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FIRST MINISTERS' CONFERENCE
ON
ABORIGINAL CONSTITUTIONAL MATTERS

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A STATEMENT BY THE INDIAN NATIONS OF HOBBSMA

After centuries of suffering and oppression, the Indian people of Hobbsma, as well as the other Indian peoples of the region, are now beginning to realize their own potentialities and to demand a more active participation in the political and social life of their country. The Indian people of Hobbsma are now beginning to realize their own potentialities and to demand a more active participation in the political and social life of their country. The Indian people of Hobbsma are now beginning to realize their own potentialities and to demand a more active participation in the political and social life of their country.

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A STATEMENT BY THE INDIAN NATIONS OF HOBBEWA

After centuries of bad faith and broken promises, we see the present Conference, at a time of constitutional renewal, as a unique opportunity to forge a new relationship between Indian Nations and Canadians based on mutual respect and pluralism. For us, the term 'pluralism' recognizes a certain interdependence of our societies, but an interdependence which recognizes, as the Constitution Act, 1982 affirms in section 25 and 35, that we have authentic aboriginal and treaty rights of our own. These rights form the basis for our distinctive political and social institutions, and for a renewed relationship which can give rise to a trust which has been virtually destroyed by past governmental acts.

Recognizing the need to give more substantive content to the rights enumerated in the Constitution Act, the following papers primarily focus on specific and some general areas which need to be defined and clarified.

The substance of each paper referred to below, together with recommendations relating thereto, has been summarized to facilitate a general review of the pertinent areas.

A. Indian Spirituality as it Relates to Indian Cultural Sovereignty

Summary

The discussion of Indian spirituality compares the Indian view of the world to that of the Euro-Canadian. Whereas the latter emphasizes a fragmented, analytical and a generally narrowly-based philosophy, our way is to perceive all institutions, from the spiritual and cultural to the political and legal, as merely different ways of approaching the same ultimate reality.

Indian tribes across Canada have differences in languages, customs and traditions, but underlying these differences is a spiritual unity with the Great Spirit and a sharing of the same fundamental outlook about nature.

The Sacred Stem Ceremony, which is performed only rarely and represents the absolute binding together of the Nations, symbolizes this interrelationship of the spiritual and temporal dimensions of our existence. The ceremony was conducted by our leaders at the signing of the treaties and in all succeeding occasions of great significance and it is appropriate that it once again be used during this time of constitutional dialogue.

Recommendation

1. In the process of identifying and defining Treaty and Aboriginal rights, the negotiations must be conducted in the context of the all-encompassing scope of Indian spirituality and unity.

2. In order that this vitally important concept should be better expressed we suggest a preamble be added to the definition of 'aboriginal and treaty rights', similar in intent to the preamble to the Canadian Charter of Rights and Freedoms, which reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:....". In the case of the definition of Indian rights, the preamble might read:

"Whereas Indian peoples see the presence of the Great Spirit underlying the diversity of man and nature, it is hereby recognized and affirmed that the following aboriginal and treaty rights are the foundations upon which the integrity and wholeness of Indian society and government is based:"

B. A PROPOSED BILATERAL PROCESS

Summary

1. Of major concern to the Indian nations participating in this conference is the need to establish an ongoing bilateral process to carry out the work of defining aboriginal title and treaty rights and entrenching them without qualification in the Constitution.
2. Identification and definition of the various aboriginal and treaty rights of the Indian, Inuit, and Metis people are to be determined at this March 1983 Constitutional Conference, but once the present Section 37 is repealed in April 1983 (by operation of section 54 of the Constitutional Act) no obligation remains to convene another conference to deal with such matters.
3. The present amending formula contained in Part V of the Constitutional Act requires the approval of the Federal Government and at least seven of the Provinces containing at least fifty (50%) per cent of the population of all the Provinces. No provision is made for the mandatory requirement of Indian consent before there is a constitutional amendment abrogating or derogating from our treaty and aboriginal rights and this once again leaves us in a most vulnerable position.

Recommendations

1. A formal Bilateral process must be established to continue independently of any ongoing process which may arise from the March Constitutional Conference.
2. We propose that an office of Indian Rights Protection (OIRP) be created as soon as possible whose initial task would be to implement a workable bilateral process between the First Nations and the Government of Canada.

3. We require a formal commitment by the Federal Government to obtain Indian consent before approving any constitutional amendments affecting our rights.

4. Our aboriginal and treaty rights could be incorporated by reference into the Constitution by means of one or more schedules identifying and defining the rights of the various aboriginal peoples. There is precedent for this in sections 80 and 108 of the BNA ACT 1867. Failing agreement on incorporating a definition of our rights by reference, we propose an amendment to entrench an ongoing series of Constitutional Conferences to define and entrench our rights.

5. We therefore propose that the Constitution Act, 1982 be amended to replace the existing Section 37 with a new Section 37 to read as follows:

37(1) A constitutional conference composed of the Prime Minister of Canada, representatives of the aboriginal peoples of Canada, and the first ministers of the provinces shall be convened by the Prime Minister of Canada.....

.....once a year for five years following the coming into force of this Part.

OR (2) The conference(s) convened under subsection (1) shall consider constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada.

(3) The Constitution of Canada may be amended following the final conference convened under subsection (1) to include the aboriginal and treaty rights of the abor-

iginal peoples of Canada only with the approval of the authorized representatives of those aboriginal peoples.

(4) The Parliament of Canada shall establish an Office to provide for the protection of the aboriginal and treaty rights of the aboriginal peoples of Canada.

(5) Section 38(3) of the Constitution Act, 1982 shall not apply to any amendment made under subsection (3) of this section.

(6) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territories and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that in the opinion of the Prime Minister, directly affects the Yukon Territories and the Northwest Territories.

6. We propose that the Constitutional Act be amended as follows to provide for the consent of the aboriginal peoples affected by amendments derogating from their aboriginal and treaty rights:

Add a new section 38(5) as follows:

38(5) An amendment to the Constitution of Canada that derogates from the aboriginal and treaty rights of the aboriginal peoples of Canada shall require the consent of the authorized representatives of those aboriginal peoples affected by any such amendment.

7. As an alternative, a provision for Indian consent could be built into a later stage of the constitutional amendment process through an amendment to section 48 of the Constitution Act. This proposal is designed to reflect the federal government's role in the bilateral

process with the Indian nations. This would include a commitment by the federal government to obtain Indian consent before approving any future Constitutional amendments affecting our rights.

We propose that section 48 be amended as follows:

48(1) Subject to subsection (2), the Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

(2) The Queen's Privy Council for Canada shall not advise the Governor General to issue a proclamation under this part where an amendment derogates from the aboriginal and treaty rights of the aboriginal peoples without first obtaining the consent of the authorized representatives of those peoples affected by any such amendment.

8. We are also concerned that the Constitution Act does not allow amendments to be initiated by the Indian Nations. We therefore propose that the present section 46 be amended to add the following subsection:

46(2) The authorized representatives of the aboriginal peoples of Canada may initiate the procedure for amendment under sections 38, 41, 42 and 43 in relation to any constitutional matters directly affecting the aboriginal and treaty rights of those peoples.

C. Indian Self-Determination

As distinct peoples with a tradition extending back for thousands of years before the time of European contact, we possess an inherent right to self-determination, along with the related right to freely determine the form of our association with the existing Canadian state.

The Encyclopaedia Britannica (Mic.v.ix,pp 41-2) distinguishes two meanings of the term "self-determination":

"First, a state is said to have the right to self-determination in the sense of having the right to choose freely its political, economic, social, and cultural systems. Second, the right to self-determination is defined as the right of a people to constitute itself in a state or otherwise freely determine the form of its association with an existing state. Both meanings have their basis in the Charter (Article 1, paragraph 2, and Article 55, paragraph 1)."²

It is the second meaning, as quoted above, to which Indian people would particularly subscribe. There can be no doubt that Indians are and have always been a distinct "people" within the contemplation of Articles 1(2), and 55(1) of the United Nations Charter, and aspire to "freely determine the form of (their) association with an existing state", as provided for in the second branch of the definition in the Encyclopaedia Britannica.

We have never relinquished our right of self-government, which throughout the continent has taken a variety of forms, and has been acknowledged by successive British and Canadian governments. A characteristic feature of Indian self-government would be that it

proceeded by consensus presided over by community leaders, without a formal opposition as developed in the Westminster-style parliamentary model of government. After a thorough discussion of all sides of the issue being considered, the final result of the deliberation would be announced by the chiefs.

We regard this right to self-determination as both an aboriginal and a treaty right. It has been established by long historical practice, and has been recognized by treaty. For example, Treaty #6, signed in 1876 with the Plain and Wood Cree Indians provides:

They (the Indians) promise and engage that they will in all respects obey and abide by the law, and they will maintain peace and good order between each other, and also between themselves and other tribes of Indians....³

and Treaty #7 signed in 1877 with the Blackfeet of Bow River and Fort MacLeod provides:

They will maintain peace and good order between each other and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, Half Breeds or Whites, now inhabiting or hereafter to inhabit, any part of the said ceded tract....⁴

The direction in the above treaties to maintain peace and order was a general mandate in treaties which acknowledged (as did many of the instruments establishing British colonial self-government)⁵ the right of the Indian people to preserve public order and govern themselves. It is not too much to say that such a right has executive, legislative and judicial dimensions. While we remain an original people within

the Canadian Confederation
and resort to our own
resources and tra

the Canadian Confederation, we also make and administer our own laws, and resort to our own dispute-resolving processes in accordance with the treaties and traditional practices.

To effect a third form of government within confederation and in conformity with our political and cultural history, the following are the powers which we must have in order to make our government effective:

1. Executive and Legislative Powers
2. The Power to Administer Justice and Enforce Laws
3. The Powers of Taxation
4. The Power to Regulate Domestic Relations
5. The Power to Regulate Property Use
6. The Power relating to Social Programs
7. The Power to Determine the Official Language
8. The Power to Delegate
9. The Power to Define Indian Status and Membership

D. NATURAL RESOURCES

Our rights to the land and to the minerals thereof which arose prior to the creation of either Canada or any of the prairie provinces, are based on aboriginal title which is confirmed by the Royal Proclamation of 1763. Since we have never alienated our rights

by public transfer as stipulated by the Proclamation, such rights continue to be our exclusive property. Further, since at the signing of the treaties, it was understood by our leaders that only enough soil, the topsoil, as was required for agricultural purposes was surrendered to the Crown, we retained everything that is underneath.

While we recognize that s. 92A(1) of the Constitution Act does not speak in terms of provincial ownership of natural resources, it does, however, confer exclusive law-making powers over non-renewable resources to the provinces without the requirement of advice or consent of the Indians who own a fair share of these resources. To prevent this from happening we propose incorporation of a new subsection (7):

'92A(7) None of the foregoing provisions shall in any way affect or derogate from Indian ownership of non-renewable natural resources either on or off Indian reserves.'

E. TREATY AND ABORIGINAL RIGHTS

The precise meaning to be ascribed to Treaty and Aboriginal rights has long evaded legislation and judicial bodies in Canada. In their dogged efforts they have nearly always failed to consider the understandings of our leaders at the treaty signing, and have consistently used foreign laws and European models to try to arrive at the proper breath and scope of our rights.

We strongly maintain that our rights cannot be accurately portrayed by simply examining the written texts of the treaties and negotiations, but that it is absolutely necessary to understand the spirit within which these covenants were made and also what our leaders understood to be the essence of the treaties.

To occupy this land for thousands of years we possessed all the powers necessary to carry out our way of life.

These rights were not surrendered upon European occupation nor upon entering into treaty. These treaty rights include the following:

- (i) Self-determination, including judicial organizations, tribal court, police, culture and language.
- (ii) hunting, fishing and trapping;
- (iii) Education;
- (iv) Health and Medicine;
- (v) Social and Economic Development, including employment programs and welfare;
- (vi) Exemptions from Taxation and Seizure;
- (vii) Natural Resources;

F. THE IMPACT OF CHARTER PROVISIONS ON INDIAN RIGHTS

Our position as Indian people has been consistent that we possess all the rights that other Canadians have, but that additionally we possess rights which are unique because of our Aboriginal and Treaty origins. The "Charter of Rights and Freedoms" contained in sections 1 to 34 is predicated on the premise of equal rights for everybody in Canada. How this is going to affect our unique rights is conjectural.

It is our opinion that Sections 1, 2, 15, 16 to 23, 24(1), 25, 28, 33, 35 and 38 could be used by courts to derogate from our unique status.

G. "EXISTING" IN S. 35(1)

There is considerable debate in Canada as to the precise meaning of the word "existing" as it is found in s. 35(1). Trying to reach a consensus in the definition of Aboriginal and Treaty Rights has to date not been very successful. The addition of the word "existing" merely adds to this uncertainty. We are therefore still not confident that our rights are protected from past encroachments. Our recommendation is that the word "existing" be deleted from s. 35(1) because it does not benefit us in any way, but will in fact detract from the rights we presently enjoy.

H. THE REMOVAL OF S. 12(1)(b) INDIAN ACT FROM THE CONSTITUTION AGENDA

Section 12(1)(b) is an artificially imposed Indian status restriction by Parliament without Indian consultation. Since its enactment, considerable hardship has been caused for Indian community because, in many instances, the entire family unit has been at worst fragmented and dislocated and at the least irretrievably altered.

Unfortunately, a simple repeal of the offending section is not now possible because in the succeeding generations since its enactment, the question of Indian status has come to be inextricably bound with other weighty political and economic considerations. Repeal of

s. 12(1)(b) without provision for the resolution of associated problems could, instead of improving the life of the Indian community, actually cause an even greater injustice to occur.

Indian Nations are intimately knowledgeable of their own people and communities and it must accordingly be left up to them to resolve the question "who is an Indian?" and also of "membership" in an Indian Tribe. This is the way it was done in the past and it must continue to be.

The foregoing statement is intended to be a summary of the relevant materials relating to the subject matters referred to therein, however, a further discussion of the subject matters is contained in the attached papers and it is recommended that the readers avail themselves to them.

INDIAN SPIRITUALITY AS IT RELATES TO INDIAN CULTURAL SOVEREIGNTY

For us as Indians it is impossible to separate the spiritual from the cultural, social and political dimensions of life. These are all different ways of approaching the same ultimate reality - the great spirit of existence which is basic to all living beings. There are, of course, differences in language, customs and traditions, but underlying these differences there is a spiritual unity expressive of our relation to the Great Spirit and our sharing the same fundamental outlook. While there are many differences in detail among the various Indian nations, reflecting different tribal memories, modes of production and political systems, as well as variations in art forms, rituals, customs and values, there are also close similarities. We uniformly respect our elders, love our children, practice co-operation, value self-reliance and share an all-encompassing relationship to the universe. Our characteristic approach to the universe is a holistic one which distinguishes us from our neighbours. At the same time, we are more fully in relation to God and nature, as all-embracing realities, but since the Industrial Revolution and the rise of modern technology, the preoccupation of Europeans and Canadians has been to fragment - to focus analytically, by mathematical and scientific procedures, on smaller and smaller problems. In a manner of speaking, the atom and the cell have become more the objects of study than the larger entities of which they form a part. As Indians, this fragmented approach to things is alien. We are not saying that there is not an important place for the study of these more narrowly-based questions, but at the same time the parts must be related to the whole in a grand context - a bringing together - and, with respect, we would argue that

INDIAN SPIRITUALITY AS IT RELATES TO INDIAN CULTURAL SOVEREIGNTY

For us as Indians it is impossible to separate the spiritual from the cultural, social and political dimensions of life. These are all different ways of approaching the same ultimate reality - the great chain of existence which is basic to all living beings. There are, of course, differences in language, customs and traditions, but underlying these differences there is a spiritual unity expressive of our relation to the Great Spirit and our sharing the same fundamental outlook. While there are many differences in detail among the various Indian nations, reflecting different tribal memories, modes of production and political systems, as well as variations in art forms, rituals, customs and values, there are also close similarities. We uniformly respect our elders, love our children, practice co-operation, value self-reliance and share an all-encompassing relationship with Mother Earth. Our characteristic approach to the universe is a 'holistic' one, which distinguishes us from our neighbours. At one time, European cultures aspired more fully to relate man to God and nature, as all-embracing realities; but since the Industrial Revolution and the rise of modern technology, the preoccupation of Europeans and Canadians has been to fragment - to focus analytically, by mathematical and scientific procedures, on smaller and smaller problems. In a manner of speaking, the atom and the cell have become more the objects of study than the larger entities of which they form a part. As Indians this fragmented approach to things is alien. We are not saying that there is not an important place for the study of these more narrowly-based questions, but at some time the parts must be related to the whole in a grand synthesis - a bringing together - and, with respect, we would argue that

it is in this 'holistic' approach to man, nature, and the Great Spirit which is the origin of all things, that Euro-Canadian culture in its present phase is defective.

We regard the above differences in basic social philosophy and in our fundamentally religious view of the universe as of the utmost significance. The emphasis on the preservation of our distinctive aboriginal and treaty rights in section 25, 35 and 37 of the Constitution Act, 1982, acknowledges the uniqueness of our tradition, a tradition founded on a basically spiritual view of reality.

There are however great dangers posed to our traditions by the assimilative pressures of the dominant Euro-Canadian culture, assisted by the seductive presence of the mass media, and the encroachment of institutions which do not adequately reflect our culture. These strong alien pressures have disrupted our educational system and distorted our social structures and processes. We have lost conceptual and logistical control of our society. Our exercise of self-determination has lost its vigour.

The interrelationship of Indian spiritual with political and legal concepts is brought out by the 'Sacred Stem Ceremony' which is performed only rarely and represents the absolute binding together of the nations, agreeing to the terms and conditions of solemn treaties, which only the Supreme Being can remove.

This ceremony, practised before consultations and at early morning light was a constant feature of the signing of treaties. The Sacred Stem of the Indian Nation has been transmitted from one generation of Sacred Stem Keepers to another for hundred of years. The cloths which wrap the

Sacred Stem are so aged and delicate that extreme care must be taken when it is to be exposed.

The Sacred Stem is only brought out once each year for the Sun Dance, or when there is an agreement between nations which will affect our people for many generations. The Stem cannot be taken away from our land where all treaties must be made and signed. Such treaties, whenever the Sacred Stem is present, invariably contain the words: "As long as the sun shall shine, the rivers flow and the grass grows". Such phraseology, accompanied by such ancient and solemn religious observances, signifies that the terms of the treaties must be observed with absolute good faith and the utmost exactness.

In the past, during the ceremony each Chief and headman prayed in succession with the Stem, after which it was retired into its lodging place. Lieutenant- Governor Morris, who presided at the signing of solemn Indian treaties, well understood the significance for the ceremony, of the presence of the Sacred Stem. For his own part, he brought forward the Holy Bible on which he took an oath binding the Queen and her successors forever to observe the terms of the treaty.

This time of constitutional renewal presents our people with opportunities to reinforce our cultural sovereignty, but also poses dangers. A strong definition of aboriginal and treaty rights will signify that future generations of Indian children will have a more positive framework in which to develop and expand their culture themselves. A weaker definition could augur the ultimate disappearance of a robust Indian culture.

We would contend that our approach to the larger issues of existence, in a spiritual context, should have an important impact on the interpretation of those provisions in the Charter and Constitution Act, 1982, relating to Indians. As mentioned above Euro-Canadian derived cultures

tend more to analyze concepts, and to proceed by abstract deductive reasoning than we have done. Such cultures tend to compartmentalize problems whereas we prefer to see things in terms of their entire context; in wholes rather than parts. We would therefore strongly recommend that when this Conference interprets the 'aboriginal and treaty rights' referred to in section 25 and 35, or emphasizes in s. 26 of the Charter that the guarantee of certain rights elsewhere "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", that the different individual definitions must be related to a meaningful whole. Since the guarantee of Indian religion and culture which is expressed by the mentioned 'aboriginal and treaty' rights is a guarantee relating to an integral way of life, all the specific guarantees should be seen as being related to a larger whole.

In order that this vitally important concept should be better expressed we would suggest that a preamble be added to the definition of 'aboriginal and treaty rights', similar in intent to the preamble to the Canadian Charter of Rights and Freedoms, which reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:....". In the case of the definition of Indian rights, the preamble might read:

"Whereas Indian peoples see the presence of the Great Spirit underlying the diversity of man and nature, it is hereby recognized and affirmed that the following aboriginal and treaty rights are the foundations upon which the integrity and wholeness of Indian society and government is based:"

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THE SECTION 37 CONSTITUTIONAL CONFERENCE
MARCH 15-16, 1983 AND THE BILATERAL PROCESS

Section 37 of the new Canadian Constitution provides a means by which the existing Aboriginal and Treaty rights of the Aboriginal peoples of Canada are defined and included in the Constitution. The Constitutional conference convened March 15-16, 1983 pursuant to section 37 of the Constitution Act, 1982 will consider several constitutional matters affecting the Indian, Inuit and Metis people of Canada.

It is a matter of great concern to the Indian nations that the constitutional process set up under section 37 to identify and define our Aboriginal and Treaty rights allows the provinces of Canada to participate in this process. Not only are the Aboriginal peoples denied any formal voice in this process but the provinces and the federal government are the ones given the power to negotiate the Constitution of Canada.

THE SECTION 37 CONSTITUTIONAL CONFERENCE
MARCH 15-16, 1983 AND THE BILATERAL PROCESS

Some months ago, officials of the Assembly of First Nations met in Ottawa to discuss negotiations with the Prime Minister and federal officials. The Assembly has established a formal bilateral process with the federal government which would facilitate recognition of Aboriginal title and Indian rights, and deal with a wide range of other matters affecting the Indian people.

The process of bilateral negotiations will also involve some work with the various jurisdictions of the Government of Canada. The up-coming negotiations with the provinces will be aimed at ensuring that the rights and interests of the Indian people are protected and that the federal government's role is not undermined. The process of bilateral negotiations will also involve some work with the provinces and the federal government.

THE SECTION 37 CONSTITUTIONAL CONFERENCE,
MARCH 15-16, 1983 AND THE BILATERAL PROCESS

I. INTRODUCTION

Section 37 of the new Canadian Constitution provides a means by which the "existing aboriginal and treaty rights" of the aboriginal peoples of Canada can be defined and included in the Constitution. The Constitutional Conference convened March 15-16, 1983 pursuant to section 37 of the Constitution Act, 1982 will consider several constitutional matters affecting the Indian, Inuit and Metis people of Canada.

It is a matter of great concern to the Indian nations that the constitutional process set up under section 37 to identify and define our aboriginal and treaty rights allows the provinces of Canada to participate in this process. Not only are the aboriginal peoples denied any formal voting rights but the provinces and the federal government are the ones given the power to define and entrench our rights in the Constitution of Canada.

Some months ago, officials of the Assembly of First Nations (AFN) initiated discussions with the Prime Minister and federal officials. The aim was to establish a formal bilateral process with the federal government which would facilitate recognition of aboriginal title and Indian rights, and deal with a wide range of other matters affecting the Indian people today.

Our rights as Indian nations have historically been a matter within the exclusive jurisdiction of the Government of Canada. Our bilateral relationship with the Crown arose from the need to protect Indian rights and interests. Local and provincial governments could not be relied upon to protect Indian rights against the frequently adverse interests those governments represented.

The existing constitutional process cannot adequately resolve the many complex issues affecting our people today. A formal bilateral process must be established to continue independently of any ongoing process which may arise from the March Constitutional Conference. The exact nature of this bilateral process and the institutions required to implement it will depend upon how much can be accomplished through the constitutional process.

We propose that an Office of Indian Rights Protection (OIRP) be created as soon as possible. The initial task of the OIRP will be to implement a workable bilateral process between the First Nations and the Government of Canada. A primary feature of such formal bilateral process will be a commitment by the federal government to obtain Indian consent before approving any constitutional amendments affecting our rights.

The OIRP could also provide valuable technical and research assistance to facilitate the work of identifying and defining our aboriginal and treaty rights. This Office would continue, however, beyond the present constitutional process. It will be the central institution through which Indian-Crown Canada relations will be conducted in the future.

We fully appreciate the difficulties involved in using the existing constitutional process to deal with the many issues concerning our people today. The lack of any ongoing process to continue the work of defining and entrenching our rights is of great concern. The present constitutional amending formula also fails to protect Indian interest. We therefore propose several amendments aimed at achieving Indian control of amendments affecting our interests.

II. THE MARCH CONFERENCE AND ONGOING PROCESS

The agenda for the Section 37 Constitutional Conference is to include identification and definition of the various aboriginal and treaty rights of the Indian, Inuit and Metis people. The first ministers are asked to consider a wide range of matters affecting these people today.

It has been suggested by our constitutional advisors that our aboriginal and treaty rights could be "incorporated by reference" into the Constitution by means of one or more schedules identifying and defining the rights of the various aboriginal peoples. It is felt that an amendment is not necessary since nothing new is being added to the Constitution. The schedules would merely be giving content to the terms "aboriginal and treaty rights" already found in section 35 and 37 of the Constitution. Schedules identifying the rights of the Indian nations have been prepared for presentation and incorporation by this means.

Failing agreement on incorporating a definition of our rights by reference, we propose an amendment to entrench an ongoing series of Constitutional Conferences to define and entrench our rights. We fully appreciate that there is little hope that the many complex issues affecting our people can ever be fully discussed and agreement reached in a single two-day conference. Our concern is that once the present Section 37 is repealed in April, 1983 (by operation of section 54 of the Constitutional Act) no obligation remains to convene another conference to deal with such matters.

1. Ongoing Process

One primary objective at the March Conference will therefore be to establish an ongoing process to carry on the work of defining and entrenching aboriginal title and treaty rights. We propose that the Constitution Act, 1982, be amended to replace the existing Section 37 with a new Section 37 as

set out below:

37(1) A constitutional conference composed of the Prime Minister of Canada, representatives of the aboriginal peoples of Canada, and the first ministers of the provinces shall be convened by the Prime Minister of Canada....

....once a year for five years following the coming into force of this Part.

ORwithin two years after this Part comes into force.

(2) The conference(s) convened under subsection (1) shall consider constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada.

(3) The Constitution of Canada may be amended following the final conference convened under subsection (1) to include the aboriginal and treaty rights of the aboriginal peoples of Canada only with the approval of the authorized representatives of those aboriginal peoples.

(4) The Parliament of Canada shall establish an office to provide for the protection of the aboriginal and treaty rights of the aboriginal peoples of Canada.

(5) Section 38(3) of the Constitutional Act, 1982 shall not apply to any amendment made under subsection (3) of this section.

(6) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territories and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that in the opinion of the Prime Minister, directly affects the Yukon Territories and the Northwest Territories.

Commentary: Our proposed s of Constitutional Conf

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Our proposed section 37(1) seeks to establish an ongoing series of Constitutional Conferences. Representatives of the aboriginal people are to have an equal voice with the first ministers in discussions at each of these conferences. It is suggested that a continuing committee be established as well to work in the intervals between formal conferences. Modeled after the Continuing Committee of Ministers on the Constitution (the CCMC), such a working committee would work through a list of items set by the participants at the March Conference.

Each of the aboriginal peoples, the federal and provincial governments would be entitled to representation on this committee. The CCMC worked to achieve a consensus on constitutional changes. A consensus format is in keeping with the traditional method of decision making within many of our Indian nations. However, we would want assurance that our understanding of the treaties and our other rights as aboriginal nations will receive at least equal consideration with the concerns of the provincial governments.

A consensus format will be acceptable at the committee level only if we are allowed a formal voice in constitutional matters affecting our rights, as set out in the proposal for a new section 37(1). Other proposals providing for Indian consent to future amendments affecting our rights will be discussed later in our presentation.

The CCMC (our model for this proposal) was co-chaired by a federal minister and a representative of the provinces. Such an arrangement would not be appropriate for a committee attempting to define and entrench the rights of the aboriginal peoples. Because of the wide diversity of interests involved in these series of constitutional talks an independent chairperson would be wanted.

Such a person could, for example, be Mr. Emmett Hall. He has expressed an interest in assisting the Indian people in the present round of constitutional talks. His judgment as a member of the Supreme Court in the Calder case shows him to be at least sympathetic to Indian interests. His distinguished career has also earned him the respect of both federal and provincial leaders.

Continuing our commentary on the proposed amendment set out above, subsection 37(3) requires that the final definition of aboriginal and treaty rights which will be entrenched in the Canadian Constitution be acceptable to the aboriginal peoples. The present amending formula makes no provision for Indian consent to amendments entrenching our rights. Subsection (1) above would give the aboriginal peoples voting rights at future conferences but without a provision such as subsection (3), the federal and provincial governments could simply decide among themselves as to which of our rights they will recognize and entrench their version without any input at all from the Indian people.

Subsection (4) requires the federal government to insure that these rights receive ongoing protection through an office such as the Office of Indian Rights Protection. (See appendices A and B for diagrams of the structure and process of the proposed OIRP.) An Office of Indian Rights Protection would be set up as the institution primarily responsible for the protection of Indian rights. It will also be the basic element in implementation of a formal Indian-Crown Canada bilateral process. Our proposals for the structure and functioning of such an institution will be discussed later as a part of the bilateral process we wish to see established.

Subsection (5) of our proposed section 37 seeks to overcome section 38(3) of the Constitution Act and prevent provinces from opting out

of amendments entrenching aboriginal and treaty rights. The opting out provision in section 38(3) would allow individual provinces to refuse to acknowledge the rights of Indians residing in that particular province even if the Constitution is amended to entrench Indian rights. This is of particular concern in areas of the Maritimes, British Columbia and Ontario where no treaties have been signed. Recognition of aboriginal title in these areas could be seen as derogating from provincial rights and powers. In addition to our new section 37(5), section 38(3) itself should be amended to add the phrase "subject to subsection (5) of section 37" at the beginning of the existing clause.

Amendment of the Constitution Act to include a new section 37 as outlined here will require the approval of federal and provincial governments under the existing amending formula. Failing agreement on entrenchment of an ongoing Constitutional process such as this, we seek the support of all participants at the March Conference to simply adjourn the Conference to allow further study of the issues raised.

Although the existing Section 37 will be repealed, adjourning the Conference will allow it to be reconvened at some future date as may be agreed upon by all participants. A working committee as previously discussed should be set up to explore the issues with a view to reaching agreement and reporting back to a reconvened Constitutional Conference.

We would ask for a public commitment and agreement from the first ministers to continue the process of identifying and entrenching our rights in the Constitution. Whether or not we are able to secure an amendment to entrench an ongoing series of Constitutional Conferences in which we will have an equal voice with the provinces, the federal government will be asked to formalize a bilateral process which will provide full protection of our rights.

2. Indian Consent

Another major concern of the First Nations is the absence of a requirement that Indian consent be obtained before the Constitution can be amended to abrogate Indian rights. An amendment to entrench such a consent clause in Part V of the Constitution Act would amount to a change in the present amending formula. Under section 41, therefore, unanimous consent of all the provinces and the federal government will be required.

We propose that the Constitution Act be amended as follows to provide for the consent of the aboriginal peoples affected by amendments derogating from their aboriginal and treaty rights:

Add a new section 38(5) as follows:

38(5) An amendment to the Constitution of Canada that derogates from the aboriginal and treaty rights of the aboriginal peoples of Canada shall require the consent of the authorized representatives of those aboriginal peoples affected by any such amendment.

As an alternative, a provision for Indian consent could be built into a later stage of the constitutional amendment process through an amendment to section 48 of the Constitution Act. This proposal is designed to reflect the federal government's role in the bilateral process with the Indian nations. This would include a commitment by the federal government to obtain Indian consent before approving any future Constitutional amendments affecting our rights.

We propose that section 48 be amended as follows:

48(1) Subject to subsection (2), the Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

(2) The Queen's Privy Council for Canada shall not advise the Governor General to issue a proclamation under this part where an amendment derogates from the aboriginal and treaty rights of the aboriginal peoples without first obtaining the consent of the authorized representatives of those peoples affected by any such amendment.

3. Indian Initiation of Constitutional Amendments

We are also concerned that the Constitution Act does not allow amendments to be initiated by the Indian nations. We therefore propose that the present section 46 be amended to add the following subsection:

46(2) The authorized representatives of the aboriginal peoples of Canada may initiate the procedure for amendment under sections 38, 41, 42 and 43 in relation to any constitutional matters directly affecting the aboriginal and treaty rights of those peoples.

4. Section 35

We further propose that section 35 of the Constitution Act be amended to remove the word "existing". The federal government denies that the addition of the word "existing" to the clause changed its meaning in any way. We strongly disagree.

Standard rules of statutory interpretation will require the courts interpreting such a clause to give effect to each word in it. It could very easily be seen as limiting our rights to those not already abrogated and denied by legislation and executive action at the time the Constitution Act was passed in 1982.

If, as the federal government insists, the word does not change the meaning of the clause in any way, there should be no objections to its removal.

III. THE BILATERAL PROCESS

The historical relationship between the Crown and the Indian peoples of Canada places Indians in a unique constitutional position in Canada today. The Indian leaders of the First Nations rely on this historical relationship with the Crown to enter into bilateral negotiations with the Government of Canada.

Although such negotiations are presently focused on the upcoming Constitutional Conference, Indian leaders wish to see the historically bilateral relationship with the Crown formalized and institutionalized at this time. It must be established to continue independently from any ongoing process arising from the Section 37 Conference itself.

1. The Historical Bilateral Relationship

When the Dominion of Canada was created in 1867, the federal Parliament was given the exclusive power and responsibility over all matters relating to Indians and lands reserved for them. The centralized power found in section 91(24) of the British North America Act, 1867 grew out of the desire of the Imperial Crown to protect the indigenous peoples in its colonies. Local and provincial governments could not be relied upon to protect Indian rights against the frequently adverse interests those governments represented.

The Royal Proclamation of 1763 first declared the Crown's protection of the "several Nations or Tribes of Indians with whom we are connected." It was just and reasonable to do so. At the time, it was also essential not only to the interests of the Crown but to the security of the colony as well. This was recognized and acknowledged by the British Crown in the Proclamation itself.

Both as a matter of justice and as a military necessity, the British Crown chose to respect Indian rights. Access to Indian lands was obtained by Crown officials in the colonies under a series of treaty surrenders.

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In return Her Majesty The Queen undertook several obligations to the Indian peoples. Many of these obligations were written into the treaties, some were not.

In 1870 in the west, the Government of Canada acquired jurisdiction over the lands surrendered under treaty when Rupert's Land and the Northwest Territories became part of Canada. The Order in Council admitting these lands to Canada did so on the condition that the Government of Canada continue to observe the "equitable principles" which had uniformly governed the British Crown in its dealings with the aboriginal peoples. The Canadian government expressly accepted the duty to make provision for the protection of the Indian tribes whose interests and well-being were involved in the transfer of these lands.

In 1930, Canada transferred its interest in these lands to the provincial governments of Manitoba, Saskatchewan and Alberta. The Government of Canada, however, again confirmed its historical duty to fulfil the Crown's obligations to the Indians. These Natural Resources Transfer Agreements and the duty of the federal government to the Indians of each province have been incorporated into the Canadian Constitution by the British North America Act, 1930 and the Constitution Act, 1982.

Patriation of the Canadian Constitution in 1982 left the Government of Canada solely responsible for the preservation and protection of Indian rights and freedoms. The jurisdiction conferred upon the Government of Canada by section 91(24) is unlike any other head of power vested in either level of government in Canada today. No other ethnic or cultural group in Canadian society is subject to such exclusive power.

Justice and humanity require that such an unprecedented power be exercised solely in the best interests of the persons subject to that power.

The essence of and rationale for the bilateral relationship established in

Indian peoples
Canada today.

1763 by the Imperial Crown continues to be the protection of Indian rights and interest.

2. Office of Indian Rights Protection

To ensure the proper working of this bilateral process and provide protection for Indian rights, we propose that an Office of Indian Rights Protection (OIRP) be established. The proposed structure and process of the office is set out in diagrams in Appendices A and B

The initial task of the Office would be to clarify and implement a workable bilateral process between the First Nations and the Government of Canada. This would involve assistance in negotiating a "Grand Treaty" as discussed above to formalize the historical Indian -Crown Canada relationship. A primary objective of this process would be Indian control of the internal affairs of the First Nations.

There is also a strong need to clarify responsibility for the provision of funding and delivery of services (especially health, education and social services) to treaty Indians residing on and off the reserves. This could include a role in establishing the institutions of Indian self-government.

The character and composition proposed for the OIRP attempts to reflect Indian aspirations in a structure that can be accommodated within the present Canadian system. It draws upon models familiar to both Indian and federal governments, such as the Canadian Indian Claims Commission and the Indian Commission of Ontario. A sound statutory base would be required to ensure the respect, recognition, political support and funding essential to an effective body.

It is proposed that this Office of Indian Rights Protection be established as an adjunct of the Governor General's Office. Its functions would be carried out under the direction of an independent secretariat having

a mandate from both the Crown and the First Nations.

The Office of Indian Rights Protection could also provide valuable technical and research assistance to the First Nations and the federal government in the work of defining and codifying aboriginal, treaty and the other rights of the Indian peoples. A central repository could be established within the OIRP for all documents and information relating to Indian history and rights.

As part of the continuing bilateral process, the OIRP would also be given the power to adjudicate or mediate disputes over governmental jurisdiction, natural resources, land entitlements, hunting and fishing rights, taxation and membership or status. The treatment of Indian rights in the past by Canadian courts (whose judges are appointed by the Government of Canada) provides a strong argument for the creation of an independent tribunal to deal with all matters affecting Indian rights.

It is also envisioned that the OIRP would play an important intervention and advocacy role in defence of Indian rights. Ongoing protection would be provided through the monitoring of all federal and provincial legislation, regulations and policy affecting Indians and Indian lands. To be effective in this role, the Office would need some power to compel changes when discussion and negotiation failed to achieve an acceptable change.

3. A "Grand Treaty" Agreement

The constitutional amendments proposed in the first portion of our presentation are designed to provide constitutional protection for our rights. The exact nature of the bilateral process will depend upon how much can be accomplished through the constitutional process. We repeat, however, that the urgent need for a formal bilateral process between the Indian nations and Crown-Canada will only be increased if no ongoing constitutional process

is established to define our aboriginal and treaty rights.

We wish to see the historical Indian-Crown Canada bilateral relationship formalized by means of a "Grand Treaty" between the First Nations and the Government of Canada. This would be a comprehensive agreement setting out the structure of our future relations with the Crown. It will contain several explicit provisions designed to provide continuing protection for our rights which have been so insiduously abrogated in the past.

Indian consent would be required before any rights or property could be taken from our people. Until such time as we are able to secure an amendment to the Constitution to provide for Indian consent, the federal government will agree to obtain Indian consent before approving any amendment affecting Indian rights. The "Grand Treaty" would set out and define our aboriginal, treaty and other rights.

IV. CONCLUSION

The existing constitutional process established under Section 37 of the Constitution Act cannot adequately resolve the many complex issues affecting our people today. It makes no provision for full Indian participation in the work of defining and entrenching our rights. It allows the provincial governments to veto and opt-out of constitutional amendments which would fully protect our rights.

We therefore propose that a formal bilateral process be established between the First Nations and the Government of Canada. The bilateral process will reflect our historical relationship with the Crown. It can be used to facilitate the recognition of our aboriginal and treaty rights and deal with a wide range of other matters concerning our people today.

We propose that an Office of Indian Rights Protection be created as soon as possible to implement a formal bilateral process and provide continuing protection for our rights. The Government of Canada is asked

to give us a commitment to
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to give us a commitment to obtain Indian consent before approving any constitutional amendments affecting our rights.

We further propose several constitutional amendments designed to entrench an ongoing process to continue the work of defining and entrenching our rights. We also propose that the existing amending formula be changed to provide for Indian consent to future amendments affecting our rights.

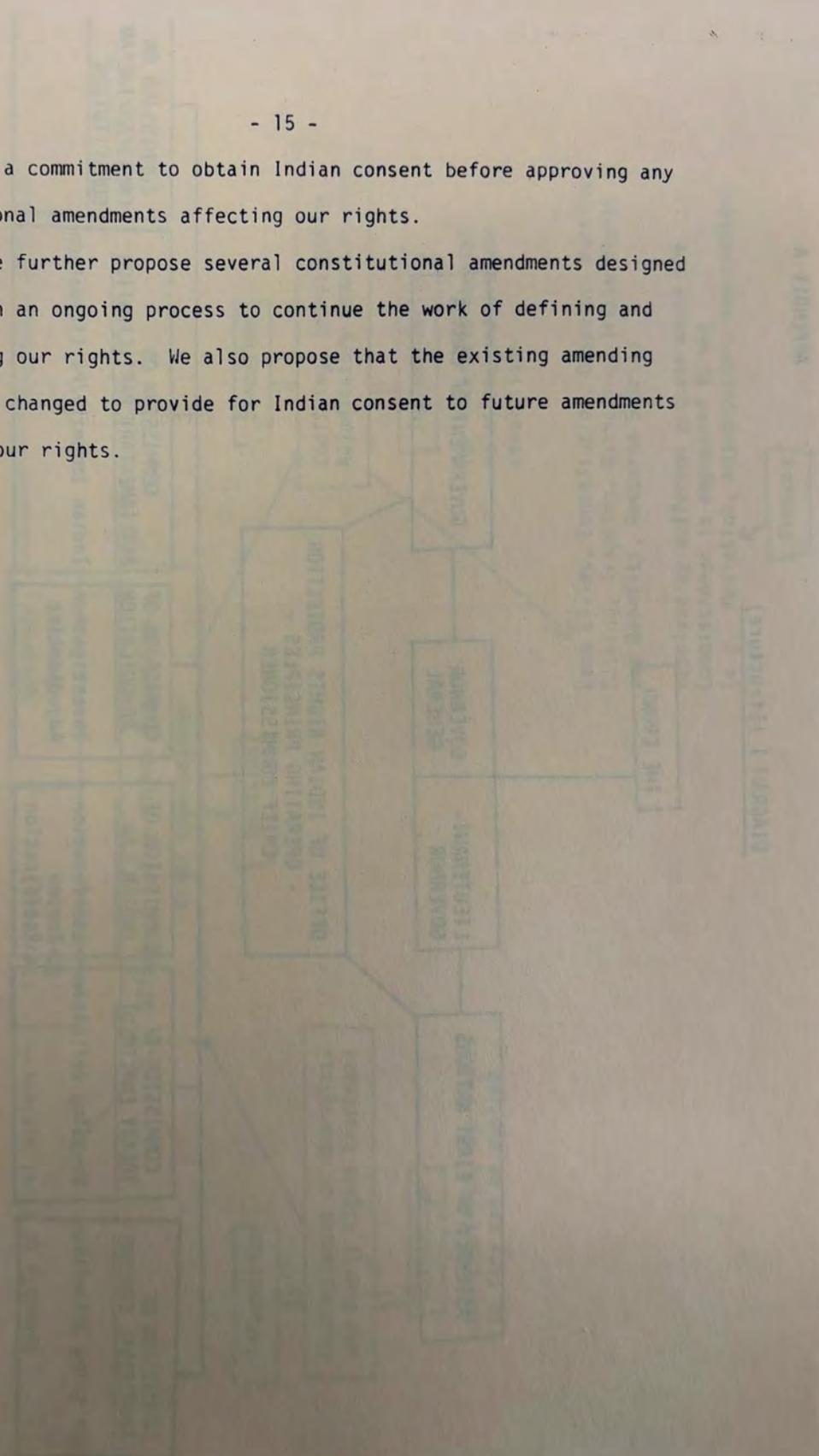


DIAGRAM I (Structure)

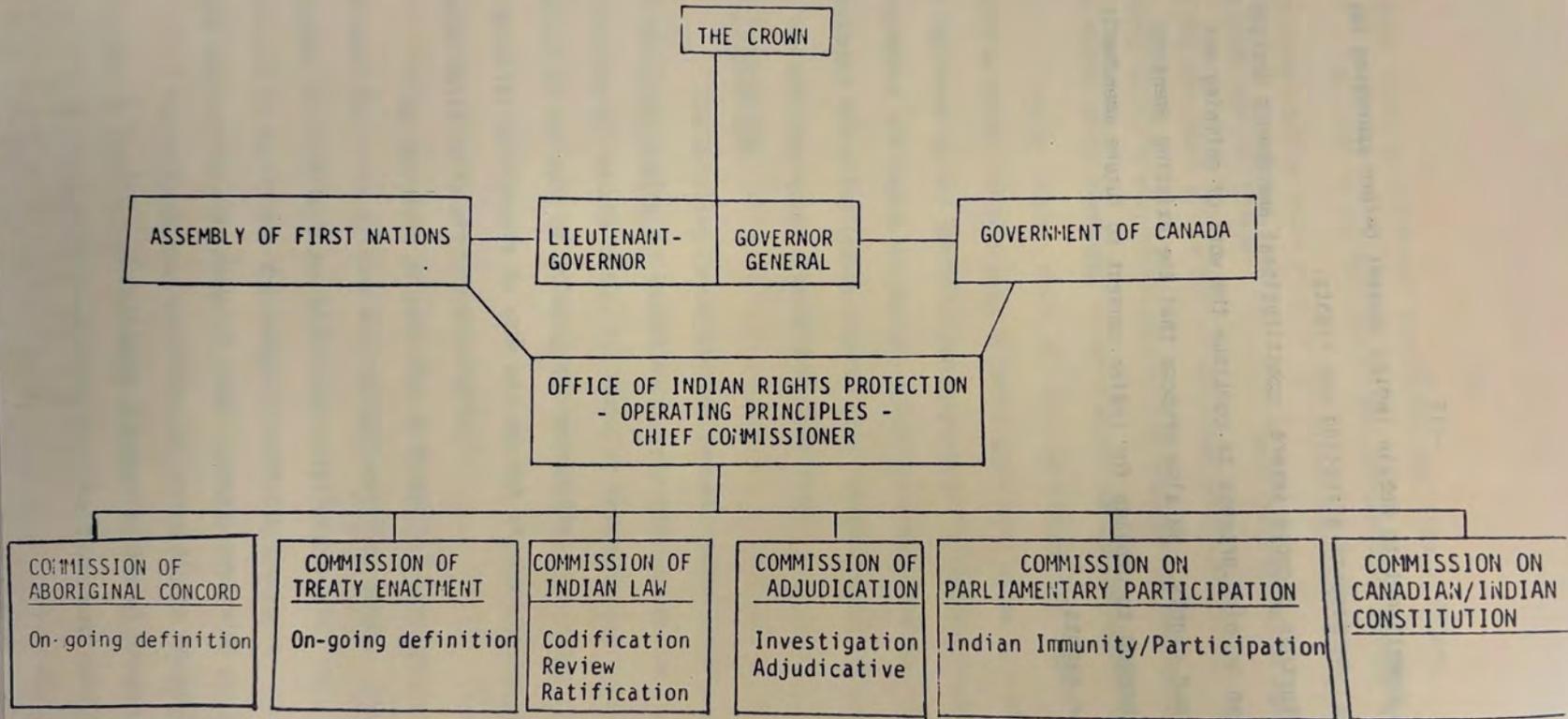
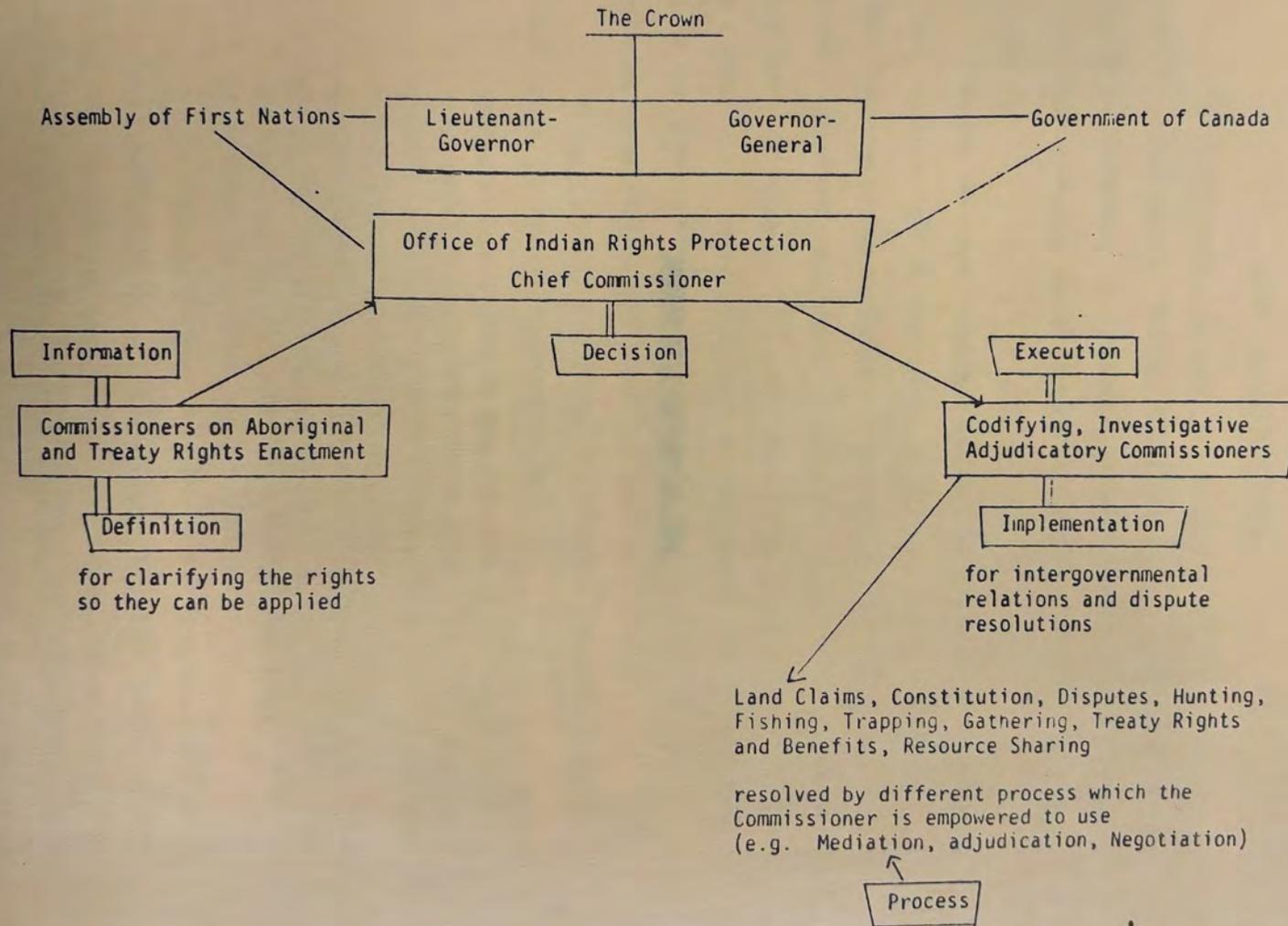


DIAGRAM 2 (Process)



INDIAN SELF-DETERMINATION

The Constitution Act, 1982, may be said to reflect "special status" for Indian people. Section 91(24), of course, confers jurisdiction on Parliament in relation to "Indians, and lands reserved for the Indians", in effect having Indian as one of three distinct groups expressly referred to in the Act.

Before the above statute was enacted, of course, Indian peoples had long practised self-determination. As distinct people inhabiting defined territory to the exclusion of other people, Indians had an inherent right of self-government. Insofar as, in many parts of the country, such a condition still prevails, they continue to possess such a right. Such a right is not interpreted as being inconsistent with their membership in the Canadian Federation. INDIAN SELF-DETERMINATION The presence of Indian people at this Conference will assist.

The Encyclopaedia Britannica (Vol. 11, pp. 41-2) distinguishes two meanings of the term "self-determination":

"First, a state is said to have the right of self-determination in the sense of having the right to choose freely its political, economic, social, and cultural systems. Second, the right of self-determination is defined as the right of a people to constitute itself in a state or otherwise freely determine the form of its association with an existing state. Both meanings have their basis in the Charter (Article 1, paragraph 2, and Article 55, paragraph 1).

It is the second meaning, as quoted above, to which Indian people would particularly ascribe. There can be no doubt that Indians are and have always been a distinct "people" within the contemplation of Article 1(2), and (4) of the Charter. Indians, and states to "freely determine the form of their association with an existing state", as also set out in the

INDIAN SELF-DETERMINATION

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The Encyclopaedia Britannica (Mic.v.ix, pp 41-2) distinguishes two meanings of the term "self-determination":

"First, a state is said to have the right of self-determination in the sense of having the right to choose freely its political, economic, social, and cultural systems. Second, the right to self-determination is defined as the right of a people to constitute itself in a state or otherwise freely determine the form of its association with an existing state. Both meanings have their basis in the Charter (Article 1, paragraph 2, and Article 55, paragraph 1)." ²

It is the second meaning, as quoted above, to which Indian people would particularly subscribe. There can be no doubt that Indians are and have always been a distinct "people" within the contemplation of Articles 1(2), and 55(1) of the United Nations Charter, and aspire to "freely determine the form of (their) association with an existing state", as provided for in the

second branch of the definition in the Encyclopaedia Britannica.

We have never relinquished our right of self-government, which throughout the continent has taken a variety of forms, and has been acknowledged by successive British and Canadian governments. A characteristic feature of Indian self-government would be that it proceeded by consensus presided over by community leaders, without a formal opposition as developed in the Westminster-style parliamentary model of government. After a thorough discussion of all sides of the issue being considered, the final result of the deliberation would be announced by the chiefs.

We regard this right to self-determination as both an aboriginal and a treaty right. It has been established by long historical practice, and has been recognized by treaty. For example, Treaty #6, signed in 1876 with the Plain and Wood Cree Indians provides:

They (the Indians) promise and engage that they will in all respects obey and abide by the law, and they will maintain peace and good order between each other, and also between themselves and other tribes of Indians...³

and Treaty #7 signed in 1877 with the Blackfeet of Bow River and Fort MacLeod provides:

They will maintain peace and good order between each other and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, Half Breeds or Whites, now inhabiting or hereafter to inhabit, any part of the said ceded tract...⁴

The direction in the above treaties to maintain peace and order was a general mandate in treaties which acknowledged (as did many of the instruments establishing British colonial self-government)⁵ the right of the Indian people to preserve public order and govern themselves. It is not too much to say

that such a right has
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that such a right has executive, legislative and judicial dimensions. While we remain an original people within the Canadian Confederation, we also make and administer our own laws, and resort to our own dispute-resolving processes in accordance with the treaties and traditional practices.

It might be suggested that in the context of world history extending over thousands of years, the advent of the territorial nation-state, five hundred years or so ago, is a relatively recent phenomenon. With the development of the European nation-state model has come centralized government, an absolutist concept of sovereignty (or supreme law-making power) and a decline in the pluralism that characterized earlier epochs.

The Algiers Declaration of the Rights of Peoples, as issued in 1976, presents an important emphasis related to the above development. In the words of Richard Falk, professor of international law at Princeton University:

...the Algiers Declaration is itself an assertion of popular sovereignty, asserting that it is the people of the world that are the fundamental source of authority with respect to governing process. Somehow statist tendencies have distorted this situation, making it appear as if governments are the ultimate, if not the only source of authority with respect to human rights. The Algiers Declaration, drawing inspiration from the Magna Carta tradition, is a framework of rights asserted by and for the people of the world over and against the claims and activities of government, multinational corporations and international institutions.⁶

The above passage is cited to emphasize that there should be more room for pluralism within the modern Canadian federation. This would not concede a right to every group to govern themselves, but would recognize the traditional Indian right of self-determination. We differ from others

in that we inhabited the Continent when the Europeans arrived, but by a long historical process have been compelled to accept institutions which were not of our own making or choice. This distinguishes us from our neighbours of European ancestry. The acknowledgement of self-governing powers in the context of Constitutional renewal would honour historical commitments and tend to enrich the Canadian state by allowing reasonable diversity, within accepted limits, in Indian self-government.

THE POWER TO DETERMINE FORMS OF GOVERNMENT

We have the power to develop our own forms of self-government in conformity with our political and cultural history. In the United States, some Indian tribes have adopted the separation-of-powers governmental model typical of a congressional system. Others have chosen a more traditional model. Whatever model was chosen, of course, would operate within the limitations of the powers agreed upon between us at Conferences such as the present one.

The following are the powers which we must have in order to make our government effective:

1. Executive and Legislative Powers:

- (i) the power to pass and interpret laws and administer justice;
- (ii) the right to define the powers and duties of our governmental officers;
- (iii) the right to determine whether acts done in the name of the government are authoritative;
- (iv) the right to define the manner in which governmental officers are to be selected and removed;

2. Defining Indian Status and Membership

An Indian government has full authority to define its

status and membership. The standards for definition might be more flexible, and could be set by custom, historical practice, written law or agreements between Indian nations. In the United States, for example, tribal governments have established their own procedures for:

- (i) abandonment of membership
- (ii) adoption of non-Indians
- (iii) adoption of persons holding citizenship in another Indian nation.

3. The Power to Administer Justice and Enforce Laws:

Pursuant to the right to self-determination, Indian nations have the power to:

- (i) make laws governing the conduct of persons, both Indians and non-Indians, within the reserve or unit of Indian government;
- (ii) establish courts to administer justice;
- (iii) establish tribal or band police forces to enforce laws;
- (iv) exclude non-band members from the reserves or other units of Indian government;
- (v) regulate hunting, fishing and gathering over both reserves and other lands pursuant to aboriginal and treaty rights.

These extra-territorial land rights include:

- (a) hunting and trapping areas;
- (b) fishing stations;
- (c) gathering areas;
- (d) hay meadows;
- (e) burial grounds and sacred lands;

(v) regulate and tax the use of the waters, minerals and forests.

4. Taxing Powers:

Indian governments have the power to impose and collect taxes from non-Indians residing or doing business within their boundaries. The revenue thereby raised would finance the provision of services to members; regulate non-Indian activities, and would be imposed in place of provincial or federal taxes on the reserve.

5. The Power to Regulate Domestic Relations:

The link between Indian families and the relevant governmental system has always been a close but uncomfortable one. We should have powers governing marriage, divorce, illegitimacy, adoption, guardianship and the support of family members. The jurisdiction of Indian courts to adjudicate on such matters should be recognized, and Indian customary practices in such areas should be acknowledged.

6. The Power to Regulate Property Use:

Property use is closely associated with self-government powers and we should have the right to regulate the use of property in units of Indian government through licensing provisions, zoning laws and rules for the inheritance of property.

7. The Power over Social Programs:

We have the power to promote and protect the health, education and general well-being of our members through social cultural and economic programs.

8. The Power to Determine the Language of Administration:

We have the power to carry on the administration of Indian government in the Indian language spoken by the tribe. Communications.

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9. The Power to Delegate:

Our Indian governments, moreover, have the power to delegate their powers to other Indian governments or the Crown, and to withdraw such delegated powers when advisable.

The purpose of the United Nations is to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

Article 68(1)

(1) With a view to the creation of conditions of stability and well-being which are necessary for successful and friendly relations among nations based on the principle of equal rights and self-determination of peoples, the United Nations shall promote:

1. Treaty No. 6, Dunes's Patent, Ottawa, 1964, at 1.
2. Treaty No. 7, Dunes's Patent, Ottawa, 1968, at 2.
3. See e.g. M. Wight, British Colonial Constitution, 1947, London, 1962, passim.
4. W. Fair, "The Atomic Decision", in U.S. Law International Rights, 21(1961), 129-33.

FOOTNOTES

1. Other provisions of the Constitution Act, 1867, referring to particular ethnic groups are s. 80, fixing the boundaries of the constituencies in Quebec in which the English-speaking minority predominated, and s. 133 which provided for English-French bilingualism in parliament, the Quebec and federal courts, and the Quebec legislature.
2. Emphasis mine; the U.N. Charter provisions on self-determination are as follows:

Article 1(2)

The purposes of the United Nations are.....

- (a) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

Article 55(1)

- (1) With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on the principle of equal rights and self-determination of peoples, the United Nations shall promote.

3. Treaty No. 6, Queen's Printer, Ottawa, 1964, at 5.
4. Treaty No. 7, Queen's Printer, Ottawa, 1966, at 5
5. See. e.g., M. Wight, *British Colonial Constitutions*, 1947, London, 1952, *passim*.
6. R. Falk, "The Algiers Declaration", in U.N. Law: Fundamental Rights, Sijthoff, Netherlands, 1979, at 232-33.

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NATURAL RESOURCES

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NATURAL RESOURCES

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NATURAL RESOURCES

In re Transfer of Natural Resources to the Province of Saskatchewan, it was held that a province could make no legal claim for compensation for the alienation of its public domain before its actual creation. In this connection, we would contend that our rights are of an altogether different character from those that the Province of Saskatchewan was pressing against the Dominion before the Privy Council in 1931. Our rights to land and minerals which arose prior to the creation of either Canada or any of the prairie provinces, are based on aboriginal title, and are confirmed by the Royal Proclamation of 1763 which is acknowledged as a source of our rights in s. 25 of the Constitution Act, 1982. Where we have never alienated our land rights to the Crown by public transfer, as required by the Proclamation, such rights continue to inhere in us by virtue of a title extending back to a source before the memory of man.

A paramount object of the federal government in retaining prairie crown lands was the promotion of agricultural settlement. Where Indian lands were involved, when a transfer was made by the federal Crown for farming purposes, it was always understood by Indians that only the topsoil was involved. We surrendered, essentially, what was required for farming; the remainder we retained. We regarded the residue, including minerals, as being collectively-owned by us and not capable of being alienated to others. It was a gift from the Great Spirit which was untransferrable to others.

While we recognize that s. 92A(1) of the Constitution Act does not speak in terms of provincial ownership of natural resources, it does, however, confer exclusive law-making powers over non-renewable resources to the provinces. Section 92A(1) as it now stands, would empower provinces

to confer exploration rights, or otherwise to make laws with respect to non-renewable natural resources owned by Indians without the advice or consent of such Indians. To prevent this from happening, we recommend the incorporation of a new subsection (7).

'92A(7) None of the foregoing provisions shall in any way affect or derogate from Indian ownership of non-renewable natural resources either on or off Indian reserves.'

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PART I

Introduction:

At the outset, it should be emphasized that the Canadian Charter of Rights and Freedoms is not an unmixed benefit for Indian peoples. In October, 1980, when the federal government announced its intention to patriate the Constitution unilaterally, adding to it a list of entrenched rights and freedoms along with an amending formula, our feelings about the initiative were ambivalent. We could see emerging from the Charter both opportunities and dangers. Our historical experience had suggested to us that, even with the best of intentions, when a Constitution is drafted primarily by and for the descendents of European peoples, and is based on a model alien to our society, it may have unexpectedly adverse consequences for us. Perhaps during the controversy culminating in the enactment of the Constitutional Act, 1982, at Westminster there may have been some disappointment by proponents of the Charter with our interventions in London. When the historical record is consulted, however, can anyone seriously blame us for our uneasiness about the government's proposals? We went to London in order to achieve at least two objectives. We wanted a more precise definition of what our aboriginal and treaty rights were incorporated in the Constitution. We wanted, also some role in the amending process (not necessarily the same role as that of Parliament or Province) to ensure that when our rights were defined they would be secure. They would be placed, in other words, beyond diminution, alteration or abolition by weighted amending formula in which we formed no part. We wanted to protect, essentially, whatever we had acquired as a result of the process of constitutional renewal that was going on in the country as a whole. We shall return to this point later, but now, in order more fully to set forth our concerns we should here mention why the Charter in its present very general form could constitute a grave danger to our peoples.

(a) Our Historical Experience: It is necessary, first, to examine our prior historical experience, both before and after the enactment of the recent legislation. What was the fate of our rights under earlier constitutional regimes? An understanding of some of our problems under these regimes will assist in showing why we are so vitally concerned about securing an adequate express guarantee of aboriginal and treaty rights in the new Constitution.

Before the European discovery of America, our peoples had inhabited this continent for thousands of years. We possessed our distinctive languages, cultures, legal and social systems. We were a religious people with strong spiritual values insofar as we believed in the great spirit who had fashioned the world and instilled in his peoples a sense of respect for all created things. Indians have always nurtured a respect for nature; we have emphasized the need for conservation, good husbandry, and above all, sharing and cooperating with others in our pursuit of a more abundant life. To use a philosophical term, we tended to view the world holistically --- to view man as part of a natural order in which he was related to all other beings and things. Perhaps others would be inclined to regard themselves more as the unqualified masters of nature than we would be inclined to do. European-derived cultures tend more to analyze concepts, and to proceed more by abstract deductive reasoning, than we have done. Such cultures tend to compartmentalize problems whereas we prefer to see things in terms of their entire context: in wholes rather than parts.

This cultural difference may even have consequences for the new constitutional order. Section 25 of the Charter, for example, emphasizes that the guarantee of certain rights in the Charter "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...". Among these rights and freedoms, surely there must be one to preserve the integrity or

wholeness of Indian values --- to preserve the best elements in our cultural heritage, all of which are interdependent, and interact with each other in a total order.

Our peoples have always had a close relationship with their lands, which they have never freely regarded as alienable commodities to be bought or sold like pieces of merchandise. It is difficult to communicate exactly to peoples of other cultures what this bond consists of. We have never regarded the European discovery of America as conferring a right on the discoverers to take our lands without our consent. As U.S. Chief Justice John Marshall declared of discovery in an early case which would apply to Canada as well as the United States: "It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it... it regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man."¹

It follows from the above reasoning that whatever property we have not alienated we still possess. Both the Royal Proclamation of 1763² and in the United States the Northwest Ordinance³ of 1787 sought to preserve such rights. Although such instruments afforded recognition and legal protection for our rights they are not, however, the source of our rights. Our rights have a prescriptive origin --- they have arisen independently of any grant or cession by others, through our actual habitation of the land over many centuries, through hunting, fishing, trapping, cultivation, and through our own self-governing institutions.

We consider, however, that our aboriginal and treaty rights have been diminished or eradicated in many instances without our consent. We

have been the victims of a historical and constitutional process which was not of our making, which has gravely undermined our rights, and which we now look to the new Constitution, at this time of renewal, to restore. The relationship between the British Crown and Indian peoples has been summed up in the following words by Chancellor Kent: "the colonial authorities uniformly negotiated with them (the Indians), and made and observed treaties with them, as sovereign communities exercising the right of free deliberation and action; but, in consideration of protection, owing a qualified subjection, in a national capacity, to the British Crown."⁴

The fundamental inequity here is that at the beginning of our negotiations with colonial powers we were treated virtually on a plane of sovereign equality, since we were needed in military alliances against rival European states. At the culmination of the process, however, we were treated in a most demeaning manner with solemn treaties being likened more or less to contracts. An international treaty, of course, can be altered only by the parties thereto by mutual consent, whereas a contract can be altered or abrogated by ordinary statute. We have had, accordingly, scant protection for our rights.

There can be little wonder that we as Indians consider ourselves vulnerable to further onslaughts against our rights. Rights once solemnly recognized by parties bargaining equally have been repeatedly eroded. This erosion of our rights has taken place in many areas, for example, in the areas of hunting, fishing, trapping and gathering, in our exemption from taxation,⁷ in our powers of self government,⁸ in our aboriginal title at common law, and in our capacity to dispose of our real and personal property by will in the same manner as other peoples.¹⁰

(b) The Constitution Act, 1982, and the Charter: For the first time in a Canadian constitutional document, section 35 of the Constitution

Act, 1982, acknowledges our "existing aboriginal and treaty rights." While we welcome this affirmation of our rights, we find the presence of s. 35 of the adjective "existing" troublesome, and would prefer to have it removed. Although the then Justice Minister Chretien had said that the term "existing" made no difference, in any constitutional dispute it would be the courts rather than the executive which defined the term, and the courts could define it narrowly or broadly. In an empirical sense, it might be defined simply to mean that we retained all property or rights which we had not voluntarily relinquished to the Crown in the past. If that were the definition of the term "existing" it would not be unacceptable to us. However, if the qualifier "existing" were held to mean that any aboriginal or treaty rights purportedly extinguished by statute as of 1982 (such as those referred to above) were forever lost, and could never be revived, even by the entrenched standard in s. 35, that would be quite unacceptable to us. Such a restrictive interpretation would consolidate the very worst features of pre-Charter law, which, in almost everybody's opinion, it was the purpose of the new constitutional provisions to remove.

It must be emphasized here that there are elements in the Constitution Act, 1982, which, in our estimation, are prejudicial to us, and which place our enumerated rights potentially in a position of inferiority with other proclaimed rights.

When the drafters of the new Charter were seeking to overcome some of the limitations in the concept of "equality before the law" in Mr. Diefenbaker's Bill, they examined those cases in which various courts had made restrictive definitions of the term "equality"¹² and endeavoured to eliminate such difficulties by using more inclusive phraseology. They considered "equality" to be such a desirable constitutional principle that in the new Charter¹³ they framed a threefold definition, encompassing not only "equality before and

under the law," but also "equal protection of the law," and "equal benefit of the law." Now, while it is undeniable that from many points of view "equality" is a desirable constitutional norm, the contrast between the expansive definition of that concept and the restrictive definition in s.35 of "aboriginal and treaty rights" with the limiting qualifier "existing" preceding the substantive term is striking. It seems that everyone is to acquire greater and greater equality, but that the distinctive rights of Indian peoples are to be defined away. There are two sides to this danger.

From Magna Carta (1215), the French Declaration of the Rights of Man (1789) to the U.S. Bill of Rights (1791) rights charters have characteristically spoken in terms of universal rights belonging to all citizens, or even to all persons everywhere. It is this kind of universal, a priori conceptualizing that poses dangers for us as Indians. We are a particularist group with specific needs not shared by others. By definition, rights expressed in universal terms may offset and supersede particular rights. In the Charter for example, if the broadly-enunciated equalitarian rights¹⁴ discussed above, or the mobility¹⁵ or democratic rights¹⁶ were given a very expansive interpretation, it could have disastrous implications for the preservation of a viable Indian culture. Since our rights have been devised to protect a very special tradition, they should not be subjected to erosion by the very powerfully expressed concept of "equality" in section 15(1). As far as mobility and democratic rights are concerned, while it is unlikely that these rights could be so construed as to confer rights on non-Indians in matters concerning Indian self-government or in relation to non-Indians moving to Indian lands, where Charter rights are expressed in universal terms it is not inconceivable that this could happen. It is in our interest that the counter-vailing provision in section 25¹⁷ should be interpreted broadly, not only by the courts, but in our dealings with governments, in order to avoid such an

undesirable result.
for sections 35 and 37,
does to the same general

undesirable result. Preferably, section 25 should perform the same office for sections 35 and 37, or any alternations or additions thereto, as section 1 does to the more general provisions of the Charter. Both sections 1 and 25 are essentially interpretative sections dealing with different provisions. An undertaking given to us to that effect would be very reassuring.

What is particularly disturbing to us is that the drafters of the Charter have sought to define other rights in very expansive terms, but have defined our rights restrictively. Section 35, indeed, with the term "existing" modifying the mentioned "aboriginal and treaty rights" would appear to be the only provision in the Constitution Act, 1982, that is so restrictively defined.

(c) Enforcement: The same restrictive tendency is discernible in the very placement of s. 35 in the Constitution Act, 1982. The enforcement provision in s. 34(1) affords a remedy only to those whose Charter rights (i.e. ss.1-34)¹⁸ have been infringed. Since s. 35 lies outside of the boundaries of such rights, there might prima facie appear to be no means of enforcing that section. It is certainly arguable, however, that s. 35 could receive implementation under s.52(1) of the Constitution Act, 1982, which contains a "supremacy clause" declaring the "Constitution of Canada" to be the supreme law of Canada and rendering any inconsistent laws "of no force or effect. " It is to be hoped that the courts will hold that the "supremacy clause" in s. 52(1), like the analogous American constitutional provision,¹⁹ to be a distinct and more general enforcement provision invocable to implement rights outside the scope of ss. 1 - 34.

From our perspective, it would have been preferable if only one remedial provision had been used, and that provision had been applied to the whole Constitution. Perhaps the worst thing that might happen to section 35 rights would be for the courts to infer an intention, since they were outside

the scope of the express remedial provision in s. 24(1), that although they were ideal norms they were of a non-enforceable character, and that no implementing machinery was envisaged. They might, thereby, be reduced essentially to admonitions to legislative draftsmen, or canons of interpretation to resolve ambiguities.

Our apprehensions on this score would be allayed if, after the words "as guaranteed by the Charter" in s. 24 (1) there were added the words "or by section 35", so that "aboriginal and treaty rights" would be enforceable on the same basis as Charter rights.

PART II
ABORIGINAL AND TREATY RIGHTS

(a) Aboriginal title to land: Section 25(a) of the Canadian Charter of Rights and Freedoms preserves, in entrenched form, "any aboriginal treaty or other rights" pertaining to the aboriginal peoples of Canada, including those recognized by the Royal Proclamation of October 7, 1763. The Proclamation solemnly affirms the intention of the Crown that Indians "... 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 us or purchased by us, are reserved to them or any of them, as their hunting grounds...and to reserve under our Sovereignty, Protection and Dominion for the use of the said Indians, all the lands and territories..."

The words of the Proclamation embraced both recognition of aboriginal title to those lands which had not expressly been conveyed to the Crown by purchase "at some public meeting or Assembly of the said Indians, to be held for that purpose," and aboriginal rights, of which hunting was an example.

(i) The Origin of Aboriginal Title in the Western Provinces:

Although the Royal Proclamation expressly excludes the territory of the Hudson's Bay Company from the extensive area set aside as "Indian Country" for the use and occupancy of Indians, and such territory would embrace much of the provinces of Alberta and Saskatchewan, successive governments of Canada have treated Indians within that territory as possessing aboriginal title. As McGillivray J.A. said in R. v. Wesley:

Whatever the rights of the...Indians were under the Hudson's Bay regime, it is clear that at the time of the making of the treaty to which I shall next allude, the Indian inhabitants of these western plains were deemed to have or at least treated by the Crown as having, titles and privileges of the same kind and character as those enjoyed by those Indians whose

rights were considered in the St. Catherine's Milling case....because it is a matter of common knowledge that the Dominion has made treaties with all the Indian tribes of the North West within the fertile belt in each of which they have given recognition to and provided for the surrender and extinguishment of Indian title. 20

In R. v. Sikyea, moreover, Johnson J.A. observed:

....Indians inhabiting Hudson Bay Company lands were excluded from the benefit of the Proclamation (of 1763) ...that fact is not important because the Government of Canada has treated all Indians across Canada, including those living on lands claimed by the Hudson's Bay Company, as having an interest in the lands that required a treaty to effect its surrender.²¹

It would seem, therefore, well established that a foundation for aboriginal rights and title like that existing in other parts of the country also prevails in Alberta and Saskatchewan, whether or not the specific areas in question were embraced within the boundaries of the 1670 grant to the Hudson's Bay Company. (The boundaries of the extensive tract conveyed to the Company are defined by the watershed of the rivers flowing into Hudson Bay.) Only the lands within the southern parts of Alberta and Saskatchewan would fall within the Company's grant. The effect of the analysis in the cases mentioned above would be, however, that notwithstanding the former status of the lands in question, all territory alike would be subject to aboriginal title and any appurtenant rights within all three prairie provinces.

(ii) The Characteristics of Aboriginal Title: Aboriginal land title was not, of course, constituted by the Royal Proclamation of 1763, but is founded on longstanding possession; our title is simply acknowledged or affirmed by the Proclamation, the Charter and s. 35, but affirmed in such a way that recognition of the title and benefits accruing from it are now permanent features of Canadian public law. Aboriginal title was recognized in the sixteenth11

century by the Spanish cleric and international lawyer Francisco de Vittoria who contended that Indian peoples had "true Dominion in both public and private matters."²² The early Spanish Jesuit writers on international law customarily adopted the same approach, and in more recent times Lindley has held that as a corollary of enduring aboriginal title, the lands inhabited by aboriginal peoples were not terrae nullius and could not, therefore, be acquired through mere occupation by a European power.²³ Cession, or public conveyances to the Crown by us, in the manner stipulated in the Royal Proclamation of 1763 became the required and accustomed way of relinquishing title, without which such title remains.

In Calder v. A.G.B.C.²⁴ the independent existence of aboriginal title was recognized both by Judson J. and Hall J., each speaking for three members of the Supreme Court of Canada. In the words of Mr. Justice Judson: "...when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means...". Or in the words of Mr. Justice Hall: "Prima facie, therefore, the Nishgas are the owners of the lands that have been in their possession from time immemorial...."

The right to benefit from reserve lands and to land entitlements in the three prairie provinces has been constitutionally protected, and placed beyond provincial abrogation, by the Natural Resources Transfer Agreement of 1930.²⁵ The still outstanding treaty land entitlements in section 10 of the three separate schedules to the above agreement (one for each of the three prairie provinces) has not yet been granted to Indian peoples with respect to treaties signed in the 1870s, and awaits implementation by the concerned federal and provincial governments. We consider that the long delay in implementing our land entitlements pursuant to the Agreement should now be remedied by prompt action to liquidate our claims. The constitutional

protection of our rights is, moreover, under the 1930 Agreement, subject to amendment or agreement between the provinces and the Dominion without our consent or participation. If the 1930 instrument stood alone, accordingly, our future land rights, insofar as they related to that document, would not have a very secure foundation.

Surely, if section 35 is to be rendered effective, it should be regarded as later, entrenched, remedial, legislation of a general and all-embracing character. It could, as such, possibly cure some of the infirmities of the Agreement. Our land entitlement is now, not simply, as section 10 of the schedules to that instrument declare, subject to agreement between non-Indian parties, but a matter of objective right. The relevant provisions of the Charter and the Constitution Act, 1982, recognize that there is an independent and superior source of land entitlement than the subjective desires of governments. To the extent that the Natural Resources Transfer Agreement, 1930, could undermine our rightful claims, we regard the later and fuller expression of our rights, as guaranteed in 1982, as superseding it.

(b) Treaty Rights:

Introduction: Treaty rights may be regarded both generically and specifically: the actual provisions of numbered treaties set out particular rights recognized as between the Crown and a particular band, but, in addition to this, in a cumulative sense, we can extract from different treaties and the associated oral undertakings a series of characteristically Indian social, political, economic and legal functions which are now enshrined in the Constitution by means of sections 25 and 35. This is the more relevant meaning we would attach to the term "treaty rights" in the foregoing sections. Our treaty rights define, in large measure, how we have governed ourselves and how our society functions.

The entrenchment of such treaty rights puts a whole spectrum of traditional Indian activities beyond alteration or abrogation by provincial and federal parliaments. In the words of Lord Denning:

It seems to me that the Canada Bill itself does all that can be done to protect the rights and freedoms of the aboriginal peoples of Canada. It entrenches them as part of the Constitution, so that they cannot be diminished or reduced except by the prescribed procedure and the prescribed majorities. In addition, it provides for a conference at the highest level to be held so as to settle exactly what their rights are. That is most important, for they are very ill-defined at the moment.²⁶

Specific Treaty Rights:

- (i) Self-determination, including judicial organizations, tribal court, police, culture and language.

As distinct peoples inhabiting defined territories, we maintain that within the existing Canadian federal state we possess an inherent right to self-determination. This is a right which our ancestors possessed and which we have always practised. We have never relinquished our right to self-government, which right has been acknowledged by successive British and Canadian governments. It might therefore be described as both an aboriginal and a treaty right, derived from history and recognized by treaty. For example, Treaty #6, signed in 1876 with the Plain and Wood Cree Indians provides:

They (the Indians) promise and engage that they will in all respects obey and abide by the law, and they will maintain peace and good order between each other, and also between themselves and other tribes of Indians...²⁷

The assertion of this right affirms an uninterrupted historical practice having executive, legislative and judicial dimensions. While we remain a part of the Canadian Confederation, we also make and administer our own laws, and resort to our own dispute-resolving processes for the purpose, as Treaty #6 declares, to "maintain peace and good order."

(see submission on "Indian Self-Determination for fuller discussion)

(ii) hunting, fishing and trapping:

These rights have customarily been recognized by treaty, for example Treaty #6 declares: "Her Majesty further agrees with her said Indians that they, the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered."²⁸

Similarly, s. 10 of the various schedules to the Natural Resources Transfer Agreement, 1930, recognizes the right of Indians to hunt, fish and trap for food "at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

Section 57 makes the Constitution inter alia, "the supreme law of Canada" and gives it retroactive effect. The combined effect of sections 57 and 35 is to revive hunting, fishing and other rights which have been diminished or extinguished by prior legislation. Past laws which have detracted from Indian rights would now have to yield to the higher law of the Constitution:

....Federal statutes, such as the Migratory Birds Convention Act, R.S.C. 1970, c. M-12, and the Fisheries Act, R.S.C. 1970 c. F-14, which have restricted treaty rights relating to hunting and fishing, would be invalidated to the extent that they conflict with those rights. Legislation which has taken away aboriginal rights unilaterally would suffer the same fate. If this interpretation is correct, the Canada Mining Regulations, which were held by Mr. Justice Mahoney in Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development, (1980) 1 F.C. 518, (1979) 3 C.N.L.R. 17, to have diminished the aboriginal rights of the Inuit of Baker Lake would be invalid to the extent that they are inconsistent with those rights. Arguably, the Pre-Confederation legislation in British Columbia which Mr. Justice Judson (Martland and Ritchie JJ. concurring) viewed as having extinguished aboriginal title in that province in Calder v. Attorney-General of British Columbia (1973), 34 D.L.R. (3d) 145 (S.C.C.) would also be invalid to the extent that it is inconsistent with the aboriginal rights of the Indians of British Columbia.²⁹

The new, superior, entrenched standard, in other words, would revive any hunting, fishing or trapping rights extinguished in the past by ordinary legislation, or even, because of its later, remedial and more general nature,

by entrenched provisions of former amendments to the British North America Act, 1867, or like legislation.

(iii) Education:

"Her Majesty agrees to maintain schools for instruction in such reserves." 30

The above treaty provisions would be reinforced by the entrenched provisions on aboriginal rights referred to earlier, since the preservation and maintenance of aboriginal rights depends on the dissemination among Indian peoples of a knowledge of their traditions, languages and culture.

(iv) Health and Medicine:

"That a medicine chest shall be kept at the house of each Indian agent for the use and benefit of the Indians." 31

This entitlement to medical care, of course, is set out in terms that would be more intelligible in a sparsely-settled country more than a century ago. Arguably, the provision of medical care in contemporary terms would be more extensive, and on a more sophisticated plane, than in 1876.

(v) Social and Economic Development, including employment programs and welfare:

Treaty #6, for example, provided for the supplying to Indian bands of a variety of agricultural implements to cultivate the soil, and also assurances of governmental assistance in the event of "pestilence" or "famine."³² It should be emphasized that in 1876 Canada was mainly an agricultural nation. The diversification of the economy since that time would require assistance to be given in other economic sectors to reflect changing conditions.

(vi) Exemptions from Taxation and Seizure:

These immunities are based both on treaties and on oral assurances. Cf. "We assured them that the Treaty would not lead to any forced interference with their mode of life, that it would not open the way to the imposition of any tax and that there was no fear of enforced military service."³³

While the above enumeration of treaty rights is by no means exhaustive, in our estimation it singles out the main categories of treaty rights, which should be incorporated in the new Constitution, defining the a bit of the relevant terms in sections 25 and 35.

(vii) Natural Resources

(see submission on Natural Resources for fuller discussion)

PART III

The Amending Power

(a) Incorporation by reference: For purposes of the definition of "aboriginal and treaty rights" in s. 35, at the March conference convened by the Prime Minister, no formal amendment under s. 38 is needed, in our opinion, since no change is being made in the text of the Constitution. All that is being done is to give its presently-existing terms meaning. Judges do this frequently when they give a fuller meaning, through judicial interpretation, to terms such as "peace, order and good government"³⁴; the only factor that would differ in this context would be that instead of defining these terms through judicial craftsmanship, they would be defined in the process of executive federalism, with the participation of aboriginal peoples, as provided for in s. 35 (2). Consequently, rather than proceeding by the laborious amending process, the concept of 'incorporation by reference' might be resorted to. This concept was used, for example, in the Constitution Act, 1867, to guarantee certain fixed legislative seats for the Quebec English-speaking minority.³⁵

What we propose, accordingly, is that three schedules be appended to the Constitution Act, 1982, respectively enumerating the aboriginal and treaty rights referred to in s. 35, for each of the three aboriginal peoples referred to in s. 35 (2).

It appears to us that three schedules are necessary since, as between the three distinct aboriginal peoples, there is simply no homogeneity because of historical, economic and other factors. Because of the radically different traditions we would regard it as unfair to limit Indian peoples to the aboriginal or treaty rights of Metis or Inuit, or, indeed, to limit them to our rights. It is quite conceivable that because of their unique development they might possess different rights than ours altogether. That

is one reason why we believe three separate schedules of aboriginal and treaty rights, one for each aboriginal people, are essential.

(b) A Limited Role in the Amending Process:

In combination with their participation in defining the aboriginal and treaty rights to be enumerated in the Constitution, Indian peoples should enjoy at least a limited role in the amendment process.

On several occasions we endeavoured to impress on British parliamentarians the need for such participation by Indians in amendments which affected our rights or culture. In the ultimate debate on the Constitution Act, 1982, in the British House of Commons, several members of parliament endorsed our claim in this respect, including Sir Bernard Braine, a former undersecretary of state for Commonwealth affairs, who declared: "Native consent is not a requirement of the amending formula. It must become so if this House wishes, with a clear conscience, to pass the Bill."³⁶

A difficulty which we perceive is that no matter what significant gains we may make as a result of the March conference, at some future date everything might be swept away by the weighted majority named in section 38(1) of the Constitution Act, 1982, in which at present Indians form no part. It would always be open to such a non-Indian weighted majority to alter or abolish by a future amendment the relevant definition of aboriginal and treaty rights in the Constitution. What we would like to secure would be an agreement that no amendment would be made in future respecting our rights without our express consent in writing.

We are not here seeking a right to propose new amendments to the Constitution, which is right now possessed only by Parliament and the provinces. We are seeking, however, at least the capacity to preserve our newly-acquired rights --- to maintain at least the status quo. A simple way of achieving this object would be through an agreement between Indian peoples

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and the federal Crown that the latter would initiate no resolution in Parliament which would derogate from, or adversely affect, Indian rights without the consent of Indian peoples, expressed in some agreed-upon manner. It is suggested that this would not amount to a new amending power that would have to be enshrined in the constitutional text since it would not be aimed at any change, but would merely seek to maintain the integrity of one part of the present constitutional text.

- 1. Attorney General v. The Queen (1982) 1 S.C.R. 313
- 2. Loeb v. Stynes (1959) 10 D.L.R. (2d) 418 (Ont. H.C.)
- 3. Minister of Inuit Affairs v. Minister of Indian Affairs (1980) T.F.C. 218
- 4. Attorney General v. Canada (1978) 1 S.C.R. 170
- 5. Canada on Behalf of Riel v. Attorney General of Canada (1970) 130 D.L.R. 217 (S.C.R.)
- 6. Attorney General v. Lavell (1974) 2 C.R. 199 R.V. Bumshtin (1974) 2 S.C.R. 133
- 7. Attorney General v. Blais (1980) 2 S.C.R. 183
- 8. Attorney General v. Blais (1980) 2 S.C.R. 183
- 9. Attorney General v. Blais (1980) 2 S.C.R. 183
- 10. Attorney General v. Blais (1980) 2 S.C.R. 183
- 11. Attorney General v. Blais (1980) 2 S.C.R. 183
- 12. Attorney General v. Blais (1980) 2 S.C.R. 183
- 13. Attorney General v. Blais (1980) 2 S.C.R. 183
- 14. Attorney General v. Blais (1980) 2 S.C.R. 183
- 15. Attorney General v. Blais (1980) 2 S.C.R. 183
- 16. Attorney General v. Blais (1980) 2 S.C.R. 183
- 17. Section 25 reads, inter alia, "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada."
- 18. See s. 26.
- 19. Attorney General v. Blais (1980) 2 S.C.R. 183
- 20. Attorney General v. Blais (1980) 2 S.C.R. 183
- 21. Attorney General v. Blais (1980) 2 S.C.R. 183

Footnotes

1. Worcester v. Georgia, 6 Pet. 369 (1832).
2. R.S.C. 1970, Appendix, 123-29.
3. For text see L. Pollak, ed., The Constitution and the Supreme Court, vol. i, 1966, 44-46.
4. Jackson v. Goodell, 5 Pet. at 66-7 (1831).
5. Reservations to the Genocide Convention, I.C.J., 1951.
6. Cf. R. v. Daniels, (1968) S.C.R. 517; R. v. Sikyea, (1964) S.C.R. 642.
7. Snow v. the Queen, (1979) C.T.C. 227 (Fed. C.A.).
8. Logan v. Styres, (1959) 20 D.L.R. (2d) 416 (Ont. H.C.).
9. Hamlet of Baker Lake v. Minister of Indian Affairs, (1980) 1. F.C. 518.
10. A-G. Can v. Canard, (1976) 1 S.C.R. 170.
11. S.1(b) Canadian Bill of Rights, R.S.C. 1970, App. III.
12. E.g., A-G. Can v. Lavell, (1974) S.C.R. 1349; R. v. Burnshine, (1974) 44 D.L.R. (3d) 584; Bliss v. A-G. Can. (1980) 2 S.C.R. 183.
13. S. 15 (1).
14. Ibid.
15. S. 6.
16. S. 3.
17. Section 25 reads, inter alia, "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."
18. See s. 34.
19. U.S. Constitution, Art VI (2).
20. (1934) 4 D.L.R., 774 at 787; 2 W.W.R. 337 at 350 (Alta. C.A.).
21. (1964) 43 D.L.R. (2d) at 152; 46 W.W.R. at 66-7.

- De Indis, (1532).
22. Lindley, The Acquisition and Government of Backward Territory in International Law (1926), 12-20.
24. (1975) 34 D.L.R. (3d) 145 (S.C.C.).
25. B.N.A. Act, 1930, 20-21 Geo. V. c. 26 (U.K.), with the separate schedules attached thereto for the three prairie provinces each, in sections 10-12, recognizing Indian land entitlement, hunting, fishing and trapping rights on behalf of Alberta, Saskatchewan and Manitoba.
26. Secretary of State for Foreign and Commonwealth Affairs v. Indian Association of Alberta and others, (1982) 2 W.L.R. 641 at 643 (U.K., C.A.).
27. Treaty No. 6, Queen's Printer, Ottawa, 1964, at 5.
28. *Ibid.*, at 3.
29. Kent McNeil, "Constitutional Entrenchment of Native Rights," (Native Law Centre, University of Saskatchewan), Report No. 5, 1980, at 4.
30. See above footnote 27 at 3.
31. *Ibid.*, at 4
32. *Ibid.*, loc. cit.; see also R.H. Bartlett, "Indian and Native Rights in Northern Saskatchewan," in (1981) 45 Sask. L. Rev. 13.
33. Report of Treaty #8 Commissioners, 1899, Queen's Printer, Ottawa, 1966, at 6; see also R.H. Bartlett, "Indians and Taxation in Canada," (1980) Native Law Centre; (1979) Amer. Ind. L. Rev. 185.
34. s. 91, preamble, Constitution Act, 1867
35. See s. 80, Constitution Act, 1867, and the Second Schedule thereof.
36. H.C. Deb. (Eng.), Vol 18, No. 59, col. 290 (17 Feb. 1982).

THE IMPACT OF CHARTER PROVISIONS ON INDIAN RIGHTS

THE IMPACT OF CHARTER PROVISIONS ON INDIAN RIGHTS

The new Constitution Act, 1982, including the Canadian Charter of Rights and Freedoms contains several provisions which could substantially and adversely affect our treaty and aboriginal rights. When a complex constitutional document is drafted over a period of time, with changes being made up to the very moment of its completion, it is bound to have unanticipated consequences. Our present submission will consider some of the possibly negative effects that the above legislation might have on our people, and will make some suggestions which will counteract such effects.

The main provisions defining, or possibly affecting, aboriginal and treaty rights, would be sections 1, 2, 15, 16-23, 24(1), 25, 28, 33, 35, 37, 38, 52(1) and 54. Of these the provisions concerning aboriginal and treaty rights per se, e.g. ss. 25 and 35, are in a substantive sense the most important, although they could be adversely or beneficially affected by the other provisions outlined above.

Section One:

Section 25 is included in the Charter, but s. 35 (according to s. 34) would fall outside of its provisions. Section 1, accordingly, which declares that 'the rights and freedoms' set out in the Charter (i.e. ss. 1-34) are subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society' would not apply to s. 35, since the latter section is not in the Charter. The fact that section 1, which potentially limits other sections, would not apply to s. 35, would remove one restrictive limitation which could undermine that section. Section 1 would also not expressly apply to the 'rights' mentioned in s. 25, but such rights, not being entrenched, could be overridden by ordinary statute insofar as they were not covered by similar terminology in s. 35.

Section 25:

That s. 25 embraces wider rights than s. 35 is argued by Professor Hogg, who notes particularly with respect to 'aboriginal and treaty rights' that : "...s. 25 is not qualified by the word 'existing', and it may be broader in its inclusion of 'other' rights and freedoms and in its express mention of the Royal Proclamation of 1763 and land claims settlements." (Hogg, Canada Act 1982 Annotated, Toronto, 1982, at 69.).

Language Rights (ss. 16-23):

Sections 16-23 confer language rights respecting governmental services in English and French, but there is no similar provision respecting Indian languages. The right to speak such languages in certain contexts is an "aboriginal right".

Fundamental Freedoms and 'Equal Rights':

The provisions on fundamental freedoms (s.2) and egalitarian rights (s. 15) present some danger for the durability of Indian organizations and communities. This is because the 'freedom of association' in s. 2, and the strong equality provisions in s. 15 and 28 might be so construed as to give non-Indians certain rights to participate in Indian entities and thereby undermine their distinctive Indian character. Indians should have more power to determine who should enjoy Indian status. The right of Indians to participate in their own organizations is one of the 'rights' recognized in s. 25, and this should be acknowledged notwithstanding the potentially conflicting rights in ss. 2, 15 and 28.

Implementation of Rights:

The implementing provisions in s. 24(1) would not apply to s. 35, which is not within the 'Charter', but nevertheless, it might be implemented under the 'supremacy clause' in s. 52(1). If the latter is not the case, the usefulness of s. 35 for us would be much reduced.

THE MEANING OF THE WORD "EXISTING" IN S. 35

Recognition of existing aboriginal and treaty rights

- 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis people of Canada.

The adjective "existing" in s. 35(1) of the Constitution Act, 1982, is a qualifier the exact meaning of which is difficult to determine. The word "existing" was not included in the original text of the proposed clause enshrining "aboriginal and treaty rights" in the Charter, but was added to the text of s. 35 late in November, 1981, apparently at the insistence of the Province of Alberta. On November 5th, as a result of the "accord" by which a compromise was reached on "patriation" between the premiers and Ottawa, the whole of s. 35 was temporarily removed. The mentioned section was later restored but with the adjective "existing" preceding the clause defining the substantive rights of "aboriginal people." At the time their Justice Minister publicly stated that the addition of the term "existing" made no difference in the interpretation of the clause.

Despite the Justice Minister's reassurances, however, it is obvious that, in any legal dispute, it will not be the federal executive but the courts which will finally interpret the constitutional meaning of s. 35. Whether or not the courts will take judicial notice of what the Minister of Justice said at the time is open to conjecture.

There has also been considerable discussion among Indian peoples and academics about the legal consequences of adding the word "existing" to "aboriginal and treaty rights" in s. 35. To date no consensus exists as to how, precisely, that word would be interpreted. Depending on the authority concerned, widely differing interpretations have been made of its possible effect on the described rights, some arguing that it would make no difference, others that it would detract from such rights, and others that it would actually extend them.

Since the qualifying term will have such an uncertain effect, we prefer to have it deleted. The very purpose of defining aboriginal and treaty rights is to make them more certain, whereas the word "existing" accomplishes the exact opposite effect.

REMOVAL OF S. 12(1)(b) INDIAN ACT FROM THE CONFERENCE AGENDA

The House of Commons passed the Indian Act, 1985, which was the first time that the Indian Act was amended since 1951. The Act was passed on June 26, 1985, and came into force on July 1, 1985. The Act was passed by a vote of 277 to 157. The Act was passed by a vote of 277 to 157. The Act was passed by a vote of 277 to 157.

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REMOVAL OF S. 12(1)(b) INDIAN ACT FROM THE CONFERENCE AGENDA

Section 12(1)(b) of the Indian Act, R.S.C. 1970, c.1-6 provides that "a woman who marries a person who is not an Indian", (with certain exceptions mentioned in s. 11) "is not entitled to be registered".

The famous leading case on s. 12(1)(b) decided by the Supreme Court of Canada in 1974, was A.-G. Can. v. Lavell and Bedard (1974) S.C.R. 1349, involved two Indian women who married non-Indian men and therefore forfeited their status as "Indians" under the above-mentioned section. The loss of their status required them by law to give up their accommodation and leave the reservation. The argument of the two women was that s. 12(1)(b) deprived them of "equality before the law" as contrasted to Indian men whose status was not affected by inter-racial marriage, thereby infringing s. 1(b) of the Canadian Bill of Rights.

Mr. Justice Ritchie, however, interpreted the "equality before the law" provision not as a substantive requirement of the law itself, but rather as an administrative requirement. Since the latter approach required only that all individuals to whom a particular legal provision applied be treated equally in the application of that provision, it made no difference that Indian women were treated differently in matters of status, and s. 12(1)(b) was upheld. The law was not applied unequally as between Indian women who alone constituted the class to which the provision extended.

Several non-Indian women's organizations and the Native Council of Canada, representing non-status Indians, supported the two women before the Supreme Court of Canada. Eight provincial and two

territorial Indian organizations, on the other hand, as well as the National Indian Brotherhood, intervened to oppose Mrs. Lavell and Mrs. Bedard.

A right to petition to the Human Rights Committee of the United Nations arises, however, under the optional protocol, signed by Canada, of the International Covenant on Civil and Political Rights. This protocol provides that individuals in the country which is a party to the protocol who claim that any of their rights have been violated may appeal to the foregoing Committee, after having exhausted all available local domestic remedies. In effect this mechanism affords an appeal from an aggrieved individual from the Supreme Court of Canada to the international forum. Acting on the petition of an Indian woman, the Committee declared two years ago that the relevant decision by the Supreme Court of Canada that s. 12(1)(b) was not in violation of the Canadian Bill of Rights was itself in violation of the covenant.

It is respectfully suggested that the U.N. Committee's decision which, of course, is not binding, discloses the very kind of universal, a priori theorizing by rights tribunals, divorced from specific context and historical development, which can create great problems for Indian peoples. "Equality", like motherhood, is something which is hard to oppose in the abstract. The ultimate model of a completely egalitarian state appears to Indians, however, to be one in which assimilation has been completed. Everyone is equal because the abstract monolithic standard of "equality" has decreed that there be no differences between individuals or groups. Indians, and members of other distinctive collectivities, must now conform not to an Indian standard, but to an abstract standard of universal human personality. What is distinctive is sacrificed to what is universal. This is one

of the things about the new Charter that we fear. Will we be able to maintain our culture and traditions, given the dominance in Canadian law of pervasive universal standards?

Among other considerations, the majority of status Indians oppose an interpretation of s. 12(1)(b) which could result in the uncontrolled and unregulated entry into reservations of white males who have married Indian women. Such an indiscriminate influx of a large number of persons having little knowledge or understanding of Indian traditions would make the maintenance of an authentic Indian culture on reservations very difficult. If the ultimate purpose of reservations is to establish a social environment where Indian life can flourish, an interpretation having the foregoing effect would be counter-productive.

In light of the foregoing discussion, we the Indian Nations oppose a repeal of s. 12(1)(b) of the Indian Act because of the economic, social and political ramifications which will flow as a result. We also oppose the possible effects of s. 15 of the Charter, when it goes into operation in 1985 on the interpretation of s. 12(1)(b) should the section be the subject of litigation. Thus the Indian Nations demand that continuing discussions take place in order to protect the entrenched treaty and aboriginal rights from erosion by s. 15 and other Charter sections.