UNDERSTANDING AN AMBIGUOUS CLAUSE

The PrimaryDocuments.ca Drafting History for Section 35 of the *Constitution Act*, 1982

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Part III: October-December, 1981

As we saw in Part II, the original s. 35 clause had been drafted during the unilateral stage of the process, without the input of the provinces. Federal officials had drafted the clause after consultations with the Indigenous groups in the Special Joint Committee and after private negotiations between Justice officials with the NDP. Following the aftermath of the SCC decision, which required provincial participation, conventionally, we see federal discussions emerge as to how to bring about a consensus. In an October 13th memo from Michael Kirby to Prime Minister Trudeau, there is a proposal to delay numerous portions of the constitutional resolution, including notably the Charter. In this list of delayed provisions, we see Clause 34 (Aboriginal Rights).

As the November conference approached, this delay proposal was continually floated as a means to garner support from the provinces. On October 30th, the following proposal was found in the Briefing Book for the FMC, "We could agree to treat this subdivision, section 34, like the equality rights clause (three-year delay with negotiations in the meantime). It should be included with any portion of the package which is made subject to opting-in/out or a referendum." Eddie Goldenberg's proposal to Michael Kirby on October 31, how to make a deal differed, suggesting no changes to Native Rights.

Echoing the federal perspective, during the November Conference, in an attempt to reach a consensus, New Brunswick put forward its delay proposal. Like certain elements of the Charter, Section 34 would only come into force after a three-year delay. There would also be a requirement for further discussion on this topic at a Constitutional Conference, which was part of the original April Resolution. As per that clause, Aboriginal rights were to be defined and identified at the conference.

Three other provincial drafts/proposals circulated at this conference including a SK draft, which did propose the entrenchment of Aboriginal rights, with the caveat that further discussion was necessary, arguing that Aboriginal groups were not satisfied with the current arrangement. There was also a BC draft, in which the Aboriginal rights clause was removed entirely. NFLD merely stated, "the provisions of the act now before parliament relating to equalization and regional disparities, the rights of the aboriginal peoples, non renewable natural resources, forestry resources and electrical energy would be included."

Thus, we see three options emerging—a delay + discussion (federal and NB), a removal entirely (BC), and leaving the provision as is (federal, NFLD). Nevertheless, Section 34 rights are founded noted in the Kitchen Accord, but its meaning is vague. It is found at the bottom of the document with no other explanation.

In the drafting documents leading up to the November Accord, Version 2, we find the word "Aboriginal" with a checkmark over it, next to clause (4), which lists the provisions of the Act which would be included. Unfortunately, version 3, is missing a page and we don't see how Aboriginal Rights are declared in that document. In Version 4, we find what we find in the final November Accord—that is to say, the clause removed, with the caveat that constitutional conference proviso was kept, which would provide Aboriginal peoples to participate in further discussions on those rights. The conference would define and identify Aboriginal rights.

On November 18th, a new resolution is drafted up for submission to Parliament. It would be presented on November 20th, 1981.

In a Parliamentary Briefing Book before the presentation of the Resolution to the Commons, we are granted an insight as to why Section 35 was removed and the positions of the federal officials, the provinces, and the Indigenous groups themselves. As per the memo (quoted at length)

> Section 34 - Imprecise
>
> 3. Section 34 was criticized on a number of grounds, but mainly on the grounds that it was vague and imprecise and therefore inappropriate for inclusion in the Constitution. It was not clear what aboriginal rights were referred to by it. Section 36 signalled this imprecision because it provided that these rights were to be identified at a future constitutional conference. Some argued that the section entrenched aboriginal "property" rights over much of the north so that the government could not thereafter construct pipelines or develop any of the resources of the region, without either the consent of the aboriginal peoples or a constitutional amendment. (If this were the case, the rights of the native peoples would be placed in a category above the property rights of any other citizens of Canada and could not be compulsorily purchased by the government even when it was deemed necessary for an important public purpose.) Some argued the section entrenched the rights of some native groups to a form of "self-government". Some argued the section had no real legal effect but was merely a "motherhood" statement.
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> Section 34 - Indian Opposition
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> 4. The aboriginal people themselves were divided as to the sections' usefulness.

All three national aboriginal organizations - the National Indian Brotherhood, the Inuit Committee on National Issues, and the Native Council of Canada (the Metis) - argued that the section constituted an insufficient guarantee unless it was expressly stated in the Constitution that section 34 could only be amended with the consent of the aboriginal peoples themselves. The Inuit, however, were willing to support the patriation proposal even though section 34 was imperfect in their view because they felt that it constituted a positive starting point.

The argument that section 34 was inadequate unless made amendable only with the consent of the aboriginal peoples is unacceptable to the federal government because the right to block such a constitutional amendment would be to accord to the aboriginal peoples a status not given to any other group of citizens of Canada. (For example, even the French and English minorities in the various parts of the country do not have the right to block amendments concerning linguistic rights.) As a matter of principle, awarding one group of citizens the right to assert their interests over those of the country as a whole is not acceptable.

Section 34 - Provincial Opposition

5. At the Federal-Provincial Frist Ministers' Conference of November 2-5, the "package" agreed upon included, at the insistence of a number of the provinces, the deletion of section 34. At the same time it was agreed to retain the requirement of a constitutional conference (in which the aboriginal peoples would directly participate) to discuss native issues and particularly to determine which aboriginal rights it was appropriate to entrench in the Constitution. It was thought to be more appropriate to first determine with some precision which aboriginal rights were being referred to and then to entrench them in the Constitution, rather than including a general statement about the recognition and confirmation of rights without having any very clear idea of the content of that section.

Federal Government Position

6. Nevertheless, the federal government's position has been, and continues to be that it would support the inclusion of section 34 in the patriation resolution, despite that section's defects, if the provincial governments would agree. At the same time, it is not willing to jettison the agreement reached with the provinces by insisting that section 34 must be included.

The Supreme Court has said as a matter of constitutional convention that substantial agreement of the provinces is required for the patriation resolution.

> Both Opposition parties in the House of Commons of Canada urged the government to reach agreement with the provinces. The Prime Minister, in answer to questions in the House of Commons on November 10, 1981, described that process: "It [the agreement] left some things out that we did not like left out. It put some things in that the provinces did not want put in. It was a compromise ... if we want to reopen the accord for the natives, then why not reopen it for other things too, and isn't that the surest way of destroying the accord?
>
> […]
>
> We negotiated the best compromise we could.
>
> 7. The status of Canada's aboriginal peoples under the proposed resolution as agreed to by federal and provincial First Ministers on November 5 would be:
>
> (1) All existing aboriginal and treaty rights remain as they are. The Charter of Rights is expressly declared not to abrogate any such rights; the amending provisions do not affect in any way such rights.
>
> (2) The Parliament of Canada continues to have exclusive legislative jurisdiction pursuant to section 91(24) of the B.N.A. Act over "Indians and Lands reserved for Indians".
>
> (3) There is a guarantee that a constitutional conference will be held with a year of the passage of the patriation legislation in which representatives of the aboriginal peoples will be entitled to participate, to identify aboriginal or treaty rights which might be entrench in the Constitution.
>
> […]
>
> 8. In addition, the self-claim to sovereignty by the Indians is not recognized by the government of Canada. The Indian claim to the right of self-determination, even through local self-government is an internal Canadian matter. […]

The government had straightforwardly stated that this ambiguity was deliberate. It is because it was not to be read on its own, but in tandem with the Constitutional Conference section, where the meaning of 35 would be identified and defined. Nevertheless, the provinces sought to identify and define *first*, and then entrench. What is also interesting is the federal officials definitively declaring that Indigenous self-government was rejected.

In "Assimilation of Indians – Not a Government Policy" (also found in the Briefing Book) we see the federal officials react to the charge that this removal was done in order to terminate their status and assimilate them into the broader Canadian population.

Nevertheless, with this clause removed, the federal officials were contemplating a new path forward, which would be an entirely federal affair. This was also being pressed by the opposition. NDP Jim Fulton was urging the government to act unilaterally on this clause, due to sec. 91(24) of the BNA Act falling outside of provincial powers. He says,

> **Mr. Jim Fulton (Skeena):** Madam Speaker, my question is directed to the Minister of Justice. Section 91(24) makes it clear that the jurisdiction over aboriginal and treaty rights is an exclusive federal power. It is my understanding that the September ruling of the Supreme Court of Canada only limited the federal government's ability to affect provincial jurisdiction directly. We all recognize the importance of last Thursday's consensus. However, I would like the minister to confirm to this House that it is, first, within the powers of this House to re-entrench Section 34 fully, which this party will support and, second, that this action would not conflict with the September ruling of the Supreme Court of Canada.

Shortly after, Fulton pressed the government again on unilateral action. For Jean Chretien, however, the goal was for entrenchment across all levels of government. He says,

> **Hon. Jean Chrétien (Minister of Justice):** I said, Madam Speaker, that we want to ensure that these rights are entrenched in the Constitution at all levels. We will do whatever is necessary to find words with which everyone can agree. Everyone knows we took the initiative of putting that in the Constitution. We wanted it to be in the Constitution for all time. The Prime Minister asked the provinces to agree to a conference so that this would be entrenched in such a way that the native people, the provinces and the federal government, will be completely satisfied, and these people will be protected.

And yet, behind the scenes, meetings were happening on this very issue. Liberal MP Warren Allmand asks his own government,

> **Hon. Warren Allmand (Notre-Dame-de-Grâce-Lachine East):** Madam Speaker, I have a supplementary question for the Prime Minister. There have been reports that the Prime Minister would meet today with the Inuit and Indian leaders to discuss the constitutional accord of November 5 which dropped Section 34 entrenching aboriginal and treaty rights. Will the Prime Minister confirm whether such a meeting has already taken place? If so, what were the results? Has the Prime

> Minister agreed at least to entrench those aboriginal and treaty rights for all matters under federal jurisdiction?

Prime Minister Trudeau responds thus,

> **Right Hon. P. E. Trudeau (Prime Minister):** Madam Speaker, I did meet with certain Inuit leaders in the presence and with the assistance of the Minister of Indian Affairs and Northern Development. We examined these questions. I expressed the federal point of view much as the Minister of Justice just did in his last answer. We were anxious to find a formula which would not only involve a recognition by the federal government of the existence of aboriginal rights, but a process which would hopefully lead the provinces to recognize those aboriginal rights.

There are three documents which appear to be post-November Accord, and pre-Resolution (November 20th), which are attempts at finding a new way forward without the provinces. The first is a document entitled, "Aboriginal and Treaty Rights and the Constitution"

In this document the federal officials discuss the bind they are in—that there is pressure from Native leaders, particularly from the Inuit, who are strongly opposed to the package. Federal officials have noted that this can't be changed without the consent of the provinces. And this deletion may cause delay from the NDP and PCs, and potentially amendments from their parties for the reinstatement of the clause. Furthermore, Indigenous groups are in London advocating against the constitutional package.

With this in the mind, the federal officials discuss three options if provincial consent cannot be met,

> 1. Pass federal legislation under S. 91. 24 of the BNA Act affirming and recognizing aboriginal and treaty rights for the purposes of federal jurisdiction generally.
>
> 2. Pass similar 'legislation to apply only to North of 60^0.
>
> 3. Make no commitment to federal legislation until the First Ministers' Conference required by the Resolution has been held.

The first option is seen as useful, but with potential conflict with the provinces. The second is seen as useful in that there would be minimal conflict with the provinces, but would divide the Native groups and may show favouritism to the Inuit. Option 3, while useful to come to a clearer understanding is simply not acceptable to native leaders.

Regardless, a strong commitment from the federal government is suggested. For a

specific recommendation the following is suggested,

> It is recommended that Cabinet agree that legislation to recognize, in relation to Federal jurisdiction only, the aboriginal and treaty rights of aboriginal peoples as defined in the former clause 34 of the Resolution should be drafted and that the Prime Minister, the Minister of Justice, the Minister of Indian Affairs and Northern Development and the Minister of State decide on the timing and process to be followed in announcing, introducing and passing the legislation.

However, the document also acknowledges that the provinces have not accepted any form of rights within their own jurisdiction, saying:

> Option 3. Would be to keep the government's options open until the First Ministers' Conference at which the rights of the aboriginal peoples would be discussed, with a view to maintaining maximum leverage on the provinces to themselves accept the recognition of aboriginal and treaty rights within their own jurisdiction. This would also allow native leaders time to develop their thinking on the precise protection they want. While this option might well increase the chances of eventually including a strong protection for aboriginal and treaty rights in all jurisdictions, it is not an option that native leaders, including the Inuit, will accept. Thus, its adoption would have little impact on the constitutional debate here or in London.

Following this document, we find a further entitled document (same PDF), which indicates the federal government's intention to act. This time, the document contains an ultimatum for Indigenous groups,

> Some have suggested the immediate application of section 34 to the federal government and matters under federal jurisdiction. The bovernment *[sic]* is prepared to act immediately on this suggestion if the leaders of the National Indian Brotherhood, the Native Council of Canada, and the Inuit Committee on National Issues, indicate their support for it by Wednesday, November 25th. If such support is not forthcoming by the deadline, the government is committed to leaving the same proposal on the table for the purposes of all negotiations on the identification of the rights of the aboriginal peoples.

There is another document, also without a date although which in high likelihood is from November 19th, entitled "Speaking Notes for Minister of Justice" which says,

> 2. Federal government wants to amend Resolution to apply aboriginal rights

> section (former S.34) to federal jurisdiction only, if three national native groups agree.
>
> -Wording on rights and definition of aboriginal peoples would be identical to S.34 but it would clearly apply only to the federal government and federal jurisdiction.
>
> -Plan to announce in speech in House of Commons tomorrow on the Resolution
>
> -Will indicate in speech that 3 national native associations have until Wednesday (Nov. 25) to indicate whether they support.
>
> 3. If any province chooses to "opt-in" along with the federal government, they will be welcome to do so.

This would indeed be announced the following day of November 20th, with the federal officials changing the new ultimatum date to November 24th.[1] Behind the scenes, however, there was a flurry of communications between the three stakeholders—the feds, the provinces, and the Indigenous groups to try and find an acceptable compromise.

One push from the provincial end came from Premier Blakeney of Saskatchewan in the back and forth over Section 28.[2] In a telex of Nov. 18 to Jean Chretien, Roy Romanow states,

> We have a further problem, Premier Blakeney has taken the position that if the accord is re-opened, he would press for the old section 34 to be reinstated, as it appeared in the parliamentary resolution, and in Saskatchewan's submission to the conference on Wednesday, November 4. We would be very reluctant to agree to any departure from the accord that failed to honour that position.

The language of Saskatchewan is further strengthened in another telex from that day,

> More specifically, if the agreement is now to be re-opened and if changes to section 28 are to be agreed to, it seems only fair to change the agreement to include section 34 for the native peoples of Canada. To change the substance of the agreement in

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1 "Some have suggested the immediate application of Section 34 to the federal government and matters under federal jurisdiction. The government is prepared to act immediately on this suggestion if the leaders of the National Indian Brotherhood, the Native Council of Canada and the Inuit Committee on National Issues indicate their support for it by Tuesday, November 24. If such support is not forthcoming by the deadline, the government will keep the same proposal on the table for the purposes of all future negotiations on the identification of the rights of the aboriginal peoples." (HOC, Nov. 20, 1981) In two other memos on the new resolution, federal officials merely stated that the clause had been deleted. See here and here.

2 See our commentary for Section 33. However, in House of Commons debates, Ontario and New Brunswick were seen as being on board with s. 35 in early November.

> this way, without further considering a change to reinstate section 34 is not acceptable to us.
>
> To summarize, we are quite willing to maintain the original agreement and to accept the compromise wording on section 33, worked out and agreed to by officials on November 17, and telecopier to us later that night. However, if you propose to change the substance of the agreement, and amend section 28, we would agree to it only if another change in the substance of the agreement is accepted as well, namely, the reinstatement of section 34 on native rights.

The National Indian Brotherhood, who were one of the three Indigenous groups given an ultimatum, meanwhile, had written up *A Declaration of First Nations* on November 18. The document[3] is notable for a few reasons: 1) it was precise[4] 2) it was substantially more comprehensive than the one from the April 24th resolution, but most importantly, 3) it gives us the starting point of the NIB position in regards to the negotiations as this document coincides with the federal government's ultimatum. The document reads,

> **Treaty and Aboriginal Rights Principles**
>
> 1. The aboriginal title, aboriginal rights and treaty rights of the aboriginal peoples of Canada, including;
>
> (a) all rights recognized by the Royal Proclamation of October 7th, 1763;
>
> (b) all rights recognized in treaties between the Crown and nations or tribes of Indians in Canada ensuring the Spiritual concept of Treaties;
>
> (c) all rights acquired by aboriginal peoples in settlements or agreements with the Crown on aboriginal rights and title;
> are hereby recognized, confirmed, ratified and sanctioned.
>
> 2. "Aboriginal people" means the First Nations or Tribes of Indians in Canada and each Nation having the right to define its own Citizenship.
>
> 3. Those parts of the Royal Proclamation of October 7th, 1763, providing for the rights of the Nation or tribes of Indians are legally and politically binding on the Canadian and British Parliaments.

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[3] This portion of the paper is still in flux as this proposal may be the same proposal put forward in the SJC. This needs to be confirmed.

[4] Provinces had criticized the clause's vagueness.

> 4. No law of Canada or of the Provinces, including the Charter of Rights and Freedoms in the Constitution of Canada, shall hereafter be construed or applied so as to abrogate, abridge or diminish the rights specified in Sections 1 and 3 of this Part.
>
> 5. (a) The Parliament and Government of Canada shall be committed to the negotiation of the full realization and implementation of the rights specified in Sections 1 and 3 of this Part.
>
> (b) Such negotiations shall be internationally supervised, if the aboriginal peoples parties to those negotiations so request.
>
> (c) Such negotiations, and any agreements concluded thereby, shall be with the full participation and the full consent of the aboriginal peoples affected.
>
> 6. Any amendments to the Constitution of Canada in relation to any constitutional matters which affect the aboriginal peoples, including the identification or definition of the rights of any of those peoples, shall be made only with the consent of the governing Council, Grant Council or Assembly of the aboriginal peoples affected by such amendment, identification or definition.
>
> 7. A Treaty and Aboriginal Rights Protection Office shall be established.
>
> 8. A declaration that Indian Governmental powers and responsibilities exist as a permanent, integral fact in the Canadian polity.
>
> 9. All pre-confederation, post-confederation treaties and treaties executed outside the present boundaries of Canada but which apply to the Indian Nations of Canada are international treaty agreements between sovereign nations. Any changes to the treaties requires the consent of the two parties to the treaties, who are the Indian Governments representing Indian Nations and the Crown represented by the British Government, The Canadian Government is only a third party and cannot initiate any changes.

In a November 20th Telex from William Davis to Jean Chrétien, Duke Redbird, et al, Davis suggests that only Ontario and New Brunswick had supported the original Section 34 resolution. Ontario still supported such an inclusion, although it noted that

> In a letter on May 7, 1981, our Attorney General Communicated technical advice

> to the Attorney General for Canada indicating our desire that careful effort be made to provide thoughtful definition to the Aboriginal rights provision so that it did not lead to misunderstandings in the future.[5]

The telex also provides us with information regarding the negotiations, stating that a telex of November 10th, seems to have started these discussions.[6]

After a long standstill, on November 20, Premier Bennett, after consulting with Indigenous leaders across BC, said that the government was now prepared to support the reinstatement of the clause. However, BC was insistent that a more precise definition would need to be arrived at, at the subsequent conference as per Section 36. More importantly, BC wanted to ensure that any obligations arising out of this clause were exclusive to the federal government. He says,

> I have made particular reference to British Columbia's terms of Union with Canada and the British North America Act which clearly imposes on the Government of Canada full responsibility to discharge any obligations to Indians as may arise from the exercise of Canada's treaty-making process. Accordingly, if as the result of the process by which the definition of aboriginal rights is clarified, any obligation arise, it will be clear responsibility of Canada to fully compensate the people and the province of British Columbia in the fulfilment of any treaty or settlement negotiated by Canada with the Aboriginal people.

The watershed moment for the reinstatement of s. 35 came on November 20th, when Alberta suggested via telex a new word, which would unlock the deadlock between the federal and provincial officials—"exist".

Firstly, the telex confirmed that for some premiers, the "full consequences and implications" of an Aboriginal rights clause was concerning. This echoes Premier Bennett's insistence that if any new obligation were to arise, it would not be a provincial responsibility. Secondly, it also dove into why the Premiers had not accepted it. Since Section 34 had been drafted during the unilateral phase, and since the provinces had not been "party to the discussion which led to the inclusion" of section 35, "more consideration was required" as to what they were agreeing to. Furthermore, the constitutional conference was to be this mechanism to allow their participation in this process:

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[5] This referenced letter is dealt with later in this paper as federal officials discuss its contents in November 1981. Attorney General McMurty initially suggested that many negative consequences would result from such an entrenchmebt and urged amendments particularly in regards to property rights disruption. Chretien initially responded saying, "As the Constitutional Resolution is presently under review by the Supreme Court of Canada, it would be premature for me to attempt to respond in detail to the particular issues you raise."

[6] The telex so far remains unknown, and it is uncertain whether it is related to Aboriginal rights or the constitutional resolution more broadly.

> My further recollection is that the ten Governments agreed that the matter could be resolved pursuant to what has now become section 36(2) in order to identify and define the Native rights being requested.

Premier Lougheed then provided its new draft, which read:

> 1. The Aboriginal and treaty rights of the Aboriginal peoples of Canada**, as those rights exist** prior to the coming into force of this part, are affirmed.
>
> 2. The rights affirmed under subsection (1) include rights subsequently included in the constitution of Canada pursuant to section 36.
>
> 3. In this Act, Aboriginal peoples of Canada includes the Indian, Inuit and Metis peoples of Canada.

Alberta had deftly sidestepped potential new obligations by adding the wording "as those rights exist prior to the coming into force of this part," which put the onus of the obligations fully on the federal government. Furthermore, the terms "recognized and affirmed" was changed to "affirmed". Thus, we see the provinces attempting to prevent any new rights or financial obligations from arising through s. 35.

Also on November 20th, in the House of Commons, opposition leader Joe Clark spoke of restoring "aboriginal title" in his speech on Section 35. What makes this interjection curious is that the term "aboriginal title" was not used in this time by either the Liberal Government or the NDP, who used rather "Aboriginal Rights". This term was also disputed by the provinces in the 1983 conference[7] on the issue of s. 35. The framing of the rights as one of "title" thus remains unique to Joe Clark.[8]

Nevertheless, on November 21, the federal government discussed provincial objections to the clause, using a letter from Ontario Attorney General Roy McMurtry from May of 1981, to answer these objections. It's unclear whether they were attempting to answer McMurty,[9] or attempting to clarify their position on the new clause internally. The letter states,

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

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7 This will be dealt with in Part IV of this paper.

8 House of Commons Debates, 13050-13051.

9 The document contains the original McMurty letter and the initial response from Chretien saying that he could not comment since the resolution was before the SCC.

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

According to the federal officials, this clause did not simply affirm existing rights, but did confer potential new obligations. However, these were not to be decided on a general principle, but on a case-by-case basis in the courts. Secondly, the clause would not "retroactively upset the vested rights of other people." It reads,

> 2. Mr. McMurtry suggests section 34 may upset vested non-native rights — he cites the City of Ottawa and Parliament Hill. In our view, aboriginal rights in densely settled parts of Canada were extinguished many years ago. **The constitution will not be interpreted to retroactively upset the vested rights acquired by other people**

Thirdly,

> Mr. McMurtry says section 34 could alter the course of current and future land claims litigation. Insofar as the defence to such litigation was based on a denial of the concept of aboriginal and treaty rights, section 34 will benefit native peoples — and properly so. The federal government has never challenged the concept of enforceable treaty rights — and since 1973 has accepted "aboriginal rights" as a proper type of claim to put forward in land claims settlement negotiations.

Finally, McMurty suggested that native people would be able to conduct hunting and fishing without regard to federal or provincial law. As per Tassé,

> We believe natives hunting and fishing for food ought to have priority over non-natives who generally speaking do not rely for their food on hunting and fishing. But this does not exempt native peoples from laws legitimately aimed at conservation of the resource itself (as opposed to conservation of the resource for non-natives).

The letter concludes by suggesting this is a legal question, and assumes the courts will arrive at solutions which are fair to all sides. However, Chretien also hints that some of these legal questions can be discussed at the 1983 conference.

The next day, Chretien responded to the Premiers,[10] citing the Lougheed and Bennett telexes above. He suggests, however, that there is *no* difference between the April Resolution and Alberta's new draft, *in substance*, saying,

> With respect to the new draft provision set out in Premier Lougheed's Telex, the federal Government would be prepared to accept either that Alberta Draft (except Paragraph Two) or the one originally contained in the previous federal resolution of last April. We do not in fact see any essential legal difference between the two texts since we believe that the federal text has implicit in it that which is expressly stated in the Alberta text, namely that the rights affirmed are those which presently exist.

With regards to whether obligations may arise in fulfilling these obligations, as per Bennett's fears, he suggests discussing this at the constitutional conference. Chretien says,

> As for the points raised in the Premier's telex respecting legal obligations and the matter of compensation to be paid to British Columbia for any settlement of Aboriginal peoples' claims in that province, the federal government believes that these are matters better left for discussion at the First Ministers' Conference contemplated under Section 36 of the resolution.

Viewing the drafts as essentially the same, the federal government agreed to accept either the original s. 35 or the Alberta draft. The federal government then gave the provinces a November 24th deadline, the same one it had given Indigenous groups to come to an agreement.

On November 23rd, the federal government reworded a proposed Aboriginal Rights clause,[11] by integrating the Alberta term "existing" and removing the second subsection re the constitutional conference as it was viewed as redundant as it was covered explicitly in the section on constitutional conferences.[12] Essentially, Tassé was recommending a reworked Alberta draft. The proposed new clause read,

> 34(1) The *[existing]* aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "Aboriginal peoples of Canada" included the Indian, Inuit and Métis people of Canada.

[10] This memo was sent to all provinces, except Quebec. It may simply be that a French copy was sent to them.

[11] These is also a second copy. Tassé to Chretien.

[12] This redundancy was noted in the telex to the Premiers the previous day.

What's interesting, here, however, is that both sides were viewing the word "existing" differently. They were agreeing to two entirely different things. The federal government even acknowledged this to be Alberta's intention, while saying the wording they provided did nothing of what they thought it did. The memo states,

> Section 34(1) of the Alberta draft is the significant one**. Obviously, it is Alberta's intention, by including reference to rights existing on proclamation of the Constitution Act, to seek to ensure that aboriginal rights which have previously been extinguished are not revived. We feel that this is basically a cosmetic change in legal terms**, since it is our view **that the federal draft implies essentially the same thing**. The rights which are being recognized and affirmed are obviously those which now exist; **the clause is not restoring original rights which have been effectively extinguished or abrogated or creating any new rights**.
>
> **We suspect that the Alberta wording is believed by them to do more than this, namely to avoid any questions being raised respecting whether past laws, orders or governmental actions have effectively extinguished aboriginal rights**. If this be **their intention, their proposed wording does not accomplish it; nor should it.**

This ambiguity of the word "existing" allowed both sides to read into the clause what they wanted. It succeeded in achieving a consensus. In the coming weeks, Chretien would stick to this interpretation in public—that the new s. 35 was identical to the older version. This interpretation would be defended by the Liberal government in Parliament, but would be seen as dubious by opposition members. Nevertheless, we find further in the memo, Tassé discussing the status of current rights, saying,

> The whole intention of the aboriginal rights provision is to recognize and affirm those rights as they now exist, leaving it to the aboriginal peoples to establish – whether by negotiations at the constitutional conference, by future treaty negotiations or by court action, if necessary – what the content of existing aboriginal rights is. **In other words, the nature and extent of existing aboriginal rights in any area of Canada will be for future determination, either on a global basis or a case-by-case basis.**

Roger Tassé was signalling that it was all to play for at this time—it would either be decided by political action or the courts, on a general laid out principle, *or* a case-by-case basis. This contradicts what Tassé had said only one day before—that this was a legal question, and one which would have to be decided on a case-by-case basis. The

government had switched its view—that a general principle could now be put forward when dealing with his issue. The memo to Chretien continues,

> The Alberta section 34(1) also drops reference to recognition, confining the rights to constitutional affirmation. We do not believe that this limitation changes the legal sense of what is intended. Whether the aboriginal rights are recognized and affirmed or simply affirmed does not change the legal fact that the Constitution is saying that whatever the rights are, they are henceforth constitutionalized.

The memo suggests that Indigenous groups be told that this new clause was not a more restrictive clause than the April one. Thus, we have, at this moment, two contradictory interpretations of what each side was signing up for. The provinces, like Alberta, had suggested wording that would be seen as more restrictive. However, the federal government was arguing that no change in substance had occurred and was going to use it as a means of winning over Indigenous groups. On the issue of compensation, the memo states,

> On another point, the telex from British Columbia agrees to entrenchment of aboriginal rights, but Premier Bennett asserts that as a matter of law, that province bears no financial responsibility for any native claims settlements that may arise in that province. While this assertion may be somewhat dubious in light of the B.C. Terms of Union, which provide for that province to transfer to Canada in trust tracts of land for Indian reserves, we have felt it best to defer this issue for discussion at the First Ministers Conference rather than upsetting any agreement on a section 34 wording now.

The memo ends on a nuanced point,

> The course to be followed during the next few days in order to allay these suspicions will require at the same time assuring the provinces that the proposed entrenchment does not mean "giving the land back to the native peoples", and assuring the native peoples that entrenchment of their rights is not mere window-dressing, but a substantive move which will enable them to protect their existing rights.

On the same day, Saskatchewan indicated its willingness to accept either the Alberta draft or the new federal draft.

During the course of that day Jean Chretien announced to the House that an agreement had been arrived at between the government and the provinces—regarding Sections 28/33 and Aboriginal Rights. And yet, no agreement had officially yet occurred.

The following day, on November 24, federal officials receive numerous responses to the new clause. British Columbia agreed to the addition of "existing". New Brunswick as well. The Aboriginal Rights Coalition sent a telex asking for clarification from Chretien, as to their concern that existing may be a limiting factor in the new clause, despite acknowledging Chretien's position that it was not a change in substance from the April clause. On that day, as well, the federal government formalized the wording of the new text, proposing that it read,

> "PART II
> RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA
>
> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada."
>
> (b) by renumbering the subsequent parts and clauses accordingly.

Finally, there is a recommendation that day from Fred Jordan to Jean Chretien that no special amending formula be used for this clause.

On November 25th, the following day, the dispute over what the term "existing" still continued. No consensus emerged as to what the term meant—whether it was limiting in any way, despite the federal insistence that it did not limit the April version of the clause. On whether it narrowed the scope of the rights. It is worth quoting this memo in depth,

> This, in my view, is not legally correct. Inclusion of the term "existing" simply makes explicit what was already clearly implicit in the earlier language, thus removing rather than adding any ambiguity as alleged. Quite clearly the recognition and affirmation of aboriginal and treaty rights can only mean those rights which continue to exist, since there can be no recognition of those which have legally ceased to exist prior to recognition. Consequently, whichever language is used in section 35, what is being constitutionalized are existing rights.
>
> There seems to be a belief in some quarters that without the term "existing", the courts would be free to find that some aboriginal rights that may have existed in the past, but which have been extinguished or abrogated by proper legal means, were now revived. This is not a proper construction of the old section 34. All it did, like the new section 35 does, is say that when a claimant is able to establish the

> existence of a still subsisting right, one which originally existed and which has not been lawfully extinguished by the Crown or surrendered by the native peoples, then it is recognized and affirmed in whatever form and nature it takes. Neither the old section 34 or the new section 35 attempted to say what the rights are that exist — this will be a matter for identification (by proof or agreement) in the process of future negotiations or litigation
>
> Another point which appear to be in contention is the argument that inserting the word "existing" creates a cut-off date (i.e. the date of proclamation) which will have the effect of validating all extinguishments or arrogations of aboriginal rights that have occurred prior to this date. Again, this is a misconception. It will still be open to the native peoples under section 35, as it would have been under old section 34, to question this legal validity of prior extinguishments and abrogations. Where they can establish that these were not legally effective, then their original rights, whatever they may be found to be, will be recognized, with restoration thereof or compensation therefore as may be appropriate.
>
> Finally, some seem to fear that by inserting the term "existing", future claims or settlements will not be possible. This is to overlook the rule of statutory construction that a law is always speaking, whenever it is invoked. Thus, twenty or fifty years hence the existing rights will still be there. If a treaty is entered into with a particular group of native peoples whereby their claimed aboriginal rights are surrendered in return for treaty rights, then on the date of that treaty those new treaty rights will be existing rights and the aboriginal rights surrendered will cease to be existing rights under section 35. At the same time, if one of the traditional aboriginal rights is established to be a right of native peoples to preserve and use their native languages in their schools and band institutions, this will continue to exist not only at the date the Constitution Act comes into force but as well in the future unless it is subsequently lawfully surrendered or extinguished.

For the likes of Alberta, the word had meaning, and was the reason for their acceptance of that particular constitutional section. Attorney General Crawford explains the government's thinking on November 23, 1981,

> MR. CRAWFORD: Mr. Speaker, except in a matter of emphasis and a slight change in the language used, there was no change in the position the government had long maintained. The Premier has made it clear on a number of occasions, in both the constitutional conference and meetings with native delegations, that the government of Alberta was interested at all times in the preservation of existing

rights. **I think the key words may well be "existing rights".** The government took some objection to the possibility that one form of the constitutional declaration, which was inserted without any consultation with the provinces, could create new rights that had not previously existed. But there was no question of our support for treaty rights and existing aboriginal rights in all respects. We were always fully supportive of those. What occurred on Friday — and I can provide the hon. leader with a copy of the statement, although it was made public on Friday and perhaps the leader already has a copy — was that as a result of several meetings involving the Metis Association of Alberta, an alternative wording to what was previously Section 34 was proposed and brought forward. **I think careful examination will show that the only aspect of it that's different from earlier proposals is the stipulation that it deal only with existing rights and therefore take away some of the uncertainties there might have been about the possibility of creating new and unknown rights.**

MR. R. SPEAKER: Mr. Speaker, a supplementary question to the Attorney General — it's more for clarification; I think I understood the answer — on the differentiation between endorsation by the Alberta government of existing rights versus endorsation of any new rights that may be requested through the amendment in the constitution. One of the greatest concerns in terms of new rights is in reference to property rights. Could the minister indicate if that's the concern of the government of Alberta at this time?

MR. CRAWFORD: Mr. Speaker, I don't think it would be possible to go through a sort of catalogue of what the concerns would be. That is one of the real overall difficulties in this matter. **If I can put it this way, our concern always was that no one knew what rights were being referred to if it was stated in a sufficiently vague and uncertain way. It was the vagueness and uncertainty that caused concern. Therefore, we could see the possibility that any number of rights might at some point be claimed to have been created by the particular wording suggested. Our view was and is that so long as it's clear that existing rights are the ones all parties speak of, that would be adequate and satisfactory, and certainly supported by Alberta.** But to go beyond that and say of those uncertainties that there is a list or catalogue of what our specific concerns were, that's not the case. The real concern was the absence of any clarity about what might be involved.

Premier Lougheed reiterated this reasoning at the 1983 Constitutional Conference,[13]

[13] The 1983 portion of the drafting history will be dealt in a later draft of this report in the coming months.

> "Our difficulty, Mr. Chairman, was that the force and the scope of the aboriginal rights provision was unclear. The government of Alberta supported, and still does fully support existing aboriginal and treaty rights. The proposed aboriginal rights provision was open to the interpretation, however, that it would create new aboriginal rights that were not previously recognized in law. Not having been part of the earlier discussion between the federal government and Indian leaders, the Premiers on November 5, 1981, were not prepared to include any additional provisions without understanding fully what was being requested and the consequences of such requests.
>
> […]
>
> I wanted to outline this recent history today, Mr. Chairman, because I understand that the inclusion of the word "existing" in Section 35 has been a subject of considerable concern among aboriginal representatives at the preparatory meetings which have preceded this conference. In response to the concern, I want to emphasize that the intent of the Alberta government in agreeing to the present wording of Section 35 was neither to freeze the legal status quo of aboriginal and treaty rights for all time, nor to deny any modern treaty of agreements between governments and aboriginal peoples the protection of Section 35. In effect, it was a commitment by governments to protect those aboriginal rights which exist now and to recognize those which may come into existence as a result of this conference.
>
> Considering the background and without wishing to debate specific agenda items at this time, Alberta is unwilling to remove the word "existing" from Section 35. Any consideration of the removal of the word "existing" can only come about after an agreement has been reached not only on the definition of these rights, but also on a full understanding of their implications and their consequences.

Alberta was willing to accept the wording because they viewed it as a starting point, as to where Aboriginal Rights then stood, which would then be further elaborated upon through the constitutional conference. The word "existing" could only be removed once an agreement as to what the rights were was achieved. It was a placeholder word, until a political agreement could be had.

As we saw, British Columbia was prepared to accept the original resolution, provided that it freeze rights until a political decision and understanding could be arrived. As we saw, premier Bennett had said,

> Because of this, British Columbia is prepared to support reinstatement of aboriginal and treaty rights in the resolution now before the House of Commons, provided you and the provinces who are signatories to the accord concur, and **provided that the process under present section 36 remains in place, with a precise definition of all aboriginal rights and the complete identification of the implications which these rights may hold for Canada and for the provinces**."

The Alberta draft as we also saw, made this implicit understanding of BC, explicit—something that Chretien echoed. That the word was making what was implicit, explicit.[14]

The provinces seemed to be agreeing to a process, (albeit with the rights entrenched) rather than a specific set of rights. However, there is indication as well that British Columbia would not have agreed to the clause without the "existing" wording.[15]

This word would draw the ire of opposition members, and even create internal friction in the Trudeau Government. One Liberal member, Warren Allmand, would join opposition members in voting for the removal of the word "existing". The government pressed forward with the claims that Tassé had discussed with Chrétien in their memos—that no legal difference had occurred. On November 24, both Minister Munro and Minister Chretien declared that the resolution was the same as the original.[16] Chretien insisted that multiple legal opinions were sought and all said the same thing—the clause had not changed despite the addition of the word "existing." Liberal MP pressed the government on the new clause, asking,

> Does the addition of the word "existing" eliminate the aboriginal rights of Indians or Inuit whose rights at one time were unilaterally extinguished by legislation of a provincial legislature or of the federal Parliament? In other words, if a provincial legislature or the federal Parliament extinguished in a unilateral manner in years past the aboriginal rights of an Indian band or an Inuit community, does it mean that those rights no longer exist and consequently are eliminated from the charter by the addition of that word?

Chretien would respond that this was a legal question and that it would be up to the courts to decide.[17] However, Chretien was able to offer forth a specific answer with regards to land claims, saying

> "What the courts will decide later on is how they will implement it in the case

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14 House of Commons (November 24, 1981). See for example, p. 13204

15 Melvin H. Smith, "Some Perspectives on the Origin and Meaning of Section 35 of the Constitution Act, 1982," *Public Policy Sources* [Fraser Institute], No. 41 (2000), p. 7, footnote 1.

16 House of Commons (November 24, 1981). See for example, pp. 13201-13206.

17 Ibid., pp. 13203 and 13205.

> where, as the hon. member said, a town or city was constructed on land which would have belonged at one time to the natives. Of course this cannot be redressed by returning that land; in my own judgment I think the Crown will be obliged to offer other lands or financial compensation.

Yet these answers from the government were not satisfactory to the opposition. Frank Oberle asked poignantly, "If the inclusion of the word "existing" really does not change the meaning of Section 35(1) of the resolution, why was it included?" He then pressed the government on clarification regarding the situation in BC,

> I should also like to follow up on the question asked by the hon. member for Notre-Dame-de-Grace-Lachine East (Mr. Allmand) but in a more practical sense. Both gentlemen are very much aware of this matter, both having been ministers of Indian affairs. I am referring to the question of the British Columbia cut-off lands where the legislature, with the consent of the people of the province and following the recommendation of a commission, took away certain lands from Indian people. If we are looking at existing rights, these rights no longer exist. Would the minister agree with me on that?

Jean Chretien responds,

> In terms of the British Columbia land question, I think the Minister of Indian Affairs and Northern Development (Mr. Munro) could reply, but I could as well because I have been involved in that matter. We have already settled cases involving land which had been cut off from Indians in the past. If the rights were irregularly taken away from the natives, the recognition that their rights flow from the Royal Proclamation will give them a stronger case in court than they had before.

Minister Munro would also add,

> **Mr. Munro (Hamilton East):** Mr. Speaker, referring to the question put by my hon. friend on the cut-off claims, as he may know, there is a sound body of legal opinion that would cast some very real doubt on the legal validity of the action taken by the province at that particular time. The province has met with the federal government and is prepared to make adjustments in terms of settlements combined with this government, putting in its own resources to rectify what is clearly felt to be an injustice of the past.
>
> That situation is based on legal views as to improprieties and disorders in terms

> of powers exercised by the province in the past. The manner in which that has been settled stands on its own merit and, I believe, has been settled to some degree to the satisfaction of the Indian peoples involved.

NDP MP Jim Fulton declared the addition of "existing" to be a "weasel word." He would move an amendment to remove it, which would be defeated. In his speech, he acknowledges that his legal consultations have resulted in the same opinion of the government (that it didn't change the clause), but that it was superfluous and ambiguous. However, he also acknowledged that the wording could have an effect. "If I cannot find a lawyer who thinks the word "existing" improves the section, where has the government found these masterminds who say that adding words to a constitution has no effect?"

Later in the day, PC MP Frank Oberle would attack the concept of the word having no meaning.

> **Mr. F. Oberle (Prince George-Peace River):** […] Many members have discussed this crucial word "existing", which, as they say, is totally meaningless, if you listen to the advice of the Minister of Justice and the Crown counsels. This word "existing", which is now the subject of this amendment, was inserted by the Minister of Justice. The minister told us yesterday that we do not have to worry about a thing because it is totally meaningless. If I know anything about law, Mr. Speaker, it is that legislatures are not supposed to put meaningless language into law. Logic tells me that if the word is meaningless, then it should be taken out.
>
> I say that it is dishonest for the Minister of Justice to stand in the House and say that the word "existing" is meaningless, because if it were it would be his duty to take that word out. It is not for us to give the Supreme Court language in our fundamental law that is meaningless. You know as well as I do, Mr. Speaker, that the words "existing rights" are not at all meaningless.
>
> The premiers have decided among themselves that the native people are getting everything to which they are entitled now and nothing else. The status quo is what the native peoples will be dealing with.

Finally, he added that the courts would simply follow the status quo, due to the word "existing" saying

> If we cannot have any faith in what the premiers are going to do after the Constitution is patriated, certainly the courts have been given a clear direction regarding what they are to do. They are to legislate the status quo since the words "existing rights" are in the Constitution.

Another NDP MP, Douglas Anguish echoed similar concerns, saying every word has meaning in the Constitution,

> I have mentioned that the word "existing" should be removed. I feel very strongly about this. It is a principle of law, of statutory interpretation, that every word in a statute—and in this case it is the Constitution—has meaning and must be considered by the courts when something comes before them.
>
> If this word remains, I am sure the judges will have to say that the word is there because the legislators or the parliamentarians, the people who put it into the Constitution, the governing law of the land, wanted it there. It may mean a variety of things.

While the opposition was fearful of the status quo emerging, others were concerned with a complete lack of a definition. Progressive Conservative MP Stan Schellenberger, on the confusion of the word "existing," says,

> As we now continue with the endeavour, as is provided in Section 36 of this resolution, these aboriginal rights must be defined. It will be a very difficult quest for the provinces, the federal government and the native people to define what are aboriginal rights.

Thus Aboriginal rights were being agreed to, in an undefined state—the conference was to clarify these terms. He says further on,

> If we are to be faced with another impediment, another word such as "existing", it only makes a conference so much more important.
>
> Because of the manner in which the resolution has been drafted and because Section 36 has been included, it is imperative for the House, since nine provinces have signed the accord and there was the unanimous movement of the House to have native rights placed in the Constitution before, to place the heavy burden of faith and hope of aboriginal peoples upon the conference; it is a tremendous undertaking.

On December 1st, another PC member, Gordon Taylor, echoed his colleague's comments saying,

> There were no aboriginal rights in the original charter. They were taken out. They

> are now back in, albeit with no definition. I hope the government is not trying to fool our aboriginal people by holding out a carrot: aboriginal rights without definition. We have asked the government to define these rights and to be fair to our native people. The Indian people in particular have suffered for a long time in this country. They should not be fooled. I hope they will not be.

Even the government was saying that these rights would only be defined in '83. Senator Austin says,

> I am referring to section 37 which provides for the holding of a constitutional conference composed of the Prime Minister and the first ministers to be convened within a year of Part IV coming into force. **Under the provisions of section 37, the rights of the aboriginal people to be included under the Constitution of Canada** shall be the subject of that conference, and the Prime Minister shall invite representatives of the aboriginal people to participate in those discussions.

Section 35 was being entrenched, albeit with no consistent definition, or understanding as to what was being agreed to. It was for the First Ministers to define these terms in 1983.

However, before s. 35 was formally entrenched, one final amendment took place to the French portion of the text on November 25th. A Liberal MP had noted that the English version contained "recognized" and "affirmed" whereas the French version only had "affirmed" Tassé thought that the result was the same, but due to the importance that the word "recognize" had received during the debates, he suggested making the texts parallel. He says,

> Comme je l'ai expliqué à Jim Peterson, lorsque nous préparons la version français des textes préparés en anglais, comme celui-ci, nous évitons d'être l'esclave de la version anglaise. Dans le cas present, nous croyons que même si la version française ne parle que de confirmation, cette version parle à la fois de la reconnaissance et de confirmation, le résultat est le même.
>
> Cependant, parce que le mot "recognize" a pris une importance toute particulière dans le present débat, je crois qu'il serait sage d'amender la version française – si cela est encoure possible de façon à avoir un parallèle parfait entre les deux versions.

Thus, the clause would read:

> 35. (1) Les droit existants – ancestraux ou issus de traités – des peuples autochtone du Canada sont reconnus et confirmés.

And with this final addition, s. 35 was passed and became part of the *Constitution Act*, 1982. And yet, nobody knew exactly what "existing" rights were. As per the provinces, they had not been part of the discussions in the unilateral stage. Indigenous rights were also barely discussed in the summer of 1980, when the provinces had been part of the negotiations. Thus, the section had barely been considered by the provinces when it was adopted. Nobody quite knew what exactly was being entrenched, which was why "existing" was so important for the provinces. It gave them a starting point, 1982, from which to then elaborate or add additional rights.

Federal officials were often hinting that this was a legal issue leading up to its adoption, but also suggesting it could be solved politically through section 37. Nevertheless, for both the federal and provincial officials, this was just the *start* of a process. The precise identification and definition of those rights would be solved at the First Ministers Conference of 1983. Section 35 was not to be read in isolation, it was interconnected with section 37. The ambiguity was to be cleared at the conference. And so, for clarity on s. 35, we must turn there.