UNDERSTANDING AN AMBIGUOUS CLAUSE

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

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Part II: October 1980-October 1981

After failing to get a consensus on constitutional reform, Prime Minister Trudeau announced his intention to proceed unilaterally on patriation. Effectively, this shut out the provinces from the decision-making process and put the onus on Parliament. This unilateral period would continue, right until the SCC ruled that by convention, provincial consent was necessary for constitutional reform. And so, a First Minister Conference was set for November, 1981, which ultimately, would produce the November Accord, and a flurry of negotiations that would lead to the enactment of the Constitution Act, 1982. That period is dealt with in Part III of this paper.

Originally, the federal government put forward a constitutional resolution to Parliament on October, 1980, which included only what would become Section 25. There was no positive entrenchment of rights as is seen in Section 35 as of yet. Prime Minister Trudeau was insistent from the get-go that Aboriginal Rights would *not* be part of the constitutional resolution. He insisted that this issue would be dealt with post-patriation between Indigenous peoples, and Federal and Provincial officials. He argued that no agreement on the topic yet existed amongst Indigenous groups. Since there was no clear definition of what those rights were, they could not yet be enshrined into the constitution.

Soon after, a Special Joint Committee on the Constitution was formed, which met from November, 1980 until February, 1981. Testimony regarding Aboriginal rights would dominate the committee's proceedings.[1] Throughout the testimony, witnesses frequently complained about the negative formulation of rights found in Section 25, and the necessity of a new clause, which would protect Aboriginal and treaty rights. This new clause, Section 35, would eventually be proposed and adopted in committee in late January. Alongside, sec. 35, another clause, sec. 37, would also be proposed and adopted in early February, which would constitutionally require a First Ministers Conference within a year with the twin goal of identifying and define what the Aboriginal Rights were in Section 35. Of course, all this work would be thrown into the air when the SCC ruled that the provinces would need to be consulted. And those discussions are found in

[1] The issue was discussed far more than any other issue during the committee's existence. There are hundreds and hundreds of pages, just from the committee alone, on this topic. Excerpts from these discussions can be found in 'Appendix B' of this paper. The appendix will be available in March, 2026.

Part III.

This paper draws on both the discussions that happened in Parliament (Special Joint Committee, House of Commons, and Senate) and also internal memoranda (Ministry of Justice and cabinet memos) to construct the original drafting of the clause, before it was rejected by the provinces and reconstituted in November, 1981. Since this paper is an attempt to formulate what the First Ministers had agreed to, both with the *Constitution Act*, 1982 and the subsequent amendment in 1983, our focus will be on the governments themselves (largely the federal government at this stage). Indigenous representations were extremely voluminous,[2] but would require an entire book simply to lay out the various positions. However, we will also provide their perspective in summary, particularly in their interactions with the federal government. The crux of this paper is to attempt to formulate what rights are found in Section 35 and what the Trudeau government thought it was agreeing to, by incorporating it into the constitutional resolution.

October 1980

The first federal resolution to Parliament did not contain a Section 35 equivalent. There was only the nucleus of what would become Section 25. In that resolution, the clause read,

> 24. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada, including any rights or freedoms that pertain to the native peoples of Canada.[3]

In the briefing notes on this clause, federal officials wrote,

> Similarly, the native peoples claim the existence of certain rights under treaties and as aboriginal rights. As these rights may become crystalized by court decisions or by negotiation, they will not be denied simply because they are not enumerated in the Charter.[4]

From the outset, the Trudeau Government was insistent that any entrenchment of positive Aboriginal rights would have to wait until after patriation. The reason coming from the government was that no consistent definition of what these rights were could be

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[2] And can be found in Appendix B.

[3] Canada, Parliament, "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" in *Sessional Papers* (1980).

[4] Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada, Briefing Notes for Use in Parliament (6 October 1980). (p. 150)

found from Indigenous groups.

While the NDP would press the government for more action on Aboriginal rights in the House, behind the scenes, leader Ed Broadbent would agree to support the Prime Minister's resolution through a letter of October 20th, which would be released publicly, insisting mostly on an amendment which would give the provinces control of natural resources. Indigenous rights were given a slight, but passing nod. The Prime Minister would respond favourably. The NDP stance irked the PC opposition. As PC MP Frank Oberle would say,

> "I should like to ask the Prime Minister whether it was entirely the letter of the NDP that was the basis of support on which the Prime Minister acted, not only to circumvent Parliament but to circumvent any meaningful further discussions with the provinces and with the native people, the aboriginal people of our country, before this action was taken in Britain, or is he now prepared, in recognition of the response which has been received in the House and from the native people throughout the country, to reopen the discussions and in particular provide access for these minority groups to the committee in a meaningful way?"[5]

Regardless of any criticism, the government continued to argue that the issue would only be solved in the future post-patriation. When Liberal MP Warren Allmand criticized his own government's actions on October 30th, Parliamentary Secretary to the Minister of Justice Ron Irwin would note,

> Mr. Speaker, I appreciate and share the concern for the Indian people expressed by the hon. member for Notre-Dame-de- Grâce (Mr. Allmand). He has indicated that the Minister of Indian Affairs and Northern Development (Mr. Munro) has said, first, that the Indians would be fully consulted on the constitutional proposals and, second, that there would be protection in a new constitution. I respectfully submit that it will take at least two decades more to settle the Indian claims of Canada and decide what their rights are.[6]

On October 30th, the Prime Minister addressed Indigenous leaders directly, sending letters to the major national bodies, such as the National Indian Brotherhood.[7] This letter would be referred to throughout the unilateral period by both supporters and detractors of the Prime Minister. In the landmark letter, he quickly alludes to the fears of patriating the constitution without Aboriginal rights, saying,

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5 Canada, House of Commons Debates, 32nd Parl, 1st Sess, 1980 at 4157-4158.

6 House of Commons Debates, 32nd Parl, 1st Sess, 1980 at 4292.

7 Prime Minister Trudeau letter to Del Riley, President of the NIB. (October 30, 1980).

> "…I am personally convinced that your people will lose nothing in this act of patriation….I believe that Canadians, with new-found pride in their own Constitution and in their new maturity as a country, will be more than ever generous in considering the needs and wishes of our first citizens. In short, I believe that constitutional change after patriation will become easier, rather than harder…"[8]

The Prime Minister said that he would be prepared to put "Native rights on the agenda" after the Constitution was brought back to Canada. More time was needed to study these rights. He adds,

> "I have already agreed to discuss with you such matters as aboriginal and treaty rights, internal Native self-government, Native representation in political institutions such as Parliament, and the responsibilities of the federal, provincial, and territorial governments for the provision of services to Native Peoples. These subjects do not exclude the introduction of others of direct interest to Indian peoples. Considerable effort will need to be expended to find common ground among Indian people, among Indians and other Native Peoples, and Canadians in general before understanding and acceptance on all issues, in part or in whole, can be achieved. The manifest complexities of such questions precludes easy and early agreements. You will understand therefore that we must proceed now to set in place, within Canada, the means for renewing the federation."[9]

Furthermore, these rights were not yet determined. The Prime Minister says,

> "What the additional rights of the Indian people might be has not yet been determined. It will be your task to come to a full and common understanding of the collective rights you have claimed by virtue of your treaties and your aboriginal standing. You will have to persuade the Governments of Canada that the special rights you claim are reasonable and that they should be guaranteed in the Constitution."[10]

Once these rights had been agreed to through consensus of the Indigenous peoples, only then could the talks be elevated to talks with the First Minister, where they would need to persuade them. He says,

> "But, as questions regarding rights are resolved or come close to resolution in

[8] Ibid.
[9] Ibid.
[10] Ibid.

> subsequent preliminary meetings with officials and Ministers responsible for constitutional matters, they can be elevated again to constitutional meetings at the level of First Ministers."[11]

Responding to this letter publicly, Prime Minister Trudeau would announce in the House of Commons on November 7, that $1.4 million had been given to the Aboriginal groups to research their constitutional claims (i.e. to define their claims). He would then remark,

> **Mr. Trudeau:** Madam Speaker, it is not correct to say that they have been completely ignored. The resolution before the committee refers to their rights not being changed in any way. The precise definition of those rights in a written constitutional document is something, I repeat, that we have assisted the Indians, native people, Métis and Inuit to research for themselves. If they come up with some form of amendment which is acceptable to all parties in this House—and I should say hopefully to several of the provincial governments—we are prepared to accept amendments on this as on other things.
>
> I would merely want to point out to the hon. member that I think the simple claim of aboriginal rights, without anyone knowing exactly what it means, is not a matter which one can convincingly argue should be put in the constitution at this time. First of all, the courts would be called upon to interpret such a constitutional amendment, and I think everyone would want to know what aboriginal rights are, what are their extent, to whom they apply, and so on.[12]

Thus, until a definition could be arrived at, the issue was dead in the water. Without a precise definition, the Trudeau government would not proceed with the issue. Interestingly, just three days later in an internal federal memo contemplating possible changes to numerous clauses, we find the following lines,

> Section 24 (Undeclared Rights): Consider (a) whether rights and freedoms of native peoples has to be made more specific (eg. Aboriginal and treaty rights) – this would be most unwise[13]

Unfortunately, the memo touched on several clauses in a truncated fashion and the analysis of undeclared rights ends abruptly.

On November 12, in the Special Joint Committee, Minister of Justice Jean Chretien laid

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[11] Ibid.

[12] Canada, House of Commons Debates, 32nd Parl, 1st Sess, 1980 at 4548.

[13] Canada, [Department of Justice?], Amendments to Proposed Resolution (10 November 1980)

out the federal rationale for why they were proceeding from a negative rights perspective rather than a positive one,

> The problem is, some are arguing at this time it is in a negative way rather than in a positive way. Exactly the reason why we are doing that is to make sure that all the rights be protected because in Canada **we still need some clarification to come to an agreement about native rights.**
>
> I have been working on that problem myself for many years and there is the right based on the treaty, the right that was given to the natives at the time of the royal proclamation of 1762 or 1763 by King George II and the instruction he gave to his colonies at this time to settle the rights of the natives, there is the question of the rights that have been either abandoned by some of them or have been taken away by different actions of governments in the past.
>
> It is a very complex issue. and in having this Clause drafted that way **we wanted to make sure that we were not creating any prejudice to their rights**, so we say all the rights they have today will not be changed by this bill.
>
> **If we were to move into an affirmative declaration of the rights at this moment, if the Committee wants to make the change, it could be that in affirming the rights we could make an error.**
>
> Now, negatively, we are telling them there is no way we want to take any rights away from you, but **if you start to affirm them you might leave some rights outside of the affirmation and that is why the drafter decided to proceed by the negative route**…. In proceeding in a negative way as we have done we were making sure that we were not causing any prejudice to their rights.[14]

He would add later,

> I just want to tell you that what we want is to maintain all the rights that they have and at the same time to give the Natives sufficient time to develop their position and to present it to the National Government and to the different provincial governments.[15]

This was a constant frame that the Liberal Government adopted in an attempt to secure

[14] Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 3 (12 November 1980), 32-33.

[15] Ibid, p. 70.

goodwill from those pushing for Indigenous rights. They were essentially saying that if we rushed this, or tried to define it now, we may make an error and leave some rights out, and thus diminish Aboriginal rights.

On November 13th, Chretien again appeared before the SJC. Regarding Aboriginal rights he says,

> **Mr. Chrétien:** The rights that the Métis have flowing from the Royal Proclamation will remain the same. This charter will not affect those rights.
>
> **Mr. Crombie:** It will not increase them any.
>
> **Mr. Chrétien:** It will not increase, it will not decrease, they will keep the same rights they had before.
>
> **Mr. Crombie:** What are they?
>
> **Mr. Chrétien:** Depending on the type of rights they have. If you are an Indian who is covered by a treaty, you have your treaty rights. If you are an Indian . . .
>
> **Mr. Crombie:** Not covered by that.
>
> **Mr. Chrétien:** . . . not covered by that, the Inuit, and so on, their rights are flowing from the Royal Proclamation of 1763. They remain the same.[16]

While this interaction covers what would be Section 25, it is an interesting glimpse into how Chretien and the Department of Justice was viewing those rights. Later on in the meeting, when pressed by a fellow Liberal MP, Warren Allmand, for a more expansive clause, Chretien would say,

> You just said there is a lot of native rights that are undefined, not clearly stated. What we wanted to do is make sure that this charter of rights does not affect the rights that exist under either the treaties or the Royal Proclamation. I do think that these are the two sources of rights that exist for the natives in Canada. These remain.
>
> You say that the Parliament of Canada could decide some day that the Royal Proclamation will not affect Canada. **I do not think that we could**.[17]

[16] Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 4 (13 November 1980), p. 10.

[17] Ibid, p. 13.

The interesting nugget from that speech is found at the end, where he suggests that the Parliament of Canada could legislate away the Royal Proclamation of 1763. And yet, Chretien would refuse to incorporate that into the proposed act as we shall see later in the process. He would also respond to Allmand saying,

> **Mr. Chrétien:** I do not know if you are arguing that there is no possibility whatever for any government for example to expropriate any lands of the native people of Canada. If it is your view, you know, I do think that in the ease of Caughnawaga when they had to build this seaway, they have expropriated the land and they have compensated the natives of the reserve in relation to the damage that they have received.
>
> If your view is that no laws could ever expropriate the land of any natives, I do not think that it is a proposition. I would like to study that because it is a very far reaching statement. There is no circumstances under which some parts of Canada cannot be expropriated for the benefit of the totality of the nation.[18]

Furthermore, he would add,

> **Mr. Chrétien:** But to make it an absurdedly impossible possibility for any government under any circumstances in the national interest to proceed, it might be the desirable policy that has been followed and we should be extremely careful.
>
> If the Committee wants to enshrine in the Constitution such a thing, what I want to make to you is this point: does this very complex problem involve not only the Federal Government but involve the Provincial Government.
>
> You know, the Crown land in the provinces now belong to the provinces. It is administered by the provinces and no more by the Federal Government and we have decided that because of the complexity of the problem, that should be a special item of discussion with the provinces under the title of Natives and The Constitution and we have given money to the Indians to get ready in order to make their position clarified and after that discussed with the Federal and Provincial authorities.[19]

Thus, Chretien was arguing that these rights could not be enshrined due to the provincial

[18] Ibid, p. 13.
[19] Ibid, pp. 13-14.

Crown land being at stake, and thus, provincial input would be necessary. This means that this could not proceed through the unilateral route they were taking with other elements of the proposed Constitution Act.

On November 17th, the federal government contemplated what a positive clause would look like, saying,

> If section 24 were to make any reference to specific native rights, such as aboriginal rights or treaty rights, this would have the effect of entrenching them without knowing the import of what was being entrenched. It would thus be left to the courts to decide what aboriginal rights means – – does it mean, as some native groups contend, a right to self-government, to separate nations, to control over education? Equally, if reference to treaty rights were included, this would make them unalterable by Parliament in the future. In addition, mention of treaty rights would meet none of the concerns of those native people not covered by treaties. *[✓good]*
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> In sum, any attempt to be specific with respect to native rights in the Charter would seriously prejudice the future ability of the federal government to negotiate with the native peoples the rights which might legitimately be placed in the constitution.[20]

On November 20th, the government's lack of acceptance of "aboriginal title" would be criticized, with an PC MP David Kilgour saying

> The subject of aboriginal title has been mentioned as well. I do not think the parliamentary secretary appreciates that the concept of aboriginal title has been recognized in civilized countries, including the United States, where aboriginal title has been bought out or terminated at a cost in compensation of some $4 billion. Members opposite do not even recognize aboriginal title despite their charter on the subject.[21]

On November 25th, again, the same messaging from the November 17th memo would continue.[22] On November 28th, the federal government, considered a proposed amendment to Section, representing the NIB, NCC, and ICNI consensus. In the memo, the proposed amendment is presented,

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[20] Memorandum to Ministers re: Possible Amendments to proposed Resolution on Constitution of Canada (17 November 1980).

[21] Canada, House of Commons Debates, 32nd Parl, 1st Sess, 1980 at 4915.

[22] Memorandum to Ministers from Minister of Justice re: Possible Amendments to Proposed Resolution on Constitution of Canada (25 November 1980).

Section 23A

(1) For the purposes of this Act, the "Aboriginal peoples of Canada" means those Indians, status and non-status, Inuit and Metis peoples resident in Canada.

(2) The aboriginal rights and treaty rights of the Aboriginal peoples of Canada are hereby confirmed and recognized.

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

(4) Within the Canadian federation, the Aboriginal Peoples of Canada shall have the right to their self-determination, and in this regard Parliament and the legislative assemblies, together with the government of Canada and the provincial governments, to the extent of their respective jurisdictions, are committed to negotiate with the Aboriginal peoples of Canada mutually satisfactory constitutional rights and protections in the following areas: inter alia;
a) aboriginal rights;
b) rights and protections pertaining to the Aboriginal peoples of Canada in relation to Section 91(24) and Section 109 of the Constitution Act, 1867;
d) rights pertaining to the aboriginal peoples and their descendants of Canada in relation to the Manitoba Act, 1870; and the Dominion Lands Acts;
e) rights or benefits provided in present and future settlements of aboriginal claims;
f) rights of self-government of the Aboriginal peoples of Canada;
g) representation of the Aboriginal peoples of Canada in Parliament and, where applicable in the legislative assemblies;
h) responsibilities of the Aboriginal peoples of Canada and the provincial governments for the provision of services in regard to the Aboriginal peoples of Canada;
so as to ensure the distinct cultural, economic and linguistic identities of the Aboriginal peoples of Canada

(5) a) Every treaty and agreement validly entered into between Her Majesty and any of the Aboriginal peoples of Canada and every treaty and agreement with the Aboriginal peoples validly authorized by Her Majesty shall continue in force after the coming into force of this Act, and all such treaties and agreement shall be

> deemed to be part of the constitution of Canada.
> b) No treaty or agreement with any of the Aboriginal peoples of Canada, or any provision or term thereof shall be diminished or abrogated by either Parliament or any legislative assembly, nor shall any Act of the Parliament of Canada or of any legislative assembly be construed or applied so as to diminish or abrogate any provision or term of any treaty or agreement with any of the Aboriginal peoples of Canada without the consent of those Aboriginal peoples party to the treaty or agreement.
>
> (6) No aboriginal right shall be subject to extinguishment by Parliament of Canada or by any legislative assembly.
>
> (7) No lands, waters or resources of the Aboriginal peoples of Canada shall be subject to expropriation under any law of the Parliament of Canada or any legislative assembly without the express consent of those Aboriginal peoples holding such lands, waters or resources.
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> (8) The free movement of persons with their personal goods and possessions guaranteed by the Treaty of Amity, Commerce and Navigation, 1794, and known as Jay's Treaty, between Her Majesty the Queen and the United States of America, shall apply mutatis-mutandis to all the Aboriginal peoples of Canada and the United States, and no Act of Parliament or any legislative assembly shall be construed so as to diminish this right.[23]

The federal memo urges the rejection of this proposal saying,

> The proposed amendment has been reviewed by representatives of FPRO, PCO, Justice and DIAND this Wednesday and as the assessment of Justice indicates (Appendix "A"), it is not acceptable to the government. It would have the effect of entrenching aboriginal and treaty rights, including the right to self government, provide that such rights could not be changed without the consent of native peoples, that native peoples would participate in constitutional discussions affecting their rights (virtually any item does) and so on. At the moment of writing, the proposed amendment had not been formally transmitted either to you or Mr. Munro.[24]

Furthermore, the memo contained an October 31, 1980 proposal from an ICNI-NCC joint

[23] Memorandum from Fred Gibson to the Prime Minister, Native Peoples and the Constitution (28 November 1980).
[24] Ibid.

working group, which read,

> The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights and freedoms that exist in Canada, including the aboriginal rights and freedoms that pertain to the Inuit, Indian, and Metis peoples of Canada and which ensure their distinct cultural, economic, and linguistic identities.[25]

This was also unacceptable to the government for it would lead undefined concepts to be defined by the courts. On this proposal, the memo says,

> A previous amendment (Appendix "B"), dated October 31, was also reviewed by Justice and rejected, despite the fact it was a refinement of the current "notwithstanding" clause, because it opens the door to judicial interpretation of undefined concepts, raises the question of distinct identities and provides the broad parameters of a definition of aboriginal rights the implications of which may be far reaching and unclear.[26]

This desire to leave the definition out of the hands of the courts was also repeatedly mentioned by Indigenous groups.[27]

On November 28th, Trudeau would reiterate his stance that nobody knew what Aboriginal rights were. He says,

> But surely the hon. member recognizes that it is not enough to say that he is for aboriginal rights. I am sure that if I asked him what consequences the insertion of those two words in the constitution would have, he would be absolutely incapable of answering exactly to whom they would apply in Canada and exactly what they entail. That is the situation.[28]

Aboriginal groups, were, in a sense, arguing the same thing, but from an expansive perspective. At the SJC, Mark Gordon of the ICNI says,

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

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25 Ibid.
26 Ibid.
27 See Appendix B.
28 Canada, House of Commons Debates, 32nd Parl, 1st Sess, 1980 at 5146.

> lands and to our heritage.[29]

The standstill wasn't simply over how maximalist the government would be in agreeing to these rights, the standstill was also over process. With the government urging definition prior to entrenchment, and Indigenous groups arguing entrenchment first.[30]

What did Indigenous groups want?[31]

During the voluminous proceedings at the SJC,[32] there were some consistently held principles and rights, in which, broadly, Indigenous groups agreed. On the term broadly, we have Harry Daniels, President of the NCC, who says,

> **Mr. Daniels:** Oh well, I must draw on the strength of the Oxford dictionary, which states in respect to aboriginal rights.
>
> Any rights that the people held before the colonists arrived.
>
> That implies to me, linguistic rights, land rights, the right of access to resources; cultural rights, social rights, political rights, religious rights. Those are the aboriginal rights; those are the rights of people.
>
> Those statements or responses by government people to the effect that they do not know what aboriginal rights are, are an indication of either a great deal of ignorance of the English language or their unwillingness to accept that these people, who were a nation of people, rich in culture with linguistic differences, with a social system, with a very definite political system with dealings with each other, and a way of holding land—that is the aboriginal right; before the arrival of

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29 Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 16 (1 December 1980), p. 20.

30 See for example the ICNI testimony at the SJC. [Footnote in progress]

31 While there is no single representative group, some groups carried more weight in the negotiations. For example, the NIB, ICNI, and NCC were the groups invited in August of 1980 to present their case to the First Ministers Conference. It was to these groups that PM Trudeau sent his letter explaining his position vis-à-vis a positive rights clause. Furthermore, as we will see in Part III, these groups were given an ultimatum in November, 1981 as, in a sense, representatives of the Aboriginal people, when it seemed likely the provinces were not going to agree to Section 35 and the federal officials were contemplating acting unilaterally on the issue Finally, these groups were the ones invited (alongside the MNC) to the 1983 Constitutional Conference which would define and identify Aboriginal rights as per section 37.

These groups, however, often felt like they were treated unequally to the other First Ministers. In the August conference they complained that they had been hastily invited, without being present at previous meetings, to discuss Aboriginal issues. And then, in the September 1980 conference, they were reduced merely to observers. In the letter from PM Trudeau, he shunted Aboriginal rights to post-patriation. Finally, in the 1983 conference they were listed as witnesses, at first, eventually being called participants, but still listed under the First Ministers, since they were not elected legislatures. For plentiful excerpts, see Appendix B. [Footnote in progress]

32 Ibid. See also Adam Dodek, *The Charter Debates* (2018).

> Europeans on these shores, whoever got here first, whether it was the Vikings or Jacques Cartier, the people operating within a set mode and in different geographical areas, and these people are now saying, "We want to continue that." And that is our aboriginal right to do so.[33]

This was a representative statement in terms of rights, which would be echoed by Liberal MP Warren Allmand on multiple occasions.[34]

Firstly, most were critical of the negative rights approach the government had advocated for, and wanted a positive clause—a positive entrenchment of rights. They were concerned that Section 25 only prevented Charter incursions into rights, but did not seem to block other legislation, whether it be federal or provincial from removing their rights. Additionally, most Indigenous groups were hoping to have the clause entrenched first, with an additional period for discussions to define these rights. Furthermore, Indigenous groups were seeking a consent clause. This meant that for the definition of these rights, and for any subsequent amendment to them constitutionally, they would have to be given a formal say in the process. Finally, Indigenous groups wanted a political solution. They did not want this issue to be left to the courts, although there were dangers with both. As Jim Sinclair, President of the Association of Metis and Non Status Indians of Saskatchewan said in the SJC on December 9, 1980, "The concern that we have, it is like going from the fox to the wolf, who is going to be tougher on us, the courts or the politicians."

On December 3rd, MP Jim Hawkes informed the SJC that the NCC felt that PM Trudeau was being dishonest in his letter of October 30th. He says,

> Last night the Native Council of Canada told us that they felt the Prime Minister was being dishonest in making that statement on October 30, and they said that in light of the fact that they had a brief prepared by the federal-provincial relations office, by Michael Kirby, I think, is the reputed author of it, in which the advice from officials indicated clearly that in fact it would be more difficult to entrench native rights subsequent to patriation rather than before.[35]

On December 8th the government in an internal memo, discussed their fear that even if they frame the clause negatively "there is the possibility that the courts would look

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[33] Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 17 (2 December 1980), p. 129.

[34] However, Allmand was not representative of the Liberal Government. From the outset he was pushing for an entrenched, positive clause. When the word "existing" was added to the clause, he protested and voted with the opposition in an amendment to remove the egregious word from the provinces.

[35] Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 18 (3 December 1980), p. 25. [Footnote in progress: will add NCC's original remarks in later versions of this paper]

upon this as an invitation to convert such rights into constitutionally recognized rights."[36]

On December 18th, they floated additional changes to sec. 25 to include more specific wording. The memo reads,

> "3. Section 24 – Native Rights
>
> Inclusion of possible reference to "historic, treaty and other rights" to be floated informally with Indian leaders. Letter sent to Tellier December 17."[37]

On December 19th, Saskatchewan Premier spoke before the SJC. He suggested an amended Section 25. However, he, like the federal government, was not advocating a positive rights clause. For Blakeney, he did not want to enshrine something he could not deliver on. He said,

> It does not affirmatively state or confirm rights of Indians, Inuit, Métis, essentially because of my approach to a Charter of Rights: that one does not dare assert that which you are uncertain about, and I think it is fair to say that **we are uncertain about the nature, scope and extent of the historic rights which pertain to Indians, Inuit, Métis or other native peoples.**
>
> **I do not like to put in a charter anything I cannot deliver on.** So this is essentially the minimum. It represents my point of view on charters.
>
> If someone takes the other point of view on charters, that we ought to state in a charter the goals to which we should be aspiring, then by all means we can say that we confirm the historic rights of Indians, Inuit, Métis or others even though we are not too clear what they are.
>
> Now, that strikes me as a reasonable position, given that opinion, but one fraught with potential difficulty because it will be misunderstood as so many other statements in the Charter will be if they are put in broad sweeping language.
>
> **Essentially it reflects our opinion on how a charter ought to be drafted as a minimum guarantee, as opposed to a statement of what we would like to happen**.[38]

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[36] Memo from Deputy Minister of Justice to Minister of Justice, Possible Amendments to Proposed Resolution (8 December 1980).

[37] Memorandum, Proposed Resolution: Matters Outstanding (18 December 1980).

[38] Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 30 (19 December 1980), pp. 56-57.

For Blakeney, Charter construction ought to be a set of minimum guarantees rather than as an ideal. This ethos seems to have permeated the provincial negotiators in November, 1981 and was likely this type of thinking that allowed for the word "existing" to be added.[39]

On December 19th, the Ministry of Justice floated amending Section 25, while still rejecting any additional clause laying out positiuve rights. However, this memorandum is interesting in that it reveals a preference to decide the issue without Indigenous input, due to their perceived hostility.

> I spoke with Paul Tellier about floating this wording with key native leaders. His view, which I share, was that it would be unwise to pursue further discussions with the native leaders, since this would only generate new pressures from them for Charter provisions which the government could not accept. **In other words, if the government is going to advance a possible amendment to section 24, it is likely best done through floating it in the Joint Committee where it can be accepted or rejected by members without having the native leaders condemn it in advance.**[40]

Furthermore, the government was insistent in not wanting to guarantee Aboriginal or treaty rights, nor for the inclusion of the Royal Proclamation to the Schedule of the Act, saying,

> I believe this to be the best approach, **since the government cannot accept the proposals that have been advanced by the native groups for guaranteeing aboriginal or treaty rights in the Charter** or for the inclusion of the Royal Proclamation of 1763 in the Schedule to the Canada Act. **Either of these approaches would place in jeopardy Parliament's power to enact laws for "Indians, and Lands reserved for Indians" without consent of the native peoples.**[41]

Thus, the government felt that by either entrenching these rights or by including the Royal Proclamation, it would prevent them from exerting the powers from Section 91(24) of the BNA Act unilaterally. They did not want a consent clause.

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[39] This is explored in Parts III and IV.

[40] Memorandum from Roger Tassé to Jean Chrétien, Charter of Rights – Aboriginal Rights (19 December 1980).

[41] Ibid.

Heading into the new year, the government was still advocating a negative rights approach arguing that no consensus had emerged,

> While the concerns of the native groups may be legitimate, their position overlooks the fact that there has not yet been any agreement, either among the various native groups themselves or between the native groups and the governments, as to the content or scope of native rights that should be entrenched.[42]

And adding, "Given the unsettled nature of what native rights are, it would clearly be premature to attempt to entrench them in the Constitution at this point.

As the committee continued its deliberations, and the testimony from Indigenous groups grew towards an overwhelming consensus regarding a positive rights clause, the government still held to their original position. That position being that there still is no definition of these rights and that by defining them, the government could potentially leave out important rights for Aboriginals.

Liberal MP Bryce Mackasey's testimony is peppered throughout the SJC proceedings with these interjections. For example on January 5 he says,

> **Mr. Mackasey: […]** At least government's position is stated in the letter of the Prime Minister, what he would prefer and that is that the first order of business, the first conference takes place after patriation and with the amending formula, would deal exactly with the problem of the aboriginal people, and I think this is significant because this is after all a letter of the Prime Minister of this country in writing, too, which is already part of the testimony here.
>
> … The fact remains that we all agree that there are such things as aboriginal rights and there are treaty rights. Our dilemma may, certainly my dilemma, is what are they and how are they best determined?
>
> …Some of us are concerned that your aboriginal rights are best determined and resolved through negotiations, through the political process, based on a statement perhaps that such things exist, rather than have through the constitutional process and have the courts determine with perhaps insensitivity or lack of appreciation or knowledge, and I think this is the Prime Minister's concern, as well, that this is one of the things that if we take it out of the political process and put in the courts it will not do the aboriginal people justice.[43]

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[42] Canada, Briefing Book for Clause by Clause Consideration of the Resolution (January 1981).

[43] Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 31 (5 January 1981), p. 53.

Here's another Liberal member of the committee, echoing the same point later that same day,

> **Mr. Irwin:** I agree with that, but I need your help to put this into definition and it looks like every right has gone into the presentations over the last month and it has been left to this group to pick and choose. I go back to what Mr. Mackasey said for which Mr. Hawkes took him to task. If we define that prematurely and put it in now we may be doing an injustice to you by picking and choosing and there should be a process for negotiating further and this process should be the political process at this point because it is actually premature to sit down and pick and choose because of that potential injustice that may occur.[44]

On January 7th, Bryce Mackasey again reiterated the statement from Prime Minister Trudeau in his October 30th letter, saying

> You made a very strong case, and this is my final contribution, Mr. Chairman, I would just say that the Prime Minister does recognize the need for participation of the aboriginal peoples in our process, and I draw your attention, sir, to a letter sent out on October 30, 1980 to the Inuit people that which is equally applicable to the Indian and I have taken the liberty of preparing a copy for you. because the Prime Minister said, and I will read you just one paragraph:
>
> I have already agreed to discuss such matters as aboriginal treaty rights, and internal native self-government, native representation in political institutions such as Parliament and responsibilities of federal and territorial governments, etc., etc., with the groups.
>
> But the Prime Minister goes on and gives a personal commitment that the old problem of aboriginal people would be the first order of business at the next federal-provincial conference and that is a very significant step forward because it means that the federal government would take the initiative and place on the agenda at the next conference the whole issue with its problems.
>
> The Prime Minister goes on in his letter to attempt to ally the fears of the aboriginal people that somehow what we are doing here will be not in the best interest of the people.[45]

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[44] Ibid., p. 85.

[45] Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 33 (7 January 1981), p. 28.

The Trudeau government had not budged an inch in its stance in regards to a positive clause and were still citing the PM's letter of October 30th as the lodestar for federal policy.

On January 13-15th, Minister of Justice Chretien returned the Special Joint Committee. On the 15th, Chretien addressed the issue of Crown obligations head on, in a back and forth with NDP MP James Manly.

> **Mr. Manly:**…On Monday night, in answering Mr. Nystrom, you recognized the Crown's obligation to protect the rights of native people and you admitted that this obligation predated Confederation and this means very clearly, then, that Canada's obligations to aboriginal people must take precedence over even the federal government's responsibility to the provinces, yet you claim that you cannot protect aboriginal rights without agreement from the provinces?
>
> **Mr. Chrétien:** You are from B.C., and I was the Minister at the time and Mr. Barrett was the First Minister and I had to deal with that government about the cut-off land question in B.C., when some land was taken away from them that had been part of reserve land and one day one government, I forget, around 1912 or 1913, took away land and we have never been able to persuade Mr. Barrett to restore those Crown lands to the Indians.
>
> **Mr. Manly:** Mr. Barrett did move on that.
>
> **Mr. Chrétien:** Just a minute. I was Minister quite a long time, I know a bit about this problem.
>
> And the same thing, they had to sue the government in B.C., the Nishka case, in order to get their rights recognized against the government and so on, but the fact of the matter is the Crown land in B.C., it is provincial Crown land, it is not federal Crown land.
>
> If you want us to take back all the Crown land in B.C., okay, we will oblige and take all the responsibilities for aboriginal rights. We will do the same thing.
>
> One might argue that in 1930, when the federal government transferred the land to the authority of the provincial administrations in the prairies, at that time we did not, the government of the day, the Parliament of the day did not protect the native rights enough, **but if you want to restore it to the original position, and having all the responsibility of aboriginal rights across Canada, we will have to abrogate the legislation that was passed, unilaterally by the way, in 1930**

> **transferring the land to the western provinces.**
>
> For example, we might take back all the tar sands and so on, because in that northern part of Alberta, the Indians, I think the people of Treaty No. 7 who covered that area, have never selected their land.[46]

Chretien was saying that this was a provincial issue, unless we wanted to revert all transfer of land back to the federal crown. As the back and forth continued, Chretien says a positive declaration would cause a legal mess,

> **Mr. Manly:** Would it be possible not to have some affirmative declaration of those rights, rights which you acknowledge exist, rights which you acknowledge the Crown has an obligation to protect, would it not be possible to have an affirmative declaration of those rights followed by a commitment to negotiate on the meaning of those rights in different parts of the country?
>
> **Mr. Chrétien:** We looked at that problem, Mr. Manly, very carefully, and there is nothing that would please me more than to oblige in that situation because of my personal commitment to that problem, but we have come a long way in making an affirmation of the rights, the way we have done it, without creating some legal mess in the administration of the land within the provinces.[47]

Chretien was arguing that the government was trying to find a balance which would not take away rights from Indigenous people, while also not causing a legal mess for the provinces, saying

> **Mr. Chrétien:** […] Some land, some reserve land has been taken back. That is why we go as far as we can legally without creating a legal mess, and if we were to try and affirm there in a narrow way they could lose some rights in the future, so that is the other side of the coin, because if we take the responsibility in a few hours to try and affirm what are those rights, if you do it in order to not create too much problem for the provinces, you might take away rights from the Indian, and if you gave everything to the Indian you might create a legal mess for the provinces.[48]

Chretien would conclude this back and forth with the familiar line that by defining, rights could be lost,

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[46] Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 38 (15 January 1981), pp. 17-18.

[47] Ibid., p. 19.

[48] Ibid., p. 20.

> **Mr. Chrétien:** No, I just say we have recognized those rights exist, but they are kind of undefined, unprecise, and it is the best way to preserve it because when you define them, you are limiting the scope of it because you are defining it in a positive way.[49]

During these discussions, Chretien would then explain why the Royal Proclamation of 1763 could not be incorporated into the Constitution Act. He says,

> **Mr. Chrétien:** It has never been incorporated there because it is a law that—what is annexed to the Canadian constitution. It is the law in constitutional matters that were passed after Confederation. All the laws that were passed pre-Confederation were not part of the Canadian constitution because the British Parliament gave Canadians a constitution in 1867, and one of the requests of your association, the presentation they made here, asked us to table and annex to our constitutional project the Order in Council of Prince Rupert Land to make sure it is part of the Canadian constitution and we have acceded to that request; but why the Royal Proclamation is not there, it is because it is not really the Canadian constitution, it is a right that was given to the natives before Confederation and these rights we say are still in existence and we refer to them in this Charter but they are pre-Confederation and they are still rights of the natives and the original people of Canada.
>
> […] The Royal Proclamation referred to many other states than Canada and I am told here that it even refers to Florida, and so that is why it is not part of the Canadian constitution and we could not pretend in the Canadian Parliament to affect the Royal Proclamation because the Royal Proclamation is affecting a lot of other lands than the Canadian lands.[50]

Chretien, when pressed by his fellow Liberal MP, Warren Allmand, who had been pushing for a positive clause, says,

> **Mr. Chrétien:** As you say, there is a symbolic aspect to it, as well as a legal aspect. There was a long explanation this morning about the legal implications of a positive description at this time of aboriginal rights and so on which could lead to a lot of extreme complications in the administration—not my own administration, not our own problem here; but the administration of the land and resources in all

[49] Ibid, p. 21.
[50] Ibid., pp. 67-68.

> the provinces of Canada.
>
> And then, You know, I would very much like to put it there, and would like to find a way to do so; it might not be perfect, but it would show the intention of the government.
>
> There is a lot of commitment by the Canadian society to the resolution of those problems. If we can strengthen that resolution, then that is fine.
>
> We are looking into the matter. I will do my best. If I can satisfy you and others, I know it would give me great personal satisfaction.[51]

The government had signaled its openness to the clause, but did not want the fall out of such a clause and a "legal mess" for the provinces.

On January 30th, after negotiations with the NDP, federal officials finally agreed to include a positive Aboriginal rights clause. However, there was still a standstill over how such rights could be amended. Federal officials said,

> The only outstanding issue is how native rights, once entrenched, can be amended. We do not want to include an amendment which would result in native rights in the north requiring the approval of provincial governments before they can be changed.[52]

While this was being worked out, Jean Chretien would announce to the SJC that Aboriginal rights would indeed be entrenched in the Constitution,

> **Mr. Chrétien:** Mr. Chairman, we have come to the conclusion on this issue of aboriginal rights that despite the difficulties surrounding this matter in terms of legal definition—difficulties that were being created for the government, after a series of negotiations and discussions involving a lot of people, we have come to accept a text which would entrench into the Canadian constitution the recognition and confirmation of the aboriginal rights of the original citizens of Canada.
>
> Due to the diligence of the deliberations—and I did not expect it to come today, but when we have a momentum we should try to maintain it; that is why I am pleased on behalf of the government to say that the aboriginal rights of the aboriginal people of Canada will be entrenched in the constitution.[53]

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51 Ibid., pp. 71-72.

52 Memorandum from Michael Kirby to Prime Minister Trudeau, Negotiations with Mr. Broadbent (30 January 1981).

53 Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of

The clause was read in committee by Peter Ittinuar,

> PART II
> Rights of the Aboriginal Peoples of Canada
>
> 31. (1) The aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> Definition "aboriginal peoples of Canada"
>
> (2) In this Act. "aboriginal peoples of Canada" include the Indian, Inuit and Métis peoples of Canada.
>
> and (b) renumbering all and clauses accordingly.[54]

Regarding the wording of the clause, Minister Chretien explains,

> **Mr. Manly**: […] One question: I presume that the phrase that this "includes Indian, Métis and Inuit peoples", that that leaves open the way for nonstatus Indians also to be included in having their rights recognized?
>
> **Mr. Chrétien:** That is exactly why we have not fixed—we had a kind of open definition rather than a closed definition.
>
> **Mr. Manly:** Would the word "Indian" include nonstatus Indians?
>
> **Mr. Chrétien:** Yes, it is all aboriginal peoples. We have decided that we were not to use this generic term.
>
> For me, when I started on that problem, I could not even use the word "aboriginal titles". It was something that was in legal jargon, if I can use that, was prohibited and I had so many problems with it because I could talk about the Royal Proclamation of 1763 but I could not refer to aboriginal rights and even if we were speaking about the same thing. and I had a lot of problems with it. I sweated in many, many meetings because this word was not part of the Canadian legal system.

Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 49 (30 January 1981) pp. 83-84.

[54] Ibid.

> Now it is there, we are confirmed and I am waiting and I will make a comment after it is voted on.
>
> **Mr. Manly:** Mr. Chairman. could I just close by reading some words that were presented before us, first of all from Mr. George Watts of the Tribal Council on Vancouver Island. He said:
>
> How we exist as a people and how we relate to each other as people lies in your hands.
>
> And Mr. James Gosnell of the Nishka Tribal Council said:
>
> Mr. Chairman, it is quite clear at this time that our destiny is in your hands, the hands of the Joint Committee. Our aboriginal title to the Nishka land must be entrenched in the constitution before patriation. That is our position at these hearings. Without the title, there can be no negotiation; without negotiation, there cannot be a just settlement of the land question; without a just settlement, the Nishka people will have absolutely no economic base upon which to survive.
>
> I believe that with this amendment we are going a long way to meeting the questions that these people came before us with and I would like to thank members of all parties who supported it.[55]

This interaction seems to conflate aboriginal rights with aboriginal title from both the government and NDP's perspective.

The following day, Minister Chretien argued that this clause would cause financial obligations to the provinces,

> **Mr. Chrétien:** […] Within the logic of this debate, as ex-Minister of Indian and Northern Affairs for some time, I know very well to what extent the recognition of aboriginal rights in the Canadian constitution will affect the provincial legislatures, since to some degree **we are imposing a mortgage on the Crown lands of certain provinces.**[56]

During the proceedings, the PCs would attempt to pass an amendment which would require the resolution to be agreed to by the provinces. [CONFIRM] For Chretien, this

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[55] Ibid., pp. 97-98.

[56] Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 50 (31 January 1981), p 39.

was nonsensical if you were attempting to pass Aboriginal rights because the provinces would not agree to it due to the financial obligations that would arise from the recognition of them. He says,

> **Mr. Chrétien:** […] And in conclusion, we had the example yesterday. Twenty years ago there were Canadians who did not have the right to vote; tomorrow they will have all their rights confirmed in the Canadian constitution. This is what this motion will solve. You cannot have it both ways. You cannot have the British Parliament approve the entrenchment of aboriginal rights in the constitution that in fact will put a mortgage on the Crown land of many provinces. **Who are the ones today who say that we should not entrench with the power of the provinces when we are telling today of the provincial government, some of them who have never wanted to deal with the native rights, that you will have an obligation**.[57]

On February 2, 1981, what would become Section 37 was introduced into the SJC. The clause would require a constitutional conference be held which would identify and define Aboriginal rights. This would involve both Indigenous peoples and the provinces. Senator Austin called this "major event in the life of the aboriginal peoples", saying,

> The purpose of this amendment is to ensure that that political commitment is contained within the interim arrangements of the constitution act and to allow what I consider to be a major event m the life of the aboriginal peoples to take place, that is their opportunity to sit as equal members of a constitutional session of the Prime Minister and other First Ministers, and to discuss the questions, including identification and definition of their rights, that is the rights of the Indians, Inuit and Metis in the society which we call Canada.[58]

Thus, Aboriginal peoples would sit at the conference as equals. And yet, there were numerous caveats that would prevent that. As per PC MP Jim Hawkes,

> **Mr. Hawkes:** Yes, Mr. Chairman. It concerns the intention of the government.
>
> I would like the Minister, if he might, to address the following points. I continue to be concerned about the exact wording. I think Senator Roblin has pointed out that this provision exists for a period of two years only. The protection which the main amendment offers to the aboriginal people or their participation has a time limit of only two years on it.

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[57] Ibid, p. 82.

[58] Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 51 (2 February 1981), p. 23.

> There are three other items which the Minister could make note of and respond to.
>
> But in the briefs which the aboriginal people presented to us, they expressed on most occasions considerable concern for the indirect effects of constitutional change. My particular question is: why does the Minister want to restrict it to direct effects and who, in fact, will determine the meaning of the word "direct"? What is the government's intention there.
>
> The second thing is that all aboriginal peoples briefs dealt with the issue of concurrence in future constitutional change as it would affect them and their culture.
>
> The issue of concurrence is not dealt with here. It may be in fact the government's intention to deal with it somewhere else; but I would like the Minister to respond to that.
>
> The third item is that the power of appointment of representation lies exclusively with the Prime Minister. It differs from the just passed subamendment. Subclause (3), where it is the elected people that should be invited by the Prime Minister; there is no such restriction in terms of the main amendment on the actions or behaviour of the Prime Minister.
>
> What we are doing here is enshrining in the constitution of Canada the principle that the Prime Minister, and the Prime Minister alone, shall select the representation, using whatever criterion the Prime Minister wants.
>
> I am wondering if the Minister could respond to those three items and give us some sense as to whether the wording adequately reflects the policy and intent of the government.[59]

For Chretien, the reason was simple—these were not elected governments, and thus, could not formally participate in the process. The final say, ultimately, would be with the First Ministers. He explains,

> **Mr. Chrétien:** There is no legislative assembly governing those peoples as such. They have different associations which have traditionally been recognized by the national government.

[59] Ibid., pp. 28-29.

> The Prime Minister will have to pass a judgment as to who they are. Sometimes some associations represent the whole community and at other times they do not. It varies from time to time.
>
> It is a political judgment the government will have to make as to who shall be there and they will live with the consequences of that judgment.
>
> So that, for example, today it may be one thing and tomorrow it may be different. For instance, in the case of the Native Council of Canada, some of the Métis in some of the provinces do not belong to it. Some provincial associations do not recognize the national association.
>
> But we have talked to the national association anyway. Some have come and made representations on their own. But at that time it will be in the light of the conference and probably in the informal discussions with those associations and other participants that there will be some decision as to who shall be there.
>
> As to the question of concurrence, the problem is the same. They are not constituted in assemblies and we could not deal with them in terms of native assemblies. It would not be advisable and it is not our intention to do that.
>
> As to the effect, this is to discuss an item on the constitution during the interim period which might be two or four years. It is an item agreed by the first ministers—the natives in the constitution. It will be for matters related to natives in the constitution. If the government refuses or neglects to look into one particular item they will be able to say, "You have not looked at that item."[60]

During these proceedings, PC MP Jake Epp would move to get the consent of the provinces. For Svend Robinson of the NDP, this would destroy Aboriginal rights. As he says,

> **Mr. Robinson:** […] First of all, Mr. Chairman, on Friday of last week it was accepted that at long last we should recognize and affirm the treaty and aboriginal rights of Canada's aboriginal peoples. Well, Mr. Chairman, the effect of this amendment would be unquestionably to do the following: to say to Canada's aboriginal peoples that they have certain rights at the federal level, they have certain rights at the territorial level, but that the only rights which they have at the

[60] Ibid., pp. 29-30.

> provincial level are those which the provinces decide to grant them. That, Mr. Chairman, is the effect of the Vancouver formula. What was given on Friday could be very easily taken away on Monday or Tuesday.
>
> We know the attitude very clearly of many of the provinces with respect to this important question of our aboriginal and treaty rights, and what the Conservative Party is saying to Canada's aboriginal peoples is that it is up to the provinces; we are not prepared to take the initiative and to say that these rights should be recognized right across Canada, both at the federal and provincial level. We will let the provinces decide whether your rights, your aboriginal and treaty rights, are to be respected.[61]

This was the Chretien argument. There was an underlying assumption that the provinces would not want to enshrine Aboriginal rights. While not seeking their consent, he did indicate that Aboriginal rights would be subject to the general amending formula. This was a climbdown from the government's initial internal position that they did not want a provincial veto over federal jurisdiction in the north. He says,

> **Mr. Chrétien:** […] After a great deal of discussion about it, about how that can be amended, we have come to the conclusion that the best way would be to apply the aboriginal rights by way of the same amending formula as in the case with other problems; so that any change in the aboriginal statement we made on Friday would not be amendable without the amending formula as known all across Canada.[62]

Senator Austin would clarify the situation, with a back and forth with Chretien,

> **Senator Austin:** I would like to ask the Minister whether, indeed, what he is saying is that with respect to aboriginal rights of the people who live—and I quote "north of 60°", that is in the Yukon and the Northwest Territories, he is now giving the provinces a say in the affairs of those native communities?
>
> **Mr. Chrétien:** In relation to aboriginal rights, yes; in order to amend the general amending formula would apply.[63]

The next day on February 3, Minister Chretien returned to the committee. The NDP pressed the government on this decision, worried that Aboriginal and treaty rights could

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61 Ibid., pp. 40-41.
62 Ibid., pp. 83-84.
63 Ibid., p. 84.

be extinguished unilaterally.[64] The discussion follows:

> **Mr. Robinson:** […] I would like to ask the Minister, through you, Mr. Chairman, whether he would agree that it is possible, pursuant to the provisions of Clause 43, for the federal government, together with the consent of one of the provincial governments, to extinguish or affect the aboriginal and treaty rights which are confirmed in Clause 31?
>
> **Mr. Chrétien:** I said the general amending formula will apply in the case of aboriginal rights.
>
> If it were to be a very clear case where it would be just a local situation, it might be that a decision would be that it is possible to amend by a provincial or the national government.
>
> **Mr. Robinson:** Mr. Chairman, through you to the Minister again—and this is hypothetical, perhaps; but in the case of a land claim involving aboriginal lands entirely within the jurisdiction of one province, for example, the Nishka land claims, presumably you will agree that it would be possible for an agreement to be made between the provincial government involved, the government of British Columbia, and the federal Parliament to affect or to extinguish those particular rights?
>
> **Mr. Chrétien:** You are asking me to speculate about that situation. It might or might not, depending upon the nature of the settlement.
>
> If it were to create a situation which would affect the other aboriginal rights of the nation, it might be considered that it has to be amended by Clause 41.

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[64] The record seems to suggest a divided NDP on the issue.

"MEMORANDUM FOR THE PRIME MINISTER Negotiations with Mr. Broadbent

In late January, Mr. Broadbent approached Mr. Chretien to indicate that unless the Joint Committee on the Constitution adopted a native rights amendment, most members of the NDP caucus would not support the resolution. Consequently, we negotiated the native rights amendment which was agreed to in your office late on a Friday afternoon and immediately introduced and passed by the Joint Committee.

Because of the speed with which that amendment was adopted, confusion existed with regard to what had been agreed upon as the method by which native rights could be amended. Some members of the NDP caucus had argued for a new amending procedure which would involve seeking the consent of the native people before an amendment could be made. Others, including Mr. Broadbent and myself, were under the impression that the native rights amendment would be part of the Charter. Still others, including Mr. Tasse who was present at the Committee when the amendment was introduced and who was involved in the final discussions with the NDP members of the Committee (which did not include Mr. Broadbent who by this time was on his way to Winnipeg), thought that the amending procedure was not specifically dealt with by the amendment and that a decision had been made to deliberately leave the amending procedure unclear."

> As we have tried to cope and deal with clarification of those particular situations, it was agreed that the general amending formula should apply in those circumstances.
>
> But you are speculating, and I cannot say definitely yes or no. It would depend upon the nature of the act of Parliament.
>
> **Mr. Robinson:** Mr. Chairman, again through you, Mr. Chairman to the Minister, it has been suggested by some aboriginal groups that in this particular provision and also in the broader provision with respect to amendment of the constitution that there should be at least some requirement for consent on the part of the aboriginal peoples involved. For example, in the case of Nishka claims, that they could not be bypassed by an agreement between the provincial government and the Parliament of Canada.
>
> Have you studied the possibility of a requirement for consent and specifically have you looked at the possibility of some form of referendum of the aboriginal people involved.
>
> **Mr. Chrétien:** We have the precedent that we have created in negotiations with the Quebec native claims in the James Bay area where we insisted that there be a consultation or a referendum with the natives of that area, so I presume that this precedent will be part of the federal jurisdiction in the matter because if we have insisted to have a consultation with people in one part od Canada I do not see why we cannot.[65]

Finally, Robinson wondered if provincial abridgement of rights would be considered a national issue, worthy of the general amending formula.

> **Mr. Robinson:** My final question, Mr. Chairman, if I may, is to seek some clarification of the Minister through you, Mr. Chairman, of the circumstances in which it might be argued that aboriginal rights which were being dealt with in the case of one particular province, within the jurisdiction of one particular province, when could it be argued that this might have an impact upon aboriginal rights for the nation generally. You have stated that under circumstances this might be argued. Have you received any legal opinion as to the circumstances in which a

[65] Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 52 (3 February 1981), pp. 66-67.

> province together with the Parliament of Canada could extinguish any rights on the one hand and on the other hand when this might have some impact on aboriginal rights in the country as a whole.
>
> **Mr. Chrétien:** I have not had the time to look at all the different possible implications. As you know, this is a decision that was made by this Committee on Friday and there was some problem at the time on the negotiation about the amending formula for the entrenchment of native rights or any change of those entrenched rights. After discussion with the natives they said they would, rather than cope with this problem specifically, be satisfied to have the general application of the amending formula to apply to those rights, just like any other rights.
>
> So you see I cannot speculate at this time and say what might be the interpretation. I just say that the national government and Parliament will have some responsibility and a decision by us will necessarily affect, if we go in one direction or the other, of the rights of the aboriginal people of Canada, and what will be the interpretation of the courts in those matters it is difficult for me to speculate on that.[66]

Nevertheless, the issue would be agreed to in committee. Regarding this process and how it was viewed by Aboriginal groups, Minister Chretien would remark,

> **Mr. Chrétien:** […] It was the provision that we were contemplating in terms of the amendment of native rights that would be entrenched, and we have decided to go through the normal amending formula father than to have a special amending formula, so consequently this had to be dropped.[67]

PC MP Jake Epp, asked the Minister for information on the standpoint of the Indigenous groups regarding the decision to use the general amending formula. They say,

> **Mr. Epp:** Just a question to the Minister. In view of the difficulty that arose when this amendment was first circulated, not tabled but circulated, I would like to ask the Minister whether he now has the assurance from the leadership of the National Indian Brotherhood, the Native Council of Canada and the Inuit Tapirisat of Canada that the procedure to amend, or the possibility of amending those clauses

[66] Ibid., pp. 67-68.
[67] Ibid., p. 115.

> affecting aboriginal rights will now be done through the amending formula which will be agreed to at a later date when the entire package obviously will be voted on, whether he has the full assurance from the leadership of those three groups that that is acceptable to them?
>
> **Mr. Chrétien:** Yes. When I proposed that article to them they were very reluctant to accept it so I said if I do not present that and have dropped it, you would be subjected to the agreed amending formula that will be coming into force later on and the unanimity rule before that and they knew that and they preferred that route than to have a specific amending formula for them.
>
> And I talked to Mr. Riley of the NIB and I talked with the representative of the Inuit Tapirisat and the third group, the Métis and non-status Indians were represented by Mr. Daniels. So I have talked to the three personally.[68]

Svend Robinson would again bring up Aboriginal consent and his concerns about the abrogation of rights in one province,

> **Mr. Robinson:** Mr. Chairman, again through you, Mr. Chairman to the Minister, it has been suggested by some aboriginal groups that in this particular provision and also in the broader provision with respect to amendment of the constitution that there should be at least some requirement for consent on the part of the aboriginal peoples involved. For example, in the case of Nishka claims, that they could not be bypassed by an agreement between the provincial government and the Parliament of Canada.
>
> Have you studied the possibility of a requirement for consent and specifically have you looked at the possibility of some form of referendum of the aboriginal people involved.
>
> **Mr. Chrétien:** We have the precedent that we have created in negotiations with the Quebec native claims in the James Bay area where we insisted that there be a consultation or a referendum with the natives of that area, so I presume that this precedent will be part of the federal jurisdiction in the matter because if we have insisted to have a consultation with people in one part of Canada I do not see why we cannot.
>
> When you take the larger terms of our aboriginal people sometimes it is easy to

[68] Ibid, 115-116.

> define them. Other times it is quite more complicated when you go with the nonstatus and the Métis people and that will be probably the subject of the national legislation when Parliament will deal with it. We do not think it is possible to entrench the referendum procedures in those matters in that clause and there is no, at the request of the natives, there is no special clause dealing with the amending formula for native rights. They have agreed with us that it will be the general amending formula that will prevail.
>
> **Mr. Robinson:** My final question, Mr. Chairman, if I may, is to seek some clarification of the Minister through you, Mr. Chairman, of the circumstances in which it might be argued that aboriginal rights which were being dealt with in the case of one particular province, within the jurisdiction of one particular province, when could it be argued that this might have an impact upon aboriginal rights for the nation generally. You have stated that under circumstances this might be argued. Have you received any legal opinion as to the circumstances in which a province together with the Parliament of Canada could extinguish any rights on the one hand and on the other hand when this might have some impact on aboriginal rights in the country as a whole.
>
> **Mr. Chrétien:** I have not had the time to look at all the different possible implications. As you know, this is a decision that was made by this Committee on Friday and there was some problem at the time on the negotiation about the amending formula for the entrenchment of native rights or any change of those entrenched rights. After discussion with the natives they said they would, rather than cope with this problem specifically, be satisfied to have the general application of the amending formula to apply to those rights, just like any other rights.
>
> So you see I cannot speculate at this time and say what might be the interpretation. I just say that the national government and Parliament will have some responsibility and a decision by us will necessarily affect, if we go in one direction or the other, of the rights of the aboriginal people of Canada, and what will be the interpretation of the courts in those matters it is difficult for me to speculate on that.[69]

Minister Chretien had argued that consent was not possible, and consultation was one which would be arrived at through federal precedent—meaning negotiations between the federal government and Indigenous peoples, while not commenting on the provinces

[69] Ibid, pp. 67-68. This quote is a repeat of a previous quote, but the analysis here is focusing on a different element of the discussion.

and that process. Regarding the abrogation of rights and whether it transcended provincial jurisdiction, he did not have an answer.

On February 5th, the conflict between resource exploration and Aboriginal rights was discussed in light of the new proposed clause,

> **M. Hawkes:** […] We are talking about ownership, the ownership of surface lands, the ownership of mines and minerals which lie under that land. We have then, in Canada, the following ownership position as related to mines and minerals.
> We have provincial Crown ownership; we have federal Crown ownership; we have freehold ownership; we have Indian reserve land ownership and a brand new concept which this Committee has approved, which remains to be discovered, and that is called aboriginal ownership, for lack of a better term.
>
> Now, can you tell me, in relationship to the proposed Section 92A(1)(a) which reads:
>
> exploration for non-renewable, natural resources in the province
>
> Can you tell me, first of all, whether the words "in the province" include all those kinds of ownership and does it place the authority of the provincial legislature, put in place the authority of the provincial legislature over all those five kinds of ownerships.
>
> **Mr. Strayer:** The clause certainly confirms the power of the province which it probably already has now anyway, with respect to regulating exploration for non-renewable natural resources. As a general proposition, the province can regulate that with respect to any lands in the province, but one has to recognize certain qualifications to that.
>
> The province cannot regulate the use of federally owned lands, for example, in the province. The province cannot make laws with respect to Indian lands in the province, say reserve lands, that is a power they do not have under the existing constitution and this I think would not give them that power either because this power has to be read subject to other provisions of the BNA Act.
>
> With respect to aboriginal rights, which Mr. Hawkes mentioned, I guess we cannot be entirely sure how this is going to relate to that because obviously the aboriginal rights will be given a constitutional recognition by Clause 31 which may well qualify the way in which the provinces can regulate exploration if there are aboriginal rights involved. There will be problems of definition and interpretation

> that will have to be worked out there over time.
>
> **M. Hawkes:** By the courts?
>
> **Mr. Strayer:** I assume so, if we do not all come to some common understanding as to what the inter-relationship is. I suppose that the courts may have to address that question sooner or later as the provision in Clause 31 of the affirmation of aboriginal rights will certainly have a bearing now on how the regulation of exploration will be carried out by the provinces.[70]

On this day, there would also be further clarification as to why the Royal Proclamation could not be part of the Constitution Act's schedule:

> **Mr. Munro:** I do not want to prolong the argument, but it does seem to me, and if through you, I might address the Minister, it does seem to me that since this schedule was drawn up in the first instance and published, and even the amendments brought forward by the government, there has been an amendment of substance referring to the aboriginal rights and the only trace that there is, the only reference to my knowledge in history in the documents to the aboriginal rights, and specific reference is made in the amendment to the Proclamation, that there ought to be in Schedule I, the Proclamation as part of the constitution of Canada.
>
> **Mr. Chrétien:** Nothing would prevent anyone wanting to define aboriginal rights to go and look at the Royal Proclamation of 1763, without having to have it appended to the constitution of Canada.
>
> Canada started as a country in 1867 and this is the Constitution Act of Canada and I do not think that we should go beyond that because that could involve all sorts of other pieces of legislation in foreign nations, either in France or in England, in the previous period that could affect that situation, and I do think that it is not desirable to append to the Canadian constitution anything that occurred before 1867.
>
> **Mr. Munro:** I accept the ruling of the law advisers to the Crown if they feel this is satisfactory, but I do think that the constitution will be defective by referring in the body of the resolution to a document that is not there in the Appendix.[71]

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[70] Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 54 (5 February 1981), pp. 20-21.

[71] Ibid, 103.

On February 17th, days after the Committee had ended, Peter Ittinyar, an NDP Member who had been part of the committee's work touted what this meant for Aboriginal peoples. He says,

> Section 35 allows for native participation at constitutional conferences held during the two-year period following patriation and calls specifically for the agenda to include the matter of identifying and defining aboriginal rights. This section implicitly recognizes the principle that the aboriginal peoples of Canada must be involved in the process of defining exactly what their rights are and, more importantly, that only the native peoples themselves can adequately represent their own interests.[72]

Thus the clause would implicitly recognize that Indigenous peoples would have to be involved in identifying and defining their rights for sec. 35. It could not be done without their input. He also adds,

> The recognition and affirmation of aboriginal rights at the constitutional level provides protection against the erosion of these rights. It means that federal government lawyers can never again argue against the existence of aboriginal rights, as they did in court against the Inuit of Baker Lake. The principle has been affirmed, and the long process of clearly defining the nature of such rights will follow. Entrenchment of aboriginal rights marks the beginning of a new era in which native people themselves will have a hand in shaping what those rights mean.[73]

We had now reached a point, where Indigenous rights had been entrenched, and Indigenous peoples would also be part of the definition of the concept in the subsequent constitutional conference. However, for many, the tension and confusion about what this meant, that had existed prior to the adoption of the clause, was still there. Here's PC MP Gary Gurbin, on February 19th in the House,

> One of the great difficulties with the Charter of Rights and Freedoms as it now exists is its application to native groups. Although the native groups, through their representations to the constitutional committee, have indeed been able to have their amendment included, the difficulty is that this amendment allows for the provision and the guarantee of aboriginal rights, but these are undefined

[72] Canada, House of Commons Debates, 32nd Parl, 1st Sess, 1981 at 7448.
[73] Ibid.

> aboriginal rights. Aboriginal rights mean many things to many people, and this will be, as time goes on, one of the major sources of friction and difficulty the native people and the government will have in Canada. This should be clarified.[74]

Even the government had indicated they did not have a definition, but would let that process unfold in the coming constitutional conference. Minister Munro says,

> Third, the Constitution Act will ensure that constitutional questions of interest to aboriginal peoples, together with the question of which rights should be included, will be discussed by their representatives with first ministers. This guarantee symbolizes, indeed formalizes, the commitment of the Prime Minister (Mr. Trudeau) to the aboriginal peoples in October 1980, that in the next phase of constitutional negotiations issues such as an elaboration and definition of what those aboriginal rights are will be discussed. Internal native self-government, representation in political institutions and the responsibilities of federal, provincial and territorial governments for the provision of services will all be discussed, and with good will we can define precisely what we mean when we entrench these fundamental rights.[75]

On March 3, a debate ensued whether Aboriginal participation in the constitutional conference would constitute a veto. Liberal Senator Steuart would say that the idea was still be considered,

> **Senator Steuart:** I understand your question. I am not a constitutional lawyer, but I am confident that the intention of the amendments brought in at the committee hearings were, in fact, to put aboriginal rights in the Constitution. The question of clarifying what those rights are and the question of whether they will, in fact, be given a veto over something that happens in the future, is still open for debate and consideration.[76]

The next day in the Senate, Senator Doody would echo concerns from the House. What exactly were these rights? He says,

> **Hon. C. William Doody:** […] What of the aboriginal rights? We have heard a great deal of self-congratulation on the other side concerning this item, but exactly what rights are we so grandly recognizing as the rights of our native peoples'! We know that the native peoples have had rights for some time. We all have rights, but the

[74] Canada, House of Commons Debates, 32nd Parl, 1st Sess, 1981 at 7494.
[75] Canada, House of Commons Debates, 32nd Parl, 1st Sess, 1981 at 7521.
[76] Canada, Senate Debates, 32nd Parl, 1st Sess, 1981 at 1922.

> native peoples don't know any more today what those rights are than they knew before this grandiose pronouncement. What amending formula will apply to the recognition of the native peoples' rights in that Constitution? Are they to be left to the mercy of the federal government or some combination of the federal and provincial governments, or are the amendments to be made through some new process yet to be displayed or dreamed up?[77]

In the House on March 12, Liberal MP Warren Allmand would argue that the rights in s. 35 were broad,

> I can tell the House that in a general way aboriginal rights are all those rights which our aboriginal peoples held prior to the arrival of the Europeans and which they never willingly gave up. These are the rights to those social structures which they had before the arrival of the Europeans; their laws, their customs, their forms of government, their economies, their languages, their lands and their waters, not just their rights to hunt, fish and gather. While those are important, aboriginal rights are not restricted to those things, and not just surface rights to certain lands. Again, that is important; aboriginal rights are not restricted to those things.
>
> …I have referred so far in this section only to aboriginal rights. It also states that the treaty rights of our aboriginal peoples are recognized and affirmed. This is also important because it puts the matters in those treaties over and above all ordinary legislation. That means that when a treaty comes into conflict with an ordinary provincial or federal law, the constitutional provision and what is contained in the treaty will prevail.[78]

Indigenous leaders, meanwhile, were not pleased to let the courts decide the issue. This had also been their refrain during the SJC meetings. Here's PC MP Bill Domm, saying,

> These rights may be entrenched, but how will they be interpreted? They will be interpreted by the courts, by government appointed judges to the Supreme Court. They are the ones who will interpret difficulties or confrontation over aboriginal rights. That is the "government" and the "individuals" mentioned by the Leader of the New Democratic Party who, in the future, will decide native rights.
>
> Del Riley, the President of the National Indian Brotherhood which consists of ten provincial and two territorial groups and represents 300,000 Indians, said he will

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[77] Canada, Senate Debates, 32nd Parl, 1st Sess, 1981 at 1936.
[78] Canada, House of Commons Debates, 32nd Parl, 1st Sess, 1980 at 8177-78.

> resign over constitutional amendments that ultimately provide for the courts to define aboriginal rights. Indian provincial groups in British Columbia, Alberta, Manitoba and Quebec have threatened to withdraw from the National Indian Brotherhood unless these constitutional amendments are dropped. And I know that Indian groups in my own riding in Ontario, represented by the Union of Ontario Indians, are opposed to the government's constitutional amendments.[79]

Finally, he argued that this clause did not guarantee Indigenous participation in the process at all. He says,

> I submit to you, Mr. Speaker, that indeed this proposal does not guarantee the continued participation of the native people of Canada in their own constitutional destiny; that it does not guarantee their rights, as alluded to in Section 33; and that it does not guarantee that fair and representative native counsel will be sought during the two-year interim period between passage of the act and the coming into force of Part VI of the act.
>
> Briefly put, the amending provisions of this act do not accommodate, beyond the two-year interim period, any future participation, of the native peoples of Canada in any further constitutional change that may affect them, their treaty rights, or their aboriginal rights; none at all.
>
> Furthermore, under Section 132 of the BNA Act and the natural resource transfer agreements, it is clear that Indian rights are the responsibility of the federal government, and the federal government alone. While there is provision in the amending formula for at least a measure of provincial participation in future constitutional change, there is absolutely none for aboriginal peoples. Clearly this gives rise to an obvious constitutional contradiction. It will be quite possible that in the future the provinces will be part of a decision-making process which might change the Constitution as it relates to native and aboriginal rights. Indian and native rights are exclusively and always have been the responsibility of the federal government.[80]

Essentially, the First Ministers would be able to repeal and create rights on their own, after the constitutionally mandated conferences.

In March of 1981, the federal government contemplated the meaning behind these new clauses. First, Indigenous peoples could not affect the amending process because they

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[79] Ibid., p. 8205.

[80] Canada, House of Commons Debates, 32nd Parl, 1st Sess, 1980 at 8206.

were not elected legislatures, saying

> "There is no provision for Native participation in the amendment process which will come into effect two years after patriation, as had been requested by Native leaders. This is because the constitutional amendment process is one which can only involve elected legislatures and governments recognized by the constitution."[81]

Finally, the rights found in what would become section 35, were as yet undefined. The definition of what these rights meant would only be determined after patriation at the constitutional conference. The briefing book says,

> "The definition of the aboriginal and treaty rights referred to in section 33 will occur both during negotiations between the federal and/or provincial governments with the aboriginal peoples in pursuit of land claims settlements and during discussions in constitutional conferences."[82]

On March 23rd, Liberal Senator Guy Williams criticized the clause, arguing it left the power of definition in the hands of the courts, saying,

> In perusing the pertinent section of the Constitution package, I did not find any positive recognition of any aboriginal rights. Neither did I find any basis for Indian land settlements. Rather, I found that the native Indians will still have to go to the courts for recognition of their aboriginal rights, and that the governments of the land will only recognize the decision of the courts regarding aboriginal rights and land claims.
>
> […] Ultimately, honourable senators, what the amendment provides is for the courts to define aboriginal rights. The majority of the Indians in this country are critical of the amendment because it leaves to the Canadian judicial system the matter of defining and interpreting native treaty and aboriginal rights.[83]

On April 10th, with rumblings that the NDP would press for an Indigenous consent clause regarding changes to Aboriginal rights, the government contemplated how to proceed if such a change was presented. The federal memo reads,

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81 Briefing Book: Constitutional Debate: The Government's Motion respecting the Constitution, February, 1981 (Revised: March 13, 1981).

82 Ibid.

83 Canada, Senate Debates, 32nd Parl, 1st Sess, 1981 at 2156.

> While the NDP appears to be firm on the "equality of sexes" amendment, there is a possibility that they may, under pressure from the native peoples, seek to modify the "aboriginals" amendment by stipulating that any amendments relating to Section 33 (Part II) can only be made with the consent of the native peoples affected.
>
> This proposal was rejected during clause-by-clause study in the Joint Committee on grounds that constitutional amendments should be made only by duly elected governments and legislatures recognized by the Constitution or by all the people in a referendum, and should not involve special interest groups be they natives, English or French language minorities or religious groups. There is no reason to change this position.
>
> Consequently, if the NDP moves this amendment as a part of their package, the Government could either:
>
> (a) denounce the NDP for reneging on its agreement and vote against the NDP amendment package, or
>
> (b) make its own amendments in the terms now agreed to with the NDP.
>
> Given the Government's public commitment to both of these amendments, the second course would appear to be the preferred course. (NOTE: Given the arrangement for voting on amendments, it would not be possible for the Government to vote for the "equality of sexes" amendment and against the "aboriginals" amendment.)[84]

As you can see, the federal government would not budge on this issue because they felt that only elected legislatures could amend the constitution. Furthermore, special consideration was not given to other groups such as linguistic minorities, even in matters of language. Therefore, the government would not accept the clause and would proceed with their original agreement, to make the clause subject to the general amending formula. Ultimately, the NDP would not push for the consent clause, and would receive considerable flack from Indigenous groups for not following up.[85]

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[84] Memo to Cabinet re Options for Handling Possible Amendments... (April 10, 1981)

[85] More research is needed, but PC MP Stan Schellenberger said on April 23 in the HOC**:** For the first time the definition will be arrived at with the participation of the provinces of this country, so the New Democratic Party said it would assist by moving an amendment to solve that problem. Members of the New Democratic Party said that rather than dealing with one province, we will now deal with the whole amending formula; we will deal with all six provinces. The provinces have an interest in defining an aboriginal claim in a very narrow way because it means land within their boundaries, it means money. So rather than having one province deal with it, there will now be a gang of provinces. One can mess things up, but I know what a gang can do, and I

On April 21st, The PCs would criticize the NDP for this retreat, saying,

> Mr. Epp: I suppose he speaks for the west or for whoever. He said to the Indian people, "I see why you feel you are not protected, but I will move nothing which does not first enjoy the approval of the government". That was his position and remains his position today. That is called parliamentary courage! The aboriginal question will not be resolved by a simple amendment. It will not be solved because of its history and its complexity. Therefore, the only way we will get to a satisfactory amendment is to sit down, either in a constituent assembly or at a first ministers' meeting, and bring in the aboriginal people in order to come up with a compromise and a negotiated solution. It will not happen with the NDP amendment, and it will not happen during these three days on the floor of the House.[86]

Furthermore, debate still raged as to what exactly the term meant. Here's Gordon Taylor of the PCs,

> Why does the government not define "aboriginal rights"? For years, the Prime Minister would not accept aboriginal rights. He said, "I don't know what they mean." He said in this House, just weeks before this was put in the charter, "I don't know what aboriginal rights mean. Define them, and then I might put them in the charter." But finally he put it in the charter without defining it. What does it mean to the Indians across Canada, to the status Indians, to the non-status Indians, to the Metis, to the Inuits and to all the other groups? Does it mean anything?[87]

On April 24th, PC Kenneth Schellenberger would say,

> The clause which causes the native people of this country much concern is clause 35. I realize that the Prime Minister could not put into the Constitution something which was not defined, so he put in a clause which sets up the procedure to define an aboriginal right. An aboriginal right will now be defined by the first ministers of the provinces, the Prime Minister and those people whom he, as Prime Minister, will invite to participate in discussions.[88]

Thus, the conference would decide what exactly Sec. 35 would mean. He

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can understand why the status Indians of this nation and the Native Council of Canada now oppose the amendment which the NDP is proposing. They asked to have a meeting with the leader. He refused to have a meeting with them to discuss this very important point, so we have lost that support. [Footnote in progress]

86 Canada, House of Commons Debates, 32nd Parl, 1st Sess, 1981 at 9370.

87 Ibid., 9363.

88 Canada, House of Commons Debates, 32nd Parl, 1st Sess, 1981 at 9459.

continues,

> **Mr. Schellenberger:** For the first time the definition will be arrived at with the participation of the provinces of this country, so the New Democratic Party said it would assist by moving an amendment to solve that problem. Members of the New Democratic Party said that rather than dealing with one province, we will now deal with the whole amending formula; we will deal with all six provinces. The provinces have an interest in defining an aboriginal claim in a very narrow way because it means land within their boundaries, it means money. So rather than having one province deal with it, there will now be a gang of provinces. One can mess things up, but I know what a gang can do, and I can understand why the status Indians of this nation and the Native Council of Canada now oppose the amendment which the NDP is proposing. They asked to have a meeting with the leader. He refused to have a meeting with them to discuss this very important point, so we have lost that support.[89]

With this state of confusion and tension, the clause would be included in the April 24th constitutional resolution, which would go to the SCC. And so, Parliament would wait to hear back, whether unilateral patriation was constitutionally valid.

On May 7th, 1981, Ontario Attorney General Roy McMurty laid out a series of fears he had to the proposed clause. It is worth documenting the letter extensively, as the provinces had not been present during the negotiations over this clause and this reveals, an early provincial perspective on fears regarding what this could mean. He says,

> In the result, it appears that every law, federal or provincial, that is inconsistent with the provision of the Constitution which "recognizes" and "affirms" the aboriginal rights and treaty rights of Indians, Inuit and Metis is of no force or effect to the extent of the inconsistency.
>
> This may have, I suggest, very serious and unfortunate consequences for the people of Canada.
>
> In the first place, although the nature of aboriginal rights is a matter of much uncertainty, it appears that they are property rights of a kind.
>
> As I read the proposed provisions, it is at least arguable that these private property rights are to be entrenched in the Constitution in the sense that (in the absence of a future constitutional amendment) they cannot be taken away, or even derogated

[89] Ibid.

from, by any legislation ever.

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

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

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

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

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

It is perhaps an arguable question as to whether The Limitations Act and its predecessors apply in the case of aboriginal title in view of section 91(24) of the B.N.A. Act, 1867. But at least the argument is available and a court might be

constrained to accede to it in order to avoid dispossession of the inhabitants of, for example, the City of Ottawa.

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

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

Finally, the proposed entrenchment would profoundly affect the question of whether any Indians are subject to game and fish legislation. Whatever else they may encompass, it is clear that aboriginal rights include a right to hunt, trap and fish. In general, the current legal position appears to be· that aboriginal rights to hunt, trap and fish are subject to federal legislation and, if our interpretation of the Kruger case in the Supreme Court of Canada is correct, to provincial legislation. Treaty rights are subject to federal legislation but, by virtue of section 88 of the Indian Act, are not subject to provincial legislation.

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

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

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

> But I suggest that this must be accomplished in a way that will not lead to unfairness, disruption, uncertainty and division in Canadian society, continuing unnecessary litigation and unrealizable expectations on the part of native peoples. It is my view that there is a substantial danger that the current provisions, if adopted and continued in their present form, will give rise to such results in some measure.
>
> Accordingly, I urge you to seriously consider amendments to the aboriginal and treaty rights provisions to remove the dangers inherent in the provisions as they now exist and to ensure the interests of the native peoples in a way that is equitable for all Canadians.[90]

While Minister Chretien would respond by saying that he couldn't comment while the SCC was examining the constitutional resolution, this letter would be discussed internally by the federal government in November, 1981.[91] Of course, for other provinces, such as BC, the fear was the potential financial obligations they would be on the hook for and were seeking that the federal government assume these costs. This will be dealt with later in the paper (Part III).

Just after the SCC ruled that provincial consent was required, by convention, on October 19th, we see an extremely interesting debate. The debate is over the *Canada Oil & Gas Act*, but the concept of Section 35 gets brought up in its practical sense. Kenneth Schellenberger argues,

> **Mr. Schellenberger: […]** There is also a feeling among native groups that Bill C-48 makes a mockery of so-called aboriginal rights contained in the proposed Charter of Rights. By virtually ignoring aboriginal title, the bill would seem to deny ifs existence despite the support given it in the charter, even though the definition clause is open to a great deal of question by native peoples.[92]

NDP MP Ian Waddell would concur,

> **Mr. Waddell: […]** We in this party support the motion, Mr. Speaker. I hope that members of the Conservative party will challenge the Minister of Energy, Mines and Resources (Mr. Lalonde) on third reading and demolish his weak argument that this is a neutral bill with respect to native land claims and native rights. It is

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90 Letter from R. Roy McMurtry to Jean Chrétien [re Aboriginal and Treaty Rights] (7 May 1981).

91 The responses to these objections is found in Part III of this paper.

92 Canada, House of Commons Debates, 32nd Parl, 1st Sess, 1981 at at 11946. See also the extensive critique of the Trudeau government by Gordon Taylor.

> not; it is a contradiction of Clause 34 of the Constitution Act and sooner or later-it may take a long time but I hope the day will come-the government will realize that.[93]

Here's Schellenberger again, on October 21st, on the same legislation,

> **Mr. Schellenberger:** Mr. Speaker, the minister put great faith in the amendments to the Constitution as the basis upon which native people could feel satisfied that their rights to land and other rights would be affirmed; yet in that very Constitution, aboriginal rights are not defined. In fact, a specific section has been put in so that not only will the federal government and native people define aboriginal claims or rights, but also the provinces. We all know that provinces are very protective of such things as land resources. This is one of the reasons many of the aboriginal or native peoples of this country question whether, in fact, they have any protection as far as land and resources are concerned, and also why they question whether such an amendment as this should be placed in the bill in order to affirm that, in fact, they have some claim to land and resources in the north under this bill. My question is whether the minister can confirm to this House that the definition will, in fact, include land and resources; and I know he cannot.[94]

Liberal MP Serge Joyal would respond,

> **Mr. Joyal:** Mr. Speaker, I appreciate the question put by the hon. member, because it is ultimately at the root of the issue of native rights. It is fair to suggest that when we attempt to define native rights, we are faced with a major difficulty. **This is why the wording of Section 34 is so vague. It is both vague and all encompassing.**
>
> Had we included in Clause 34 an enumeration of either a restrictive or indicative nature of the kind of rights that could be included or the kind of things those rights might have contained, we would have been faced with insuperable difficulties. Clearly, the provinces, as he rightly suggests, are most reluctant to enter into a discussion process where the contents of those rights would be specified. The hon. member for Provencher, who took part along with us in all those discussions, was the first to suggest that. Within the framework of the constitutional conference envisaged in Section 36, the hon. member realized this, and I quote Section 36(2):

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93 Ibid, 11947.

94 Canada, House of Commons Debates, 32nd Parl, 1st Sess, 1981 at 12037.

> —respecting 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.
>
> **Committee members unanimously recognized that had we gone into that process at this stage, we would never have seen the end of it, for the very good reason that those rights change.** They take greater dimensions along the years. Current native land claims at this time are much more extensive than ten or 20 years ago. And it is better to have an over-all protection in principle stating the rights as a whole rather than to try, by way of an enumeration, even if it is indicative, to restrict the object of those rights. However, if I may answer more directly the question, native rights include both rights to the land and rights to the resources. When earlier settlements were reached with the COPE group, the hon. member for Nunatsiaq rightly suggested that the matter of resources already being explored were excluded.
>
> But matters have changed since. I even mentioned to him that concerning the claims of the Dene and Métis, we were ready to consider, within the framework of over-all negotiations, the assessment and inclusion of resources already or close to being developed. Therefore, there is nothing in the matter of native claims that precludes claims on these lands or resources, whether surface or subsurface. The matter in my view must be examined in the over-all context of Section 34. In other words, what is involved here is the over-all rights, and those rights include social rights, property rights and other rights connected with the occupancy of the land.[95]

He would also add importantly,

> What must be recognized at this stage is that Clause 34 acknowledges and affirms their rights, and if it is shown in the settlement of claims over these lands that these people had strict ownership rights with regard to these resources, **they are entitled to a generous compensation either of a financial nature, of which there are many examples, or through lands that could be made available to them in similar conditions.** We cannot, at this point, provide for everything and some groups may indeed be in dire circumstances, but the important thing is that their rights are protected. They are protected because the ownership rights of these people over these resources are recognized.[96]

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[95] Ibid, 12037-38.
[96] Ibid, p. 12040.

Furthermore, he says,

> When we say in Clause 34 that aboriginal rights are hereby confirmed, the basic right remains, regardless of whether these rights are confirmed now or will be in the future. There will be some form of compensation and it will be possible in the settlement of the claim to offer these people the same protection and access to the resources they would have had if they had made their claim in due time. Yet the hon. member must admit that it is impossible to provide for everything. Many of the native peoples who appeared before the committee could not define aboriginal rights. It is an evolutionary notion. Its contents increase rather than decrease. Its meaning and its implications increase in keeping with our knowledge of history, treaties and past practices**. Therefore the implications of this recognition or rights will not lessen, they will extend, and will only place more responsibility on representatives of the Crown and on all corporations which may become involved in those areas. That** is why I want to reassure the hon. member that this aspect and these implications are protected because the rights of those people will be upheld, and all claims that may be laid will be based on full and total ownership of these lands and resources.[97]

We see here the final glimmer of what the federal government had set into motion. For Serge Joyal, the clause was one that would grow over time, an evolutionary one, whose contents would "increase rather than decrease".

The End of the Unilateral Stage

And yet, this path would be disrupted by the entry of a new player—the provinces. With the SCC deciding that provincial consent was required by convention, a new First Ministers Conference would be called--one which would yank the entire clause from the constitutional resolution. The provinces wanted a say in how the clause would be worded. And so, to November, 1981 we turn.

[97] Ibid.