section 31 in part II of the constitutional proposal would commit the government to promoting equal opportunity, but in many cases native people require and demand special opportunities. We ask whether the failure to mention native people in Section 31 will or might be interpreted in the future to mean that such mention was

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considered and rejected, in the light of Section 24, and that special opportunities for native people were thereby prohibited.

Finally, we have said that rights and freedoms, the phrase "rights and freedoms" does not adequately describe the scope of interests which comprise the special status of native people in Canada. Native people are primarily concerned in this context with collective rights over and above these individual rights. In particular, the Nuu-Chah-Nulth are concerned with preservation of their long-standing claim of aboriginal title.

We doubt if the phrase "rights and freedoms", when read in conjunction with all the preceding sections of the Charter is adequate to encompass such a complex idea as a land claim based on aboriginal title.

In preparing our submission, we have appreciated hearing and reading brief of preceding groups. Our understanding of this complicated area of law is still evolving, and we are happy to be able to adopt some of the principle points which have been put before you earlier in these proceedings.

In particular, we find ourselves in precisely the same legal and constitutional position as the Nishga Tribal Council which appeared before you last night.

We particularly agree with their submission that the vagaries of judicial interpretation with respect to the meaning of the doctrine of aboriginal title and the Royal Proclamation of 1763 must be buttressed by specific mention in the Charter.

We propose the following wording as an additional amendment, not included in our submission, to be included in the Charter.

> I will now refer or read two sentences which ought to be included as specific additional clauses to the Charter. They are not in our brief, and they are additional as a result of the submissions we heard last night from the Nishga Tribal Council.
>
> They are: (a) the aboriginal title of all of the native peoples of Canada, except where extinguished, is preserved; (b) any rights acknowledged by the Royal Proclamation of 1763 shall be guaranteed pursuant to this Charter.
>
> These two statements reflect the present state of constitutional law in this country.
>
> To enact them is merely to preserve as constitutionally binding the present law. To fail to enact them while simultaneously entrenching all sorts of other provisions, would be a gross violation of the centuries-old trust. The fundamental pact between Europeans and Indians, which dates to 1763 and which was intended to secure peace, would be thereby broken.

Jack Woodward, p. 135

> **Mr. Woodward:** No, it would not be a fair categorization that the mere inclusion of the Proclamation would be sufficient.
>
> Some honourable members have suggested that it be included in the proposed manner of the wording of the old Clause 26 of Bill C-60.
>
> It is not sufficient merely to say that the rights arising there are not to be abridged. We are insisting that those rights be entrenched. The reason why we are insisting on that, is that those rights are now part of the constitution of Canada, and, therefore, could not be overruled either by a province or by the federal government acting alone, and we expect that situation ought. to continue in the future.
>
> So, yes, if by inclusion of the Royal Proclamation you man the entrenchment of the Royal Proclamation, that is exactly our position.
>
> But the mere inclusion of the proposed wording of Section 26 to replace Section 24 would not be sufficient.

James Fulton & George Watts, p. 147

> **Mr. Fulton:** […] What we have to face up to is, number 1, the native people exist, that they did exist historically on this continent and particularly in relation, Mr. Watts, to your band. Title has never been extinguished either by federal or provincial Crown and thus we have a stonewall and it is the duty of this Committee to set aside vote getting techniques or partisan principles or whatever and to set those rights in a position where they can be settled and they can flow from it, and it is from those comments that my question first to you, Mr. Watts, flows. On the entrenchment, should this Committee move forward, which I am hopeful, very deeply hopeful that this
>
> *[Page 148]*

Committee will, to entrench the principle of aboriginal title not only in Section 24 but through a variety of techniques we have touched on. Senator Connolly touched on it, other members tonight, Senator Williams has touched on it, that the inclusion of such treaties as the treaty of 1763, the capitulation of Montreal, there is a wide variety of treaties, the inclusion of all of those, but the most important and critical fact to be included in there so that the Supreme Court and other courts and governments of this land can interpret over not only the next decades but the next centuries and generations what aboriginal rights are.

Mr. Watts, I wonder if you could comment on when these negotiated settlement is made from the principle of entrenched title what the impact will be in terms of what has historically been your rights in terms of fishing, the use of timber, the use of game as well as such things as the potlatch that you have touched on, we recognize what your claim is now and what may flow through negotiations should this Committee do what I think in principle we should do as Canadians and as honest global beings, what impact do you think there will be on the fabric? Do you feel that your culture can survive on a settlement that is negotiated, that is very different, but taking into account the changing fabric of Canadian society and Canadian economy?

Mr. Watts: The answer to your first question is yes, we agree that the principle of aboriginal rights should be entrenched. In regard to what are the benefits that are going to flow or what our future is as Indian people once we have a negotiated settlement, I guess part of the answer to that is we know what is not going to work because we have been living with it for the last 100 years. We know what does not work for our society, and what is destroying our society. l guess it really lies in the hands of our negotiators and l think we have some very able people who will be able to put forth in front of the government what we see as being the negotiated items that we need to survive as a people. What is the alternative? The alternative to having a negotiated settlement on aboriginal rights, the alternative to it is the destruction of our people. It is as simple as that. It is not whether or not we are guessing if it is going to happen, we are seeing it, we are witnessing it. We are witnessing it today, seeing it happening and all we need is a few more years to have you guys around and we are going to die as a people unless there is an about-turn.

Mr. Fulton: Are you saying, Mr. Watts, if I can get some clarification here I think it is one of the things that has created conflict in the minds of almost all members of this Committee, should the principle of aboriginal titles solely and simply be entrenched in the constitution without some additional strengthening in terms of aboriginal rights, and when I say that I couch it in terms of not being self-determination with paramountcy above the provincial or federal paramountcy in this country, but that there needs to be something related to the concept of entrenched aboriginal rights within the constitution to ensure that the title alone cannot preserve your culture but there is a requirement for some additional strengthening within the resolution.

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What I am basically asking is, is simple entrenchment of the concept of aboriginal title enough or does it require an additional concept of entrenched aboriginal rights. When I say that, what I am asking is do you feel that rights will flow simply from title or do you feel that aboriginal rights is required outside the bounds of title itself?

Mr. Watts: I think what happens is that future rights flow from the negotiations and how they are entrenched in Canadian law or in the acts of Parliament depend on negotiations. You have to look

> at what our history is. We have the right to food fish. That is part of the Fisheries Act but in the future that might not necessarily be a part of the Fisheries Act. How our aboriginal right to food fish is defined would depend on our people, how we negotiate it, where we want to be, how we want to have a relationship with the rest of Canada in regard to what we see as being part of our resources. I do not know how far you can go in defining it in the constitution. You know, the constitution, the amendment or whatever it is, could end up being a thousand page document just talking about Indian rights; and I am not too sure whether we would want to be there.
>
> At the same time I agree that there are certain basic principles that have to be there, otherwise what will happen is that we get into the very situation which I talked about before which is we will end up squabbling with the provinces and the feds for the next 100 years about what our rights are, and no one will ever agree upon them and they will never be resolved.

Jack Woodward, p. 151

> **Mr. Woodward:** Well, it is not entrenchment. We have a similar problem with the wording of Section 22, although 1 have not addressed my mind to that Section as much as to Section 24.
>
> The idea of saying in this Charter that this Charter does not eliminate this or that right, and, of course it does not; but the Charter entrenches certain rights, which once entrenched, then they go through the whole complicated, difficult amending process, as it should be; because if it is a minority right you want it to be difficult to get rid of.
>
> The point is that inclusion in Section 24 of some reference to the Royal Proclamation of 1763 or to aboriginal title, in that fashion, saying, "Nothing in this Charter of Rights shall be taken to eliminate the Royal Proclamation or its effect," is not enough because it does not have the effect of entrenching and we are still talking about minority rights.
>
> The Royal Proclamation and the doctrine of aboriginal title are essentially minority rights and ought to be treated the way the other provisions of the Charter are, in a positive and not in a negative way.

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January 5, 1981: Paul Williams (Union of Ontario Indians, as the agent for Anishinabek) speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (click HERE to view the Special Joint Committee, Issue 31, then scroll to p. 30)

> **Mr. Paul Williams (Union of Ontario Indians, as the agent for Anishinabek):** […] **We also want to** explain that we do not have what you call Indian rights. The rights of each of these nations, in relation to the Crown, are different; because the treaties of each of these nations with the Crowns contained different terms.
>
> Thus the Ojibways do not have Indian rights; they have Objibway rights. The Micmacs do not have Indian rights; they have Micmac rights.

> Canada's Indian Act has been an attempt to take a diversity of nations, with a diversity of relationships with the Crown, and to generalize, and then in the process of this generalization to lose sight of certain rights, certain specific relationships, because each of these is different.
>
> I should also like to point out that we are not discussing the kind of rights that are described in the proposed Charter of Rights and the resolution.
>
> Canada, with its European heritage, understands things in terms of relations between the individual and his government. The rights we are talking about are not individual rights. They are the rights of groups. There is nothing in the proposed Charter of Rights that deals in any way with collective rights.
>
> What we are discussing here are collective rights and not individual rights.

Delia Opekokew (Legal Counsel, Federation of Saskatchewan Indians) & Ron Irwin, p. 86

> **Ms. Opekokew:** Aboriginal rights relates to the right for the Indian people to have their ownership to the lands and resources recognized and additionally for the right of those
>
> *[Page 87]*
>
> people to control those resources and lands, so it is a two aspect answer. Presently in the court system in Canada aboriginal title only recognizes the right to occupancy without recognizing the right to self-determination and the right to control, so it is a two aspect answer, and for that reason also because of how much control you want, et cetera, an indefinite type of statement, it is very difficult to answer the second aspect of it, except to say that is where the right to self-determination comes in.
>
> **Mr. Irwin:** May I interrupt here.
>
> **Ms. Opekokew:** May I finish this.
>
> **Mr. Irwin:** Just on this point, what you are saying is your definition of aboriginal is not the courts. at least in a minority position, have decided what is the definition of aboriginal, and you want these amplified to fit what you feel are your traditional aboriginal rights.
>
> **Ms. Opekokew:** Yes, to be amplified to the definition now used in international law of what aboriginal rights mean because in order to have control over lands you also have to have control over the right to govern those lands and that is where aboriginal rights come in.

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January 6, 1981: Graydon Nicholas (Chairman of the Board, Union of New Brunswick Indians) speaking in the Special Joint Committee of the Senate and

House of Commons on the Constitution of Canada (click HERE to view the Special Joint Committee, Issue 32, then scroll to p. 77)

Graydon Nicholas (Chairman of the Board, Union of New Brunswick Indians): […] Aboriginal rights include our right to exist as Indians, to govern ourselves and to determine our livelihood, political, cultural, economic, social and legal units.

We have these rights and much more, because we have never been conquered, never released or extinguished our aboriginal rights in New Brunswick.

In fact, our very essence of belief is that we cannot sign our rights away.

How can we, as descendants, sign away aboriginal rights that have existed since time immemorial for our past, present and future generations of Indians? We would not—and there is evidence to support the fact that up to now our past and

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present Indian leaders would not-sign our Indianness away and would not break away from our traditional aboriginal rights.

Aboriginal rights are much more than a slogan, more than a people, because they include our spiritual, cultural, physical and emotional needs.

We hope that you, as honourable representatives of Canada, will act with due laith and freedom of thought to accept the principle that aboriginal rights do exist today in New Brunswick.

[…]

These treaties are dated as follows: 1713; 1725; 1752; 1778 and 1779.

There are also numerous occasions when some of these treaties were renewed, ratified and sanctioned. We, as the descendants of the representatives who signed, continue to claim and maintain our treaties. Ours was signed before the Province of New Brunswick was established in 1784. Some were over 100 years old at the time of Confederation.

We have not released our treaty rights; yet we continue to face prosecution in courts at the authority of the Attorney General who shows no respect for our solemn treaties.

We have lived up to our end of the bargain, and yet we face harassment and persecution.

Our people cannot afford to pay their fines. Why has Parliament sat silently and allowed our treaty rights to be abrogated by federal legislation, such as the Fisheries Act, the Migratory Birds Convention Act, the National Parks Act and the regulations enacted at the whim of conservation officers who advised the appropriate Minister?

> We have been denied the equitable and just exercise of our treaty rights without compensation, without consultation and without our consent.
>
> [Page 79]
>
> There were two parties represented in those treaties. How come we are now denied our right to participate and protect our treaties?
>
> There is a solution to this dilemma. They are presented in the part touching on entrenchment. We will also never sign away our treaty rights. It is beyond our authority. Besides, treaties are not like contracts and agreements. They are solemn commitments and obligations on both sides, a sacred covenant.
>
> In the area of our proclamations, in colonial times in our area, many governors who were representing Nova Scotia were empowered to set up relationships with the Indian tribes. This was crucial.
>
> In fact the treaties mentioned above were signed and entered in to when there was a pending or the conclusion of a military conflict between the French and the English.
>
> Two particular proclamations affect our treaties in New Brunswick—the Proclamation of 1761 and the Royal Proclamation of 1763. Both recognize the unique and special relationship with the Indian nations at that time.
>
> Touching on the aspect of entrenchment, although the word "entrenchment" sounds inflexible, concrete and undesirable to some, it is also a process by which certain rights and principles are guaranteed to be beyond the reach of law making institutions.
>
> Our treaty and aboriginal rights have to be protected, have to be safeguarded, preserved. Our unique relationship with the Crown has to be manifested by entrenchment into this country's most sacred, solemn and honourable constitution.

Chief Stanley Johnson (President, Union of Nova Scotia Indians), p. 85

> **Chief Stanley Johnson (President, Union of Nova Scotia Indians):** […] Section 24 of the act attempts to give the appearance of preserving our existing rights, undeclared. Why should this be such a benefit to us? We have had our rights for over two centuries, yet the federal government has refused to implement them. We are not a corporation existing solely in law, we are human beings attempting to forge a better society.
>
> The preservation of the existing rights, undeclared or declared, merely grants us the right to live in poverty at the discretion of federal policy. If our existing rights are so extensive, why are not they included in a schedule or distinguished between treaty rights and other rights?

Stanley Johnson, p. 87

> **Chief Stanley Johnson (President, Union of Nova Scotia Indians):** […] We refused to be treated like colonies of Canada or to be forcefully assimilated in a tyrannical Canada. Our political and legal relationship is with the Imperial Crown, not Canada; hence it is our decision as to our future, to be made in the following months, on what is in our best interest for tribal society. We have two questions which we would like the Committee to ponder and answer for us. First, will the Canada Act lreeze the notions of a superior European race and culture into constitutional law or is it an attempt to break the history of colonialism and racism in Canada? Second, does Canada still believe that tribal society is an evolutionary cul-de-sac in political development which is preordained to vanish by the will of racial genes and scientific racism or that it is entitled to the same protections as the French people in Canada? These are dangling questions in the debate over the Canada Act. The answer to these questions would help our society address the Canada Act in a more rational manner. We shall not fold our arms in this battle for human rights. We have the support of the world behind our quest for self-determination and dignity. We are not alone, anymore.

Dr. Sageth Henderson (Executive Advisor, Union of Nova Scotia Indians), p. 92

> **Mr. Henderson:** Well, basically treaty federalism preceded provincial federalism. Treaty federalism is where your original treaty between the Indian nations, the Micmac nation and the Crown, which allocated jurisdiction both to the Crown and reserve lands and jurisdiction in the tribal polity. That has remained untouched over all these years except for the lack of administration of the Crown's responsibility, first by provincial agents of the Crown and now the federal agents.
>
> Provincial federalism is basically the same idea in a more elaborate form. It is the essence of the notion that the Quebec referendum, when it went to Great Britain and was introduced into the Imperial Parliament, it was introduced, the British North America Act, as a treaty of union between the peoples of those provinces to create a bigger and better form of responsible government. They are virtually identical in theory and origin. The only difference is that the Indian tribes were acknowledged as members of the law of nations whereas the British Parliament would not go so far as to acknowledge the provinces having any standing in the international community until quite recently, 1931.
>
> That is the major difference.

Coline Campbell, Graydon Nicholas, & Stanley Johnson, p. 93

> **Miss Campbell:** […] I would also like to point out that most of the groups that have appeared before us have asked this Committee to go further than the proposal and are certainly supportive of recognition o[the Indian people in Canada or the aboriginal people in Canada, in fact two of the three groups that we saw today specifically made note of Section 24 and I think we can go back over the past few weeks hearings and find that most of the groups that have come before us have supported aboriginal rights.
>
> On that I would like to ask either group if this committee were to recognize and confirm aboriginal rights in the constitution, do you think that this requires a detailed definition of constitutional rights, or would you leave the details to later negotiations and decision by the courts?

Mr. Nicholas: From the point of view of New Brunswick, as we submitted in our brief, we cannot give you today a precise and concise and a nice definition of aboriginal rights, it is just impossible. I think there are already previous court decisions that have attempted to examine the concept of aboriginal rights, I am thinking now specifically of the Calder case which involved the Indians of British Columbia, where Mr. Justice

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Hall, in his judgment, extensively discussed the notion of aboriginal rights. Then quite recently another decision involving the Northwest Territories, the Baker Lake Decision, where again a judge of the Federal Court of Canada dealt very extensively with the notion of aboriginal rights and something like 89 pages were written, and I do not think we could summarize that in two or three lines.

Miss Campbell: I would just bring to your attention that this would be entrenched, if it was entrenched in the constitution the courts would have to look to this new document and would that not make a difference if there was an entrenchment of aboriginal treaty rights in that document, would this not give a new direction to the courts? It is still up to the courts to interpret, but...

Mr. Nicholas: I would say before the courts were given that particular notion, arguments would have to be submitted as to what constitutes aboriginal rights, where they start or emanate from.

This is one of the dangers of entrenching aboriginal rights. If, in fact, it is entrenched and such a concept is interpreted by a future court not to our satisfaction or the satisfaction of the government, then disputes may arise.

That is why there must be clear discussions and dialogue on this notion of what the aboriginal concept is. But if the Committee were to accept that aboriginal rights exist, then I think you have gone a long way.

Miss Campbell: Yes, but the Committee is looking at a proposal. We have heard other groups talk about aboriginal rights. I take it you would not be prepared to go that far in putting it down, in entrenching it.

Mr. Nicholas: No. We want entrenchment of the principles of aboriginal and treaty rights, but you cannot give a five-line definition of it.

Miss Campbell: I do not propose to go into the definition of it. But would you like more than just that in this proposal?

Mr. Nicholas: If the constitution of this country is flexible enough that it would warrant future discussions between representatives, including representatives of the people, then more opportunity should be made available to fully discuss and develop this notion.

Miss Campbell: Would the Union of Nova Scotia Indians like to comment on that?

Chief Johnson: When Mr. Warren Allmand was the Minister of Indian Affairs in 1977, we presented our position paper on aboriginal rights to him, and the only reply we got from the federal

government to date was that aboriginal rights in Atlantic Canada do not exist and that they were superseded by law.

We can not tolerate this type of reply. We have consistently questioned the federal government and we have asked them to provide us with any detailed knowledge they have on what laws superseded aboriginal rights and to date they have not been able to respond.

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We do not want Canada Act to be put in place until our arguments are fully heard and even presented to the court.

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January 12, 1981: Jean Chretien speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (click HERE to view the Special Joint Committee, Issue 36, then scroll to p. 18)

The Honourable Jean Chrétien (Minister of Justice): […] There have been many groups representing native people who have appeared before you. I am pleased that they have had a full opportunity to be heard. As a government, we have been impressed by the testimony which has been presented to you. Of course, it is not possible to agree to everything that has been proposed.

Most of the matters raised before the Committee remain subject to negotiation between governments and the native peoples. The Prime Minister has made a commitment that these negotiations will take place immediately after patriation.

Yet it is possible to state in greater detail the kinds of native rights which are not to be adversely affected by the Charter and it is possible to set these rights apart from other undeclared rights and freedoms. Therefore, I am proposing somewhat along the lines suggested by Premier Blakeney that Section 24 be reworded to read as follows:

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.

In addition, as requested by the Inuit Council on National Issues the Order in Council of June 23, 1870 admitting Rupert's Land and the North West Territory to the Union will be added to Schedule I of the constitution act.

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January 30, 1981: Jean Chretien, James McGrath, Peter Ittinuar, Eymard Corbin, Jake Epp, Warren Allmand, Senator Tremblay, & Serge Joyal (Joint Chairman) speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (click HERE to view the Special Joint Committee, Issue 49, then scroll to p. 83)

Mr. Chrétien: Mr. Chairman, we have come to the concIusion on this issue of aboriginal rights that despite the difficulties surrounding this matter in terms of legal definition—difficulties that were being created for the government, after a series of negotiations and discussions involving a lot of people, we have come to accept a text which would entrench into the Canadian constitution the recognition and confirmation of the aboriginal rights of the original citizens of Canada.

Due to the dilligence of the deIiberations—and I did not expect it to come today, but when we have a momentum we should try to maintain it; that is why I am pleased on behalf of

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the government to say that the aboriginal rights of the aboriginal people of Canada will be entrenched in the constitution.

There are two or three texts which will affect two or three clauses in the charter and in the constitution.

Before I proceed any further, I would like to thank the National Indian Brotherhood, the Inuit Tapirisat, the Métis and Nonstatus Federation of Canada for their work.

I would also like to thank my colleagues who have worked very dilligently in the matter. I am also glad to see here one of my predecessors, Mr. Warren Allmand who has devoted a lot of time to that issue: and, of course, my colleague, John Munro who. inside the government, has been very useful under very difficult circumstances.

This afternoon, we have the privilege of having with us . . .

Mr. McGrath: I am sure the Minister would not want to leave out the former distinguished minister of Indian and Northern Affairs!

Mr. Chrétien: I am going in that direction. I am coming to that.

At this table, we are fortunate to have, of course, Mr. Epp who has served as a Minister of Indian and Northern Affairs—an extremely difficult post; he has served, not unfortunately for him, but fortunately for us, very distinctively. I would like to thank him for what he has done on behalf of the people who live there and receive services from this department.

I am sure all honourable members of this Committee will permit me to ask Peter Ittinuar, who is from the Inuit People of Canada to read, on behalf of the government, the first resolution.

I would like to ask the member for Nunatsiaq-my Inuit has not improved over the years—to read, as one of the Inuit persons serving in Parliament, to read the first motion on behalf of the government.

The Joint Chairman (Mr. Joyal): Mr. Ittinuar.

Mr. Ittinuar: Thank you, Mr. Chairman.

I would like to thank Mr. Chrétien for allowing me to do this.

I am indeed honoured to move on behalf of the government

that the heading preceding Clause 24 and Clause 24 of the proposed constitution act, 1980 be amended by (a) striking out the heading immediately preceding line I and lines 1 to 6 on page 8 and substituting the following:

General

24. The guarantee in this charter of certain rights and freedoms shall not be construed so as to abrogate or derrogate 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

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(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

25. The guarantee of 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.

And (b) renumbering the subsequent clauses accordingly.

I would like to ask my friend, the Minister, to read in French, because I cannot speak French, unfortunately.

Mr. Chrétien: I would like to invite Mr. Warren Allmand to read it in French.

The Joint Chairman (Mr. Joyal): I understand I have the consent of the honourable members of this Committee to invite the honourable Warren Allmand.

[Translation]

The Joint Chairman (Mr. Joyal): Mr. Corbin.

Mr. Corbin: Mr. Chairman, I certainly have no objection to Mr. Allmand performing this duty, with unanimous consent, but you should mention that he is not an official member of the committee that could cause procedural problems. But if we have an unanimous agreement, I agree as well.

[Text]

The Joint Chairman (Mr. Joyal): The Honourable Jake Epp.

Mr. Epp: Mr. Chairman, Mr. Corbin does not have to worry about our raising any procedural argument.

The Joint Chairman (Mr. Joyal): That is why I sought the unanimous consent of honourable members.

The honourable Warren Allmand.

[Translation]

M. Allmand: Thank you, Mr. Chairman.

This is the same amendment moved by Mr. Ittinuar. It is moved:

[Text]

Que l'article 24 du projet de Loi constitutionnelle de 1980 et la rubrique qui le précède soient modifiés par

a) substitution à la rubrique et aux lignes 1 à 5, page 8, de ce qui suit:

«Dispositions generales

24. Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés—ancestraux, issus de traités ou autres—des peuples autochtones du Canada, notamment

a) des droits ou libertés reconnus par la Proclamation royale d'octobre 1763;
b) des droits ou libertés acquis par règlement de revendications territoriales.

25. Le fait que la présente charte garantit certains droits et libertés ne constitue pas une négation des autres droits ou libertés qui existent au Canada».

b) les changements de numéros d'article qui en découlent.

[Translation]

The Joint Chairman (Mr. Joyal): Thank you, Mr. Allmand.

The honourable Jake Epp.

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[Text]

The Joint Chairman (Mr. Joyal): Merci, Mr. Allmand.

The Honourable Jake Epp.

Mr. Epp: Mr. Chairman, as a matter of procedure, it would be my recommendation that we deal with Clause 24 and 25, though read together as separate entities.

The Joint Chairman (Mr. Joyal): Certainly the Chair is ready to entertain such a suggestion.

[Translation]

The Honourable Senator Tremblay.

Senator Tremblay: This is just a minor technical question.

It seems to me that in the French text we should say «il est proposé que l'article 24 et l'article 25».

It seems to me that something is missing. Is it not?

The Joint Chairman (Mr. Joyal): Senator Tremblay, that is just a procedural question.

There are other resolutions or amendments coming up on Clause 25 of our proposed resolution. So at this stage we do not need to worry about Clause 25 of the original proposed resolution. We will deal with it eventually, and we will renumber all the clauses accordingly.

Senator Tremblay: in the English text, then, the words "Clause 24" should be removed.

The Joint chairman (Mr. Joyal): No, we absolutely have to keep . . .

Senator Tremblay: But it is repeated twice.

The Joint Chairman (Mr. Joyal): No, that is because in the first instance it refers to the title of Clause 24 and in the second instance to Clause 24 itself.

Senator Tremblay: I see!

The Joint Chairman (Mr. Joyal): You see, I will explain to you in a simple manner what we intend to change: we propose that the heading preceding Clause 24, in French «La rubrique qui le précède» . . .

Senator Tremblay: Undeclared Rights and Freedoms.

The Joint Chairman (Mr. Joyal): Exactly, and Clause 24. All right? You see, it is logical because there is a distinction made between the title and the clause.

Senator Tremblay: Logic is always hard to perceive.

The Joint Chairman (Mr. Joyal): l was going to quote to you from Boileau: "Whate'er is well conceived is clearly said, and the words to say it flow with ease".
Senator Tremblay: it is just that we have to find the thought through the words.

The Joint Chairman (Mr. Joyal): Fine, thank you.

[Text]

Perhaps our friends in the audience might have been wondering what we were discussing with Senator Tremblay; but we have settled our own procedural problems and discussions at this point.

[Translation]

So I would now like to ask either the Minister of Justice or Mr. Ittinuar to move the amendment before I ask other speakers to take the floor.

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Mr. Chrétien: Well, there is of course another amendment to come, number 31, which is more or less the official proclamation. I would once again like to ask Mr. Ittinuar to read the English version and Mr. Allmand to read the French.

The Joint Chairman (Mr. Joyal): Fine.

[Text]

Mr. Ittinuar.

Mr. Ittinuar: Thank you, Mr. Chairman.

Again, I am extremely honoured to move that the proposed constitution act, 1980, be amended by . . .

The Joint Chairman (Mr. Joyal): I am sorry, but the copy of that amendment has not yet been circulated, to my knowledge. I would like honourable members to wait until we have additional copies for all members.

Mr. Epp: Mr. Chairman, could we not proceed this way in that Mr. Ittinuar could proceed with this amendment—that is, to proceed with Clause 24?

Mr. Chrétien: Might we not proceed with Clause 24 and then come back to that?

The Joint Chairman (Mr. Joyal): That is why I suggested it would be much easier to go step by step, rather than having a bunch of amendments which might bring confusion into our debate.
l would like to invite honourable members who wish to address the Chair on Clause 24 as amended, to show their interest.

The honourable Jake Epp.

Mr. Epp: Mr. Chairman, prior to my speaking, may I ask whether the Minister has any comments to make first by way of explanation? if that is the ease, I think he should have the first opportunity.

Mr. Chrétien: No, I have no statement to make at this time. You may go ahead.

Mr. Epp: Mr. Chairman. in speaking to the amendment, 1 would like, on behalf of our party, to endorse the position which has been put forward in this amendment.

Last Tuesday, when we presented to this Committee and to the Canadian people our position on aboriginal rights. we said the following—and i think it is important that it be quoted:

We support the government's amendment to Clause 25 concerning native rights. We recognize the need for further discussions and refinements of aboriginal and treaty rights.

The the next clause will be really addressing the next clause. We welcome the Prime Minister's commitment to include

Canada's native people in the constitution as a priority in the next round of constitutional discussion.

After making that statement on behalf of my party, there were discussions and for those who think this is an easy matter and that we had tried to cop out, that was not the case.

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In fact, the reason we put those words in was that we knew that the only way in which progress could be made on this topic would be if there was all-party agreement—all-party agreement with the aboriginal peoples; and that there was no point in coming forward with an amendment which might enjoy of one group and, in fact, by its very enjoyment of support in fact derogate or abrogate rights held by another group.

So, there were some very good reasons why we chose to take that course of action, and I think it is important that the record should show that that was the reason it was done.

We said also, Mr. Chairman at that time that we believed that while the recognition was finally given—the recognition of aboriginal rights and treaty rights and the Proclamation of 1763, those three matters—that further refinements were needed and they would only be arrived at through further discussions and, I believe, Mr. Chairman, Parliament is a strange and wondrous place at times, those further discussions have led us to this juncture.

Sometimes those discussions take a long time, and sometimes they move very quickly. Obviously, this time they moved very quickly.

So, I want to say to you, Mr. Chairman, on behalf of our party, that these words are in recognition of our position and also a position that we not only can defend, but in fact we believe can be given to other Canadian people.

I think also, Mr. Chairman, there is no point in forgetting what has happened. If I can speak personally for one minute, for those of us who have filled the position of the Ministry of Indian Affairs and Northern Development-and I wish to thank the Minister of Justice for his kind words—those of us who have had that responsibility or presently have that responsibility, while it is not recognized by a large portion of the population of Canada, I believe it is nevertheless one of the most difficult portfolios in the Cabinet, in the government of Canada.

I say it for this reason: I do not see anywhere where a Cabinet post demands greater sensitivity, not only to the people you are serving. but to the relationship you have to them and, as importantly, the impression other Canadians have of the people you are to serve.

I say it quite openly, Mr. Chairman, it is a difficult role very often to convey to other Canadians that if justice is to be done in the country it must also be done first to Canada's aboriginal people.

I think it is important that Canadians recognize that, if justice is to prevail, then justice must prevail on all grounds.

Having said that, Mr. Chairman, I feel in terms of the agreement among the aboriginal people themselves tonight, between the National Indian Brotherhood, the Inuit Tapirisat of Canada, and the Native Council of Canada, that that achievement in itself is one to be recognized; because that is an

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achievement where peoples with different backgrounds and similar backgrounds and different visions of their past and similar visions of their past, have had difficulty in agreeing.

It must also be said that that also has been a difficulty, not only within the department, but also between the three groups I have mentioned.

Mr. Chairman, I look forward to the day when the aboriginal peoples of Canada, in an economic sense and in every other term, will be able to play a full role and to take up their full partnership in the Canadian family.

If I can be administrative, just for one minute, I believe the Department of Indian Affairs and Northern Development will also have to change its role more as a facilitator, rather than seeing its role in a paternalistic sense.

The native people of Canada are mature and if given the opportunities, I believe they make the contributions to Canada which I personally am convinced they are quite capable of making.

Having said that, Mr. Chairman, I want to make one other point. l mentioned this to the three leaders during the negotiations this afternoon.

Mr. Chrétien: May l invite the three leaders to come and sit right here, to join me.

Now, they are my advisers!

Mr. Epp: l was about to say, Mr. Minister, if you were their adviser, I could see them leaving; but I am sure they will not.

Mr. Chairman, I want also to say to the leadership of the aboriginal people that the agreement they have struck will go a long way in correcting many of the wrongs that some of us have seen. When one looks at Section 9124, one sees the responsibility that the federal government had to Indians and to Indian lands. There are still cases today, though some Canadians might not be aware of it or be willing to hear of it, cases today where treaties that were signed and lands that were given have still not been fulfilled. Nowhere is that more evident than in parts of the country from which I come.

So, l want to say that this Clause will not end that work or fullfil the deficiencies which still exist. I only have one other point, Mr. Chairman, and that is—and I had just started mentioning this prior to the leaders coming to sit behind the Minister; that is, that I believe that should be a separate section, rather than it simply being in the Charter.

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Serge Joyal, Jean Chretien, Peter Ittinuar, Warren Allmand, Senator Tremblay, Roger Tassé (Deputy Minister of Justice), & James Manly, p. 94

The Joint Chairman (Mr. Joyal): Certainly.

[Text]

I would like then to call the vote on the proposed amendment as introduced by Mr. Ittinuar on the clause of the motion that reads:

Aboriginal rights and freedoms not affected by Charter

[Page 95]

General

24. 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 original peoples of Canada by way of land claims settlement.

Amendment agreed to: Yes. 24; Nays, 0.

Clause 24 as amended agreed to.

The Joint Chairman (Mr. Joyal): I would like to ask the honourable Minister of Justice for the next amendment.

Mr. Chrétien: I would like to move on Clause 31, Clause 31 is the clause of entrenchidng the confirmation of the aboriginal rights in the constitution. We were on a technical clause before and now we are going on the real declaration, more or less. So I will again ask Mr. Ittinuar to propose it and Warren Allmand to second it in French

The Joint Chairman (Mr. Joyal): Mr. Ittinuar.

Mr. Ittinuar: Thank you, Mr. Chairman. I have the great honour to move that the proposed constitution act, 1980 be amended by (a) adding immediately after line 2 on page 9 the following headings and section:

Recognition of aboriginal and treaty rights

PART II

Rights of the Aboriginal Peoples of Canada

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

Definition “aboriginal peoples of Canada”

(2) In this Act. “aboriginal peoples of Canada” include the Indian, Inuit and Métis peoples of Canada.

and (b) renumbering all and clauses accordingly.

I would like to ask my friend, Mr. Allmand in French.

subsequent parts

The Joint Chairman (Mr. Joyal): Honourable Warren Allmand.

M. Allmand: Il est proposé

Que la Loi constitutionnelle de 1980 soit modifiée par

a) adjonction, suivant la ligne 2, page 9, des rubriques et de l'article qui suivent:
«Partie II—Droits des peuples autochtones du Canada

[Page 96]

31. (1) La présente charte confirme les droits, ancestraux ou issus des traités, des peuples autochtones du Canada».

(2) Dans la présente loi, «peuples autochtones du Canada» s'entend notamment des Indiens, des Inuit et des Métis du Canada».

b) les changements do numéros de partie et d'articles qui en découlent.

You will note, Mr. Chairman. that there was an amendment to the copy as distributed which said in Clause 31(1) "La présente charte"; the good French should read "La présente loi". l was instructed by the law officers of the Crown and I read it as "La présente loi confirme".

[Translation]

The Joint Chairman (Mr. Joyal): Thank you, Mr. Allmand.

The Honourable Senator Tremblay.

Senator Tremblay: Mr. Chairman there is a difference between the French and English version.

In the English version there is nothing which corresponds to the word "notamment" when the definition of aboriginal peoples of Canada is given. I think this changes the meaning.

When you use a word like "notamment" amongst others you expect a longer enumeration than the one we are given. I would like to know what the specific intent was of the drafters.

Mr. Tassé: Mr. Chairman, with all respect to Senator Tremblay, I think that the French version is consistent with the English one. ln English the word "includes" is used and the following enumeration is not exclusive.

Senator Tremblay: The meaning is the same.

Mr. Chrétien: The meaning is exactly the same.

Mr. Tassé: ln French by using the words "s'entend notamment" it is meant . . .

Senator Tremblay: So it must be my ignorance of English language that made me ask the question.

The Joint Chairman (Mr. Joyal): With all due respect, although I am not a linguist, it seems to me that the word "includes" is not limitative when there follows afterwards an enumeration of persons or things referred to.

Senator Tremblay: That is in the English version.

The Joint Chairman (Mr. Joyal): Thank you Senator Tremblay.

[Text]

Do I see other speakers before I call the vote on the proposed amendment? Mr. Manly. with the consent of the honourable members of the Committee.

Mr. Manly: Thank you very much.

I believe that this amendment calls for a small celebration when it is finally included in our charter; and when the charter

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as part of a new Canadian constitution is brought home, then I believe it will call for a large celebration.

I would like to join others in commending the Minister for bringing this amendment forward, I believe that it marks a very significant day, not only for the aboriginal peoples of Canada, but for all peoples of Canada because it means that we are not only saying to Great Britain that we want to end any vestiges of colonial status that remain, but also that we are not interested in looking on the aboriginal peoples simply as subjects to be colonized, that we want them to take their full place and their full stature as members of Canadian society.

The one thing, Mr. Minister, I hope that the government will not give with one hand and take away with the other, I want to assure you that members of our party will be looking very carefully at the amending clause that is brought forward for this section. I think it is very important that these rights not only be included in the constitution but that they be properly protected.

I would like to commend my friend, Mr. Ittinuar, for moving this, and Mr. Broadbent, the leader of my party, who has done a great deal of work on behalf of our party, which has had for many years now on record our desire to have these rights recognized.

So, Mr. Minister, I simply hope that now we have taken this small step we will go on and take the final step.

One question: I presume that the phrase that this "includes Indian, Métis and Inuit peoples", that that leaves open the way for nonstatus Indians also to be included in having their rights recognized?

Mr. Chrétien: That is exactly why we have not fixed—we had a kind of open definition rather than a closed definition.

Mr. Manly: Would the word "Indian" include nonstatus Indians?

Mr. Chrétien: Yes, it is all aboriginal peoples. We have decided that we were not to use this generic term.

For me, when I started on that problem, I could not even use the word "aboriginal titles". It was something that was in legal jargon, if I can use that, was prohibited and I had so many problems with it because I could talk about the Royal Proclamation of 1763 but I could not refer to aboriginal rights and even if we were speaking about the same thing. and I had a lot of problems with it. I sweated in many, many meetings because this word was not part of the Canadian legal system.

Now it is there, we are confirmed and I am waiting and I will make a comment after it is voted on.

Mr. Manly: Mr. Chairman. could I just close by reading some words that were presented before us, first of all from Mr. George Watts of the Tribal Council on Vancouver Island. He said:

How we exist as a people and how we relate to each other as people lies in your hands.

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And Mr. James Gosnell of the Nishka Tribal Council said:

Mr. Chairman, it is quite clear at this time that our destiny is in your hands, the hands of the Joint Committee. Our aboriginal title to the Nishka land must be entrenched in the constitution before patriation. That is our position at these hearings. Without the title, there can be no negotiation; without negotiation, there cannot be a just settlement of the land question; without a just settlement, the Nishka people will have absolutely no economic base upon which to survive.

I believe that with this amendment we are going a long way to meeting the questions that these people came before us with and I would like to thank members of all parties who supported it.

Lorne Nystrom, p. 99

Mr. Nystrom: I also want to associate myself with the tremendous accomplishment that has been made here at the Committee this afternoon of affirming the treaty and aboriginal rights of our aboriginal people, and I feel very strongly about this, as other people, and Senator Austin referred to when he was in law school and the tremendous discrimination or law against the aboriginal peoples.

I grew up, Mr. Chairman, on a small Saskatchewan farm that was adjacent to one Indian reserve and a mile from a second Indian reserve, and I always went to a school where we had Indian people and Métis people, and so I feel that my whole background from my very early childhood has been one where I have always been associated with the aboriginal people of this country.

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I want to say that I think what we are seeing today is a tremendous accomplishment, that the rights of these people must be enshrined in our constitution, that we owe a great debt to the founding nations of the country, the founding peoples of this country, the aboriginal peoples and, as has already been said, it was not many years ago when they did not even have the right to vote in one of the most advanced and democratic societies in the world.

> So I want to say that I am very, very pleased to associate myself and our party, to see all three parties come together and do something that is exceedingly worthwhile. I think we have just concluded a major chapter in the history of our country and what we are doing today is opening a new chapter, a new chapter that still has a lot of content to be put into it in terms of facilities and services and jobs and opportunities for the aboriginal people to make them really true and equal with the other peoples of this country.
>
> Mr. Chairman, this is a major first step in the new chapter of what I hope is a very exciting book in the new Canada of the 20th and 21st Centuries.

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February 17, 1981, Debate in the House of Commons, pp. 7375, 7378, 7394 (click HERE)

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February 18, 1981, Debate in the House of Commons, pp. 7447-7449 (click HERE)

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February 19, 1981, Debate in the House of Commons, pp. 7495-7497 (click HERE)

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February 20, 1981, Debate in the House of Commons, pp. 7519-7521 (click HERE)

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March 3, 1981, Debate in the Senate, pp. 1921-1922 (click HERE)

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March 4, 1981, Debate in the Senate, pp. 1936-1937 (click HERE)

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March 11, 1981, Debate in the House of Commons, pp. 8136-8137 (click HERE)

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March 12, 1981, Debate in the House of Commons, pp. 8177-8178, 8205-8206 (click HERE)

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March 16, 1981, Debate in the House of Commons, pp. 8273-8274, 8304 (click HERE)

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March 19, 1981, Debate in the House of Commons, p. 8426 (click HERE)

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March 25, 1981, Debate in the House of Commons, p. 2156-2157 (click HERE)

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April 21, 1981, Debate in the House of Commons, p. 9363 (click HERE)

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April 23, 1981, Debate in the House of Commons, pp. 9458-9459, 9463 (click HERE)

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October 19, 1981, Debate in the House of Commons, pp. 11952-11953 (click HERE)

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October 21, 1981, Debate in the House of Commons, p. 12036 (click HERE)

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November 2, 1981, Federal-Provincial Conference of First Ministers on the Constitution—A New Brunswick Proposal to Obtain Wider Support for the Constitutional Resolution, p. 7 (click HERE)

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November 20, 1981, Debate in the House of Commons, p. 13045 (click HERE)

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November 24, 1981, Debate in the House of Commons, pp. 13201-13202, 13204-13206, 13219-13223 (click HERE)

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November 25, 1981, Debate in the House of Commons, pp. 13276-13278, 13280-13281, 13290 (click HERE)

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December 7, 1981, Debate in the House of Commons, pp. 3317-3318 (click HERE)

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February 17, 1982, Debate in the House of Commons (UK)—Second Reading of Canada Bill (click HERE)

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February 23, 1982, Debate in the House of Commons (UK)—Aboriginal Rights Commission (click HERE)

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March 3, 1982, Debate in the House of Commons (UK)—Committee (click HERE)

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March 8, 1982, Debate in the House of Commons (UK)—Third Reading (click HERE)

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March 18, 1982, Debate in the House of Lords (UK)—Second Reading (click HERE)

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March 23, 1982, Debate in the House of Lords (UK)—Committee (click HERE)

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March 25, 1982, Debate in the House of Lords (UK)—Third Reading (click HERE)

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PART 4:

Constitution Amendment Proclamation, 1983

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Coming Soon.