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ENTITLEMENT TO THE RIGHTS OF ABORIGINAL PEOPLE

BY

JOCELYN GAGNE

Thesis submitted to the School of Graduate Studies and  
Research in partial fulfilment of the requirements for  
the degree of Masters of Laws

University of Ottawa



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ISBN 0-315-85772-2



UNIVERSITÉ D'OTTAWA  
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## ABSTRACT

The question that I consider, in my thesis, is who is entitled to share in whatever distinct rights aboriginal peoples may be afforded by Canadian law. The conclusion that I reach is that only groups which are capable of exercising collective rights and which are connected, by some degree of descent, to aboriginal groups that existed prior to the coming of the Europeans are entitled to aboriginal rights today.

This conclusion is derived from a consideration of the sources of aboriginal rights. Aboriginal rights, in the sense in which I use it, would include any rights which are unique to aboriginal people, including common law, treaty and constitutional rights. While the source of treaty rights appears to be, at least in part, the recognition of common law rights and the source of constitutional rights appears to be the recognition of both treaty and common law rights, the source of aboriginal peoples' common law rights is less clear.

I consider two possible sources of common law aboriginal rights.. The first is that British Colonial law recognized the continuing validity of aboriginal customary law, even after sovereignty was acquired. The second is that the common law afforded proprietary rights to those who were already in possession when the crown acquired sovereignty. The basis on which common law rights exist today in Canada has not been conclusively determined by the courts, although support for either of these sources can be found. I make no final conclusions in my thesis concerning the source or sources of common law aboriginal rights in Canada.

The significant point is that all the potential sources of aboriginal rights that I consider indicate that these rights were created for groups, not individuals and that they therefore are collective rights. A customary law based right would by its nature be the right of a group since, even if the law itself did not dictate communal holding, a law is by definition the product of a group. If prior possession is the source of aboriginal rights then who was in prior possession would have to be considered. The communal nature of most indigenous

occupation is a fact which can not be denied. It is also clear that Canadian courts regard aboriginal rights, including treaty rights, as collective or group rights not individual rights.

The sources of these rights also indicate that they were created for those who lived here before Canada was colonized and that they are therefore historical rights. Customary law refers to the laws that were created by a group before sovereignty was acquired. Prior possession refers to possession before the crown acquired sovereignty. Even if aboriginal rights are not regarded as resulting from the actions or the existence of particular groups of aboriginal people it is clear that the concept of unique rights for aboriginal people is based on the fact that these people lived here before the crown acquired the area.

Both the fact that aboriginal rights are collective and the fact that they are historical rights have certain consequences concerning who is entitled to these rights today.

Because aboriginal rights are collective rights, only a group that is a collectivity can possess these rights. However, depending on the type of collective right, the group as a whole may not have to exercise the right. Some collective rights can be exercised by individuals although their right to do so would depend on group membership.

I consider four elements that are characteristic of a grouping that constitutes a collectivity: distinct locality, distinct race, distinct culture and group identity. I determine that a collectivity must be united by something that is significant to them as a group and collect themselves on that basis but that they need not exist in a single location or be completely distinct from the rest of society on the basis of race or culture as long as they are distinguishable on these grounds.

Clearly not every collectivity that exists today is entitled to aboriginal rights. Because these rights are historical there must be a connection to an historical group. I argue that this connection does not necessarily have to be between an entire modern day collectivity and a single historical group. The original native groups that existed prior to settlement have undergone extensive changes in response both to the presence of the settlers and to laws enacted by

the government. Changes in aboriginal groupings should not alone result in the loss of aboriginal rights.

Although aboriginal rights are collective it is possible that individual members of an aboriginal collectivity that exists today may have connections to a number of different historical groups. I argue that such a collectivity should not be denied aboriginal rights although their rights may have be recognized in different ways than those of collectivities that consist almost entirely of members descended from a single historical group.

Assuming that the group as a whole or its individual members must show a connection to an historically entitled group the question is how can this connection be shown. Descent from an originally entitled group is likely the best method for doing this since it has been recognized by courts in the case of treaty rights and because it would allow the change and evolution of aboriginal groupings to take place without loss of rights. Although descent is a good method of connecting existing groups to historically entitled ones it is clear that complete descent from such groups or full aboriginal blood is not required.

I conclude that existing aboriginal groups which have a group identity and which are distinguishable on the basis of race and culture, from the rest of society, are entitled to aboriginal rights if they or their members are connected by some degree of descent to an originally entitled group.

Having considered who is entitled to aboriginal rights I go on to consider how entitlement can be affected by legislation. Both common law and treaty rights of aboriginal people are subject to legislation enacted by the appropriate level of government, although legislative power over the rights of aboriginal people protected by section 35 of the Constitution is now limited.

However, there is a distinction between legislation which regulates the exercise of aboriginal rights or even prevents their exercise and legislation which extinguishes these rights. Only once it was accepted that section 35 protected all unextinguished was it necessary for the courts to determine whether the aboriginal rights in question had been extinguished by legislation enacted prior to section 35.

It is still not entirely clear what the rules are regarding how aboriginal

rights could be extinguished before section 35 of the Constitution was enacted. What is clear, however, is that the fact that legislation prevented the exercise of a right does not mean that it extinguished the right. I conclude that those who are in principle entitled to aboriginal rights continue to have these rights even if in the past legislation prevented them from exercising these rights.

To determine who is entitled to aboriginal rights today then it is not sufficient to simply look at who is exercising these rights or who legislative provisions recognize as being entitled to these rights. It is necessary to consider both the existence of a collectivity and the historical connections that the collectivity or its members have.

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## Chapter I

INTRODUCTION

The question that will be considered in this work is, assuming an aboriginal, treaty or other right unique to aboriginal people can be established, who is entitled to that right. The definition of the rights of aboriginal people and how they can be enforced is beyond the scope of this work.

The issue of who is entitled to the rights of aboriginal people is relevant in a number of different circumstances. Examples can be identified to give context to this question. Whenever the rights of aboriginal people are recognized or enforced the question of who is entitled to these rights has to be addressed. This includes when these rights are recognized through a declaration by a court that common law aboriginal title exists in certain lands or when an agreement is made between the Government and an aboriginal group concerning these rights.

The question of who is entitled to the rights of aboriginal people also arises where legislative or constitutional provisions protect these rights against certain legislation. This includes where the Indian Act<sup>1</sup> protects a treaty right from provincial legislation<sup>2</sup>, where the Natural Resources Transfer Agreements<sup>3</sup> protect "Indian" hunting and fishing rights against provincial legislation and where section 35 of the Constitution<sup>4</sup> protects "existing" aboriginal and treaty rights. In all these cases only those entitled to the rights protected could claim the benefit of these legislative or constitutional provisions.

The question of entitlement to the rights of aboriginal people could also arise if legislation, such as the Indian Act<sup>5</sup>, which deals with these rights, is challenged under the equality section of the Charter<sup>6</sup>. Section 25 of the Charter protects "aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada" from derogation or abrogation by a Charter provision.<sup>7</sup> In an equality case, it seems likely that section 25 would only

apply when the unequal treatment of those entitled to the rights of aboriginal people and those not entitled to these rights is challenged.

It is difficult to see how applying equality to give rights to persons who are entitled to the rights of aboriginal people could negatively affect the rights of those who are already recognized as being entitled. Clearly, recognizing others as having rights could have a negative impact on those who already possess those rights, particularly if there are limited resources which must then be shared by a larger group. However, if other persons also have a right to these resources then those who currently possess rights can not be seen as being entitled to the larger share to which they may now have access. The relevance and implications of a determining entitlement to the rights of aboriginal people is not, however, the focus of this work.

The question which will be addressed is who is entitled to the rights of aboriginal people by the terms of these rights, or in principle. This question, although fundamental to the development of the concept of aboriginal rights as "rights" not privileges, is not one which has been addressed in any coherent way by Canadian law. Perhaps the major reason for this is that it has been assumed that the common law and the Canadian Constitution vested Parliament with full power over the rights of aboriginal people.

The source and the nature of the rights of aboriginal people will be considered to the extent that they are relevant to who is entitled to the rights of aboriginal people. Through this discussion, it will be seen that these rights are both historical and collective rights. Through considering the source of the rights of aboriginal people it can be concluded that these rights were vested in aboriginal groups existing at a certain point in time. Through considering the nature of the rights of aboriginal people, it can be seen that an individual is entitled to them because he or she is a member of a group and that in some cases only a group is capable of exercising these rights. The question to consider, then, is what group or groups are today entitled to and/or capable of exercising the rights vested in the original aboriginal groups.

It will be necessary to analyze what makes a group of people an entity that

is capable of exercising collective rights and what characteristics a group must possess to entitle its members to collective rights. A group that can meet these requirements would not be barred from being entitled to or from exercising the rights of aboriginal people solely on the basis that these rights are collective in nature.

However, the fact that an entity is a group capable of being entitled to or exercising collective rights does not automatically mean that they have those rights. This can only be determined by considering, based on the historical nature of aboriginal rights, who is entitled to these rights today. It will be seen that aboriginal groups, existing today, could claim entitlement to the historical rights of an original group based on descent from those originally entitled or through cultural attributes. Cultural attributes would such include things as lifestyle, customs, beliefs, religion and language. Both of these methods of connecting an existing group with an original aboriginal group will be analyzed, as well as the relationship between these requirements and the fact that these rights must be vested in a collectivity.

Having considered who is entitled to the rights of aboriginal people, it will be necessary to consider the effect that legislation can have on entitlement to these rights. The principles concerning the relationship between legislation and both common law aboriginal rights and treaty rights will be discussed. The question of whether there is a distinction between legislation which extinguishes rights and legislation which restricts, breaches or overrides these rights will be considered. In this context, both cases before section 35 of the Constitution was enacted, dealing with the paramountcy of federal legislation, and jurisprudence on section 35 concerning the meaning of "existing" will be analyzed.

Assuming that there is a difference between extinguishing a right and preventing its exercise, the requirements for extinguishment will be discussed, including the question of whether these requirements depend on the type of aboriginal right and on whether the right itself or an individual's entitlement to that right is being extinguished.

From this analysis, it is possible to draw some conclusions concerning the requirements that may have to be met by individuals or groups to show entitlement to a right of aboriginal people. Some situations in which these conclusions could be useful will then be briefly discussed. To determine who is entitled to aboriginal rights today, it is not sufficient to simply look at who is exercising these rights or who legislative provisions recognize a being entitled to these rights. It is necessary to consider both the existence of a collectivity and the existence of historical connections.

## Chapter II

THE SOURCE OF THE RIGHTS OF ABORIGINAL PEOPLEA. Introduction

A large part of the study of native law is concerned with the question of what rights the aboriginal occupants of a land have when that land is subsequently "settled" or "conquered" by others. A detailed consideration of what rights aboriginal people possess and how they can be enforced is beyond the scope of this work. The source of these rights, however, may be an important factor in determining who is entitled to them. The source of the rights of aboriginal people is relevant because to determine who is entitled to these rights, in principle, it is necessary to look at the terms of the rights themselves.

It will be seen from a consideration of the source of common law aboriginal rights that these rights were established because of circumstances which existed at a certain point in history. How other rights of aboriginal people, particularly treaty rights, arose from the recognition of these common law rights will be considered. It will be seen that these rights are, like common law rights, established at a certain point in time, although the date of establishment is different than for common law rights.

From this discussion of the source of rights of aboriginal people it will be possible to conclude that, because these rights are established at a certain point in time, current exercise of the rights does not determine who is entitled to these rights today. It will be concluded that, due to the historical nature of aboriginal rights, it is association with the originally entitled groups which is important.

## B. The Source Of Common Law Aboriginal Rights

### 1. The Laws of the Original Occupants

When a state acquires a territory that is already inhabited, the question of what rights the original occupants will continue to have must be addressed. In certain circumstances, the laws of the state which acquires a new territory will recognize the continuing validity of the laws of the original inhabitants, sometimes referred to as customary laws. Sovereignty over what is now Canada having eventually been claimed by Britain, the continuing validity of the customary laws of the original inhabitants depends on an aspect of the British common law sometimes called colonial constitutional law.

The laws of the original inhabitants, as recognized by the laws of the state which acquired sovereignty, then may be a source of aboriginal rights. Slattery describes the common law doctrine of aboriginal rights as a "principle of continuity" whereby governmental institutions, customary laws and property rights of the original inhabitants were presumed to survive to the extent that was compatible with the Crown's ultimate title to the land.<sup>8</sup> Pentney states that a basic foundation of aboriginal rights is the idea that the original inhabitant's "social, legal and institutional life merited recognition."<sup>9</sup>

Pentney quotes from Sanders who states that:

The claims to land are logically a claim to the recognition of a set of legal rights established under Indian and Inuit customary law, a law that has validity because Indian and Inuit communities had their own governments.<sup>10</sup>

Pentney concludes that "[a]lthough the Spanish theologians were concerned with affirming the humanity of native peoples later colonizing powers recognized the indigenous social institutions, at least so far as group rules governing possession of lands" were concerned.<sup>11</sup>

As already noted, this source for aboriginal rights exists because of the status the common law afforded the original inhabitants' laws. The British common law would apply once Britain had "acquired" the area in question. McNeil notes

that at the "dawn of the colonial era towards the end of the fifteenth century, there were no set rules for the acquisition of territories in international law."<sup>12</sup> He notes that "shaky claims" were fortified by whatever means were available "including assertions of discovery, symbolic acts of possession, papal bulls, the signing of treaties with rival States or local chiefs and princes, the establishment of settlements, and outright conquest by force of arms."<sup>13</sup> He concludes that although there was considerable debate about the effect of these methods "[i]n practical terms...might made right, so that a sovereign who succeeded in exercising a sufficient degree of exclusive control was generally regarded as having acquired sovereignty."<sup>14</sup>

As opposed to acquiring sovereignty in international law, the acquisition of sovereignty in municipal law depends on "the intention of the Crown, gathered from its own acts and surrounding circumstances..."<sup>15</sup> McNeil notes that the intention of the Crown is sometimes clear, such as in cases where it is expressed directly, where treaties are signed, or where settlement is authorized in the name of the Crown, and at other times more difficult to determine, such as when jurisdiction is extended over a territory gradually by a number of actions.<sup>16</sup>

The effect that the acquisition of sovereignty has on the rights of the original inhabitants depends on how that sovereignty was acquired. McNeil notes that originally the common law only recognized descent and conquest as means of acquiring territorial sovereignty but that settlement became an accepted means when "territories that were unclaimed and uninhabited - or virtually so - began to be colonized."<sup>17</sup>

McNeil goes on to discuss how it is determined whether an area was acquired by settlement or conquest. Bilson notes that in the eighteenth century the conquest theory was replaced by a concept of "peaceful possession of land which was essentially unoccupied."<sup>18</sup> McNeil would disagree with the idea that the classification of an area can be determined by the position adopted by the acquiring state.<sup>19</sup> He states that the Crown "does not have the legal authority to determine the constitutional status of its acquisitions."<sup>20</sup> This is to be determined by the courts based on "the Crown's conduct and any other relevant

circumstances."<sup>21</sup> The Crown, then, can not determine the status of a colony simply by applying a particular theory, but the Crown's actions, such as the use of force or the signing of treaties,<sup>22</sup> could affect the status of an area.

The rules concerning when a territory is settled and when it is conquered appear to be somewhat ambiguous. Slattery considers the argument that a territory is terra nullius, thus open to acquisition by settlement alone, if the land is not cultivated.<sup>23</sup> He notes a passage from Blackstone's Commentaries on the Laws of England where it is stated that:

Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where already cultivated, they have been gained by conquest or ceded to us by treaties.<sup>24</sup>

Slattery argues that there is ambiguity in this passage. He concludes that the implication that occupied lands could be settled if they were not cultivated is "dispelled" by the passage where Blackstone states that American plantations were generally conquered or ceded "being obtained in the last century by right of conquest and driving the natives out...or by treaties."<sup>25</sup>

McNeil, on the other hand, clearly does not regard the fact that an area was inhabited as precluding acquisition of the territory by settlement under British colonial law. He notes that a territory does not have to be completely vacant to be "settled", but he rejects the idea that any area that was not under cultivation or was not controlled by a state with a recognized international personality could be settled.<sup>26</sup> He considers in some detail the question of whether an established system of law precludes settlement and if so what the definition of such a system would be.<sup>27</sup> However, he concludes that in at least one situation where there was an established system of law the colony was classified as settled nonetheless.<sup>28</sup> According to McNeil, an area that was inhabited, even by persons who had an established system of law, could be acquired through "settlement" by England.

Different rules, concerning the relationship between English law and the laws of the prior inhabitants, apply depending on whether the area is classified as conquered, ceded or settled. The British law concerning the position of

inhabitants of a conquered dominion was set forward by Lord Mansfield in the 1774 case of Campbell v. Hall.<sup>29</sup> Lord Mansfield noted that "conquered inhabitants, once received under the King's protection, become subjects" and are not "enemies or aliens."<sup>30</sup> He went on to state that "the laws of a conquered country continue in force, until they are altered by the conqueror" regardless of whether those conquered were christians or pagans.<sup>31</sup> Similarly, McNeil concludes that in conquered or ceded colonies "local laws and customs, in so far as they were not unconscionable or incompatible with the change in sovereignty remained in place until altered or replaced by the Crown."<sup>32</sup>

On the other hand, the common law rule for a settled area is that enacted British law comes into force as of the date of settlement.<sup>33</sup> The logical result of the application of this rule may appear to be that English law would replace customary law as soon as sovereignty was acquired by settlement. However, this rule has been interpreted in such a way that the aboriginal inhabitants of what is now North America can continue to claim rights based on their customary laws even when the area is classified as "settled".

There are a number of different views concerning how this common law rule and the continued existence of rights based on customary law in areas that were settled or "discovered" can be reconciled. Despite these differences there appears to be general agreement that the doctrine of continuity of customary law applies to both settled and conquered areas.

McNeil notes that "local law, whether customary or otherwise, could be a good source of indigenous rights, including land rights, in settlements as well as in conquests and cessions, even in the absence of recognition of those rights by the Crown."<sup>34</sup> He further states that if conquest would not vest private property in the Crown "the act of state whereby the Crown acquired title to a settlement would not have that effect either."<sup>35</sup>

McNeil considers the difficulty presented by the fact that in a settled colony English law "would immediately rush into what was supposedly a legal vacuum" leaving no legal basis for the rights of indigenous inhabitants.<sup>36</sup> He would explain the ability of indigenous inhabitants to rely on customary law, as

a foundation for property rights, due to the fact that English law did not entirely and at once replace all local laws and that even when it did replace these laws it did not apply retroactively.

McNeil notes that in settled territories "English law accompanied the colonists to the extent that it was applicable to local circumstances."<sup>37</sup> He would interpret local circumstances to include the fact that there were indigenous occupants with their own system of laws to regulate their internal civil affairs.<sup>38</sup> For this reason, English law would not replace their laws concerning internal civil affairs; although, it could be used to supplement their system if it was inadequate to protect their rights.<sup>39</sup>

Others have considered the possibility that, even when sovereignty is gained by settlement, if the area is in fact inhabited, the rules concerning the rights of conquered inhabitants apply. Elliot notes that it has been argued that the distinction between settled and conquered areas, made by the British common law, does not account for the colonial situation of settlement of an already inhabited area.<sup>40</sup> He concludes that "British colonial law arguably was on its way to assimilating the general legal consequences of the conquest (or cession) and peaceful settlement doctrines" and that the United States Supreme Court appeared to be moving in the same direction.<sup>41</sup>

That those previously occupying a settled area were in the same position as those previously occupying a conquered area is supported by the case of Johnstone v. Connolly.<sup>42</sup> The court first noted that even in the case of a conquered country local laws and usages continue in force and went on to conclude that it was therefore:

manifest that the mere exclusive right of trading furs with the inhabitants...does not interfere with the local or national customs of those people.<sup>43</sup>

The right to be governed by their own laws or customs was, as in the case of conquered inhabitants, subject to change by the settling nation. On this point the court found that "[l]egislative power alone can change local law...but even the Legislature, would not exercise that power over countries where the local nations have been left in territorial possession...".<sup>44</sup> It could be argued

that customary law continues to be a source of rights for the original occupants either because of modifications in the way English law would apply to a settled area that was inhabited or by analogy to the position of conquered inhabitants. According to Slattery, however, the rules concerning the reception of English law to an area acquired by settlement would simply not apply to lands already occupied by aboriginal inhabitants.

Slattery notes that the doctrine of a "legal vacuum" was and still is sometimes used to determine the respective rights of the original occupants and those who later settled an area.<sup>45</sup> He describes this doctrine as viewing the original inhabitants as "mere wanderers over the surface of the land, possessing neither sovereignty nor permanent rights of any sort to the territories they occupied."<sup>46</sup> Slattery concludes that, on this view, the lands of the original inhabitants "were supposedly open to European appropriation by such methods as discovery, symbolic acts, or occupation...without any need to obtain the consent of the inhabitants, or even to conquer them."<sup>47</sup> However, Slattery states that "[i]t is not easy for us today to give much credence to this view."<sup>48</sup>

If lands occupied by aboriginal people were not terra nullius then it would be a contradiction in terms to acquire them by "settlement" or "discovery". Slattery appears to conclude, through a consideration of the landmark decision of Chief Justice Marshall in the American case of Johnson v. M'Intosh<sup>49</sup>, that in fact no rights against the original occupants were gained by virtue of settlement or discovery alone.<sup>50</sup>

Slattery notes that Marshall "envisages four stages in the evolution of the Crown's rights to Indian lands."<sup>51</sup> The first stage is when America was inhabited, in the words of Chief Justice Marshall "by a distinct people, divided into separate nations, independent of each other and of the rest of the world..."<sup>52</sup>

It is in the second stage that Marshall deals with the consequences of the European nations "discovering" already occupied lands. Slattery notes that Marshall states that:

It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have

rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or...that the discovery...should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.<sup>53</sup>

Slattery states that "[t]his right of discovery was held against other European states but not the Indian peoples, who had not ascribed to it, and whose rights were in no way affected."<sup>54</sup> The effect of "discovery" or other claims to land already occupied then was to prevent claims by other states, not to make English law applicable in the whole territory so claimed.

The third stage did not take place until actual control of the area was secured "by force of arms or treaty and Indian peoples generally became dependant nations..."<sup>55</sup> Apparently, the only effect control of Indian lands had was to prevent alienation to other states.<sup>56</sup> The final stage that Slattery describes is extinguishment which takes place by virtue of agreement or conquest.<sup>57</sup>

The end result of what Slattery describes as the doctrine of aboriginal title is that the customary law of the original inhabitants, concerning at least their rights to the lands they held, would not be affected until there was a conquest or a cession, at which time the doctrine of continuity would apply to give validity to customary laws until they were changed by the conquerors.

Others have disagreed that the fundamental basis for aboriginal rights is the recognition of aboriginal customary law, through whatever means, by the British common law. Flanagan argues that the "doctrine of aboriginal title evolved in British law to cover the situation where British sovereignty was imposed on nomadic, hunting and food gathering peoples."<sup>58</sup> He goes on to state that the "underlying theory was that the introduction of European methods of agriculture, which would multiply the productivity of the soil and enlarge the population, justified the sovereign in requiring the natives to surrender their right to live off the land and to settle down in a way compatible with European-style agriculture."<sup>59</sup> He argues that "[a]boriginal title makes no sense unless the imperial power recognizes a distinction between agricultural and nomadic existence."<sup>60</sup>

Flanagan concludes that the "[c]onquest of agricultural peoples calls for

the retention of their property rights, as part of the...doctrine of the law of nations", while "[t]he less individualistic property rights of uncivilized" peoples are protected by "aboriginal title, extinguishment and compensation."<sup>61</sup> Based on this, he concludes that "aboriginal rights are not merely or chiefly, a question of who was there first; they arise rather as an adjustment in the contact between agricultural and nomadic peoples."<sup>62</sup>

Flanagan's conclusions are questionable on a number of grounds. In the first place the assumption that all aboriginal inhabitants were non-agricultural nomads could be challenged. Even if it was assumed that an aboriginal group did not cultivate the land, it has been seen that lack of cultivation alone is likely not a basis for considering an area to be settled as opposed to being conquered. Finally, even if British colonial constitutional law was interpreted in such a way, contrary to the opinion of Slattery, that all of what is now Canada was considered to have been acquired by settlement alone it seems clear that those who inhabited a settled area can have customary law rights.

What Flanagan fails to take into account is the fact that the distinction between farmers and "nomads" was only relevant to justify applying the doctrine of discovery, instead of the conquest doctrine. This ethnocentric justification became obsolete when the distinctions between the consequences, for the original inhabitants, of conquest or discovery were abolished due to the fact that the common law recognized inhabitants of both areas as having rights, based on the continuing validity of their laws.

For these reasons the conclusion that aboriginal rights are based on the fact that aboriginal peoples were "nomads" is questionable. If it were accepted that this was the source of aboriginal rights, then this may have consequences for who is entitled to these rights today. However, it would be necessary to keep in mind that the basis for the establishment of aboriginal rights is not the same thing as the characteristics necessary to show entitlement to established rights. That is to say that even if the source of this type of rights in general was the original occupants' nomadic existence this does not mean that only nomads can claim these rights today.

## 2. Prior Occupation

Customary law, continued by principles of colonial law, may not be the only source of common law rights for aboriginal occupants. McNeil discusses the potential difficulties of establishing a claim based on customary law including proof of a customary system of law at the time sovereignty was acquired as well as the possibility that some aboriginal groups did not have "a concept" of ownership of land.<sup>63</sup>

McNeil states, however, that "whether or not an indigenous people had land rights of a proprietary nature under their own laws, the fact of their presence on and use of lands at the time the Crown acquired sovereignty over the lands inhabited by them could hardly be denied."<sup>64</sup> Similarly Cumming and Mickenberg describe aboriginal rights as "those rights which native people retain as a result of their original possession of the soil..."<sup>65</sup>

McNeil considers the situation where the Crown acquires sovereignty by settlement without actually seizing the lands.<sup>66</sup> He makes a distinction between "territorial sovereignty", involving "questions of international and constitutional law" and title to land, involving "proprietary rights, which depend for the most part on the municipal law of property."<sup>67</sup> McNeil notes, however, that because of principles of feudal English law, which dictate that sovereignty is based on Crown ownership, territorial sovereignty itself carried with it proprietary title.<sup>68</sup>

McNeil concludes that whether the Crown is deemed to possess the lands or whether the Crown is simply regarded as possessing them in international, not municipal law, the important point is that in English law actual possession and ownership of lands is not a pre-requisite to sovereignty over the lands.<sup>69</sup> Because the Crown need not have actually been in possession of the land to acquire sovereignty, and because English law, as has been seen, would apply upon the acquisition of sovereignty, it would be possible for the original occupants to gain rights in English law based on their possession at the time that English law first applied.

McNeil considers whether original inhabitants would be considered to be in "occupation" by English law and concludes that even those inhabitants who did not cultivate a particular area but who "habitually and exclusively ranged over a definite tract of land...would have been in occupation of that land."<sup>70</sup> He then discusses how at common law occupation is prima-facie proof of possession, which in turn results in the presumption of title to the land.<sup>71</sup>

The question remains, however, as to whether sovereignty itself gave the Crown title to the land such that an occupancy based title could not be claimed. McNeil concludes that the Crown did not acquire possession and title to lands of indigenous inhabitants simply by virtue of having "settled" the territory. He argues that the Crown would gain paramount lordship but not title to the lands themselves when the lands were already occupied since the basis for this title, Crown occupancy, could not exist in areas already inhabited.<sup>72</sup> He notes that the basis for Crown possessory title to land in settled areas is the fact that the lands are vacant.<sup>73</sup> Therefore in inhabited areas there would be no basis for such a title.<sup>74</sup> He would get around the fact that the Crown is deemed by English law to have an occupancy based title to all lands over which it has sovereignty by noting that this "fiction" can not generally be used against those in occupation because a Crown grant is deemed in the circumstances.<sup>75</sup>

British colonial law, then, may recognize aboriginal inhabitants as having title to the land they occupied based simply on the fact they were already living on the land at the time that the British acquired the area. This source for common law aboriginal title would exist regardless of whether the inhabitants in question had a system of law under which they were entitled to land rights of a possessory nature.

## 3. The Case Law

Judicial opinion is not unanimous, at least in some earlier cases, concerning the source or sources of aboriginal common law rights. In an early Canadian case dealing with aboriginal title to land, the Judicial Committee of the Privy Council appeared to take the view that the source of Indian title is the Royal Proclamation, 1763<sup>76</sup>. In the St. Catherine's case Lord Watson, speaking for the Committee, held that the possession of the Indians in question "such as it was, can only be ascribed to the general provisions made by the royal proclamation."<sup>77</sup>

One author notes that Lord Watson may not have intended to exclude other types of claims based on occupation or that he may have seen the Royal Proclamation interest as "merely recognizing and formalizing a wider occupation-based aboriginal title."<sup>78</sup> Similarly, McNeil notes that Lord Watson "based his remarks respecting the nature of the Indians' interest on the terms of the Royal Proclamation, apparently without deciding whether the Indians had land rights under the French regime."<sup>79</sup> The idea that Indian land rights are based on the Royal Proclamation then may be confined to those cases both where the Proclamation applies and where another basis, such as customary law or prior occupation, is not proven.<sup>80</sup>

Despite what was said in the St. Catherine's case there appears to be a consensus in modern Canadian cases that aboriginal title is not based on the Royal Proclamation, 1763 or any other executive or legislative action. While it now seems clear that Canadian courts have rejected this proposition there remains some question as to whether customary law or prior occupancy, or some combination of both, is regarded as the source of common law aboriginal rights.

McNeil notes that in Connolly v. Woolrich<sup>81</sup> a Canadian court affirmed that the doctrine of continuity applies in settled areas of Canada.<sup>82</sup> However, he also notes that because this case dealt with a marriage by custom its application to land rights would be obiter but would be supported by principles of colonial law.<sup>83</sup> McNeil concludes that "[o]nly rarely...have Canadian judges relied

expressly on customary law as a basis of indigenous land rights."<sup>84</sup>

A land mark Canadian case concerning aboriginal title is the Calder case.<sup>85</sup> It will be seen, however, that this case did not conclusively determine the source of common law aboriginal title. Neither the question of whether legislative or executive action was required or the question of whether aboriginal title was based on customary law or prior occupation were conclusively answered by the judgments in this case.

Judson, J., Martland and Ritchie, JJ. concurring, stated:

It is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means....<sup>86</sup>

McNeil notes that "[a]lthough Judson does not seem to have excluded the possibility of customary law title, his emphasis was more on occupation and use in accordance with the Indian's way of life."<sup>87</sup>

Judson, J. then went on to consider the question of whether the common law rights in question were extinguished.<sup>88</sup> The fact that he felt it necessary to do so is a clear indication that he accepted that common law aboriginal rights could exist simply by virtue of prior occupation without any legislative or other action affirming them. His conclusion, however, strictly speaking did not involve a decision on the point of whether the aboriginal rights claimed ever existed. He simply found that any right that the Nishga might have had no longer existed.<sup>89</sup>

Hall, J., Spence and Laskin, JJ. concurring, began with a consideration of the history of the Nishga people and the use they made of the land in question.<sup>90</sup> He went on to consider "jurisprudence affirming common law recognition of aboriginal rights" including the decision of Chief Justice Marshall in Johnson v. M'Intosh.<sup>91</sup> Hall, J. stated that:

The dominant and recurring proposition stated by Chief Justice Marshall in Johnson v. M'Intosh is that on discovery or on conquest the aborigines of the newly-found lands were conceded to be the rightful occupants of the soil with a legal as well as a just claim to retain possession of it...but their rights to complete sovereignty as independent nations were necessarily

diminished....<sup>92</sup>

Hall, J. concluded that "aboriginal Indian title does not depend on treaty, executive order or legislative enactment."<sup>93</sup>

Hall, J. then, unlike Judson, J., definitely accepted that legislative or executive action was not the source of aboriginal title. However, as McNeil notes, it is not clear, whether Hall, J. regarded the title as based on prior occupation or customary law.<sup>94</sup> McNeil notes that Hall, J. regards aboriginal land rights as being based on aboriginal concepts of ownership but at the same time finds that possession itself is proof of ownership.<sup>95</sup> McNeil goes on to describe how Hall, J. did not require proof of the customary law under which the Nishga held title while at the same time did not accord the Nishga the extent of title they would possess under an occupation based title.<sup>96</sup> McNeil concludes that "Hall's judgment none the less indicates an awareness of the relevance to aboriginal land claims of the presumption that possessors have title."<sup>97</sup>

Some have questioned whether the Calder case positively affirms that aboriginal rights, at least regarding the land they once occupied, exist under the common law alone. One author suggests that as "a legal precedent, the Supreme Court's Calder decision did little to clarify the status of aboriginal title."<sup>98</sup> He notes that of the six judges who considered "occupancy-based title" none rejected the concept.<sup>99</sup> However he also argues that "Judson, J. may have simply been pointing out that what the Nishgas were claiming were not Proclamation rights but occupancy-based rights."<sup>100</sup>

The author goes on to note that because three of the judges who accepted occupancy-based title dissented, on other issues, and Pigeon, J. only supported the other three on the procedural question, the only majority judgment in the case was on this procedural point.<sup>101</sup> After considering a number of cases, decided after the Calder case, the author concludes that:

for the most part higher Canadian courts have failed to give clear legal recognition to an occupancy based title....[t]he Supreme Court of Canada...has not yet explicitly equated them with common law rights....Higher courts have shown a preference for resolving issues on the basis of more procedural or technical issues....<sup>102</sup>

However, it will be seen that cases, including ones decided after this

opinion was written, interpret the opinion of the majority of the Justices in the Calder case as determining that aboriginal rights do exist under the rules of the common law. This is true despite the fact that this majority opinion did not affect the outcome of the Calder case itself and despite the fact that it is not clear whether the source of these common law rights was considered to be the recognition of customary law, prior occupancy or both.

Mahoney, J., of the Federal Court, Trial Division, in the Baker Lake case simply stated that "[t]he Calder decision renders untenable, in so far as Canada is concerned, the defendants' arguments that no aboriginal title exists in a settled, as distinguished from a conquered or ceded, colony and that there is no aboriginal title unless it has been recognized by statute or prerogative act of the Crown or by treaty having statutory effect."<sup>103</sup>

While there is no doubt in this case about the fact that aboriginal title does not derive from legislation or executive action, this case does little to resolve the question of whether aboriginal title is based on the recognition of customary law by the British common law or the rights accorded to prior occupants by the British common law. Mahoney, J.'s reference to colonial rules regarding the consequences of settlement or conquest would seem to imply that he considered aboriginal title to be based on the doctrine of continuity of customary law after settlement or conquest.

McNeil, however, criticizes the judgment of Mahoney, J. for not considering whether a customary law right to the use of the land existed, if this was the basis for establishing the land rights.<sup>104</sup> McNeil states that "if the Inuit's title depended on their own customary laws (as Mahoney seems to have thought), one may wonder how he reached any conclusions about the nature of their rights without proof of that law."<sup>105</sup>

Dickson, C.J.C. in the Supreme Court case of Guerin noted that in Calder the Supreme Court "recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands."<sup>106</sup> He stated that the Indians' interest in their lands "is a pre-existing legal right not created by the Royal Proclamation, by ...the Indian Act, or by any other

executive order or legal provision."<sup>107</sup> Dickson, C.J.C. also noted "that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants."<sup>108</sup>

Once again legislative or executive action is rejected as the basis for aboriginal title, but it is not clear what alternative source is accepted. McNeil notes that "one might think that Dickson regarded customary law as the source of Indian aboriginal title."<sup>109</sup> Presumably this would be because he referred to aboriginal title as a "pre-existing legal right". However Dickson, C.J.C. also noted that it was based on "historic occupation and possession" which supports the conclusion that aboriginal title was based simply on prior occupation. The confusion created by these two passages is confounded by the fact that, as McNeil notes, the nature of the interest that Dickson, C.J.C. found aboriginal groups to have did not correspond with the idea that these rights were based on customary law.<sup>110</sup>

In the Denny<sup>111</sup> case the Appeal Division of the Nova Scotia Supreme Court also accepted the idea that aboriginal rights are not based on legislative or executive action. Clarke, C.J.N.S., speaking for the court, first noted that in the Calder case the Supreme Court of Canada "recognized aboriginal title as a legal right derived from Indians' historic occupation and possession of their tribal lands."<sup>112</sup> He appears to be paraphrasing what was said in the Guerin case concerning the source of aboriginal title. Like the statement in the Guerin case, this statement could imply either a customary law or an occupancy based title.

The question of the source of aboriginal title was also raised in the Sparrow case.<sup>113</sup> The Court of Appeal concluded that "[s]ix judges of the Supreme Court having joined in rejecting the view that aboriginal title can exist only if conferred by a treaty, statute or agreement, there can be no justification for continuing to treat that view as binding."<sup>114</sup>

When the Sparrow case was appealed to the Supreme Court, the issue of common law aboriginal rights was again briefly considered. Dickson, C.J.C. and La Forest, J. gave the judgment of the court. At one point they noted that the "evidence reveals that the Musqueam have lived in the area as an organized

society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day."<sup>115</sup> They went on to note that although the evidence was "scanty" for the period between 1867 and 1961 "the evidence was not disputed or contradicted in the courts below and there is evidence of sufficient continuity of the right to support the Court of Appeal's finding" that Sparrow was exercising an aboriginal right to fish at the relevant time.<sup>116</sup>

As in other Canadian cases dealing with the source of aboriginal title, the judgment of the Supreme Court in this case could be used to support the argument that aboriginal title is based on the continuation of customary law or that it is simply based on prior use of the land. McNeil notes that the rationale for requiring an organized society is that what is being recognized is the laws of that society.<sup>117</sup> The reference to an organized society then may indicate that the court regarded the rights as being based on customary law. However, as in earlier cases, the court also referred simply to the prior use made of the land by the aboriginal group.

It would seem then that there is little doubt that the aboriginal people have rights reflected in the common law. It is not clear whether this is based on the laws of the original inhabitants being continued through principles of colonial common law or on the rights afforded to prior occupants by the English common law, or some combination of the two. McNeil concludes that:

Canadian judges, while generally acknowledging that indigenous peoples were in occupation and had some sort of communal legal title to lands used by them when territorial sovereignty was acquired by the Crown, have so far failed to specify clearly the source or sources of that title. They have referred variously to customary law, occupation and use of traditional lands and the Royal Proclamation of 1763....<sup>118</sup>

For our purposes it is not necessary to determine conclusively the sources of common law aboriginal rights. The important point is that in either case the rights are based on circumstances which existed at a certain point in history. The relevant circumstance may be the existence of a customary system of law or simple occupation of the land or some combination of the two. The important question to consider now is when must a system of customary law exist or when

must aboriginal people be occupying the land in order to claim rights under the common law.

#### 4. When Aboriginal Rights are Established

If the source of aboriginal common law rights is the continuing validity of the laws of the original occupants, even after settlement or conquest by Britain, the question of when those laws must exist in order to establish aboriginal rights has to be addressed. It would seem logical to conclude that it is the customary laws that existed before English law applied that would be the source of aboriginal rights.

The rationale for the validity of the customary laws is what is called the doctrine of continuity. Both McNeil and Slattery note that English law would not apply retroactively so as to nullify pre-existing rights held under customary law.<sup>119</sup> Although both Slattery and McNeil appear to agree that "it is the customary law in effect when English laws first applies to the area that establishes aboriginal rights to land, there is some question as to when each would regard English law as applying.

McNeil, in discussing the difficulties with establishing a claim by virtue of customary law, states that "it may not be possible to determine today whether or not indigenous people had a customary system of tenure at the time the Crown acquired sovereignty over the territory inhabited by them."<sup>120</sup> [emphasis added] This would seem to imply that only customary law in existence at the time sovereignty was acquired could be the source of aboriginal land rights.

The methods that McNeil discusses for acquiring sovereignty have already been considered. It is sufficient to note at this point that he appears to accept that Britain could acquire sovereignty over an area simply by indicating a clear intention to do so without actually occupying the area or conquering the people inhabiting the area. By this reasoning, it would be the customary law that existed when sovereignty was asserted that would establish rights. After that point English law would apply, at least regarding the respective rights of the

original occupants and the settlers.

Slattery, on the other hand, because he would not view the original inhabitants as being affected by claims through "discovery" or settlement that were not backed by conquest or agreement would presumably regard the original inhabitants as capable of creating rights through their own laws until the area was acquired by conquest or agreement. Slattery notes that the doctrine of aboriginal title does not assume aboriginal groups were tied to a particular tract of land as it was accepted practice to move.<sup>121</sup> He uses this fact to make the point that aboriginal title arguably applies to lands actually occupied at the time of settlement.<sup>122</sup> Presumably what Slattery means by "settlement" in this context is not the acquisition of sovereignty by authorization of settlement in the name of the Crown but rather the actual gaining of control of the area through occupation by settlers and other means.

The same questions, regarding the exact date of establishment of the rights, could arise if the source of the rights was found to be prior occupation. In the same way that a claim based on customary laws would be based on pre-existing laws, it would seem logical that a claim to land based on occupation would be based on prior occupation. Once the Crown had acquired sovereignty, it would, according to McNeil, also gain proprietary title to any vacant land. It is only the fact that the land was occupied when sovereignty was acquired that would prevent this. For this reason occupation at a later date would not be relevant. McNeil states that the "beneficiaries of common law aboriginal title at the time that the Crown acquired sovereignty would be the persons then in occupation."<sup>123</sup>

However, it is possible to argue that the relevant time to establish occupation is not when sovereignty was acquired by "discovery" or the authorization of settlement in the Crown's name. If these acts were only effective as between the acquiring state and other European nations and did not effect the rights of the original inhabitants, as Slattery argues, then an occupancy based title could be claimed if occupation was established any time before the state gained rights against the original occupants by conquest or

agreement.

Judicial opinion does not conclusively settle the question of when customary laws or prior occupation must exist in order to form the basis of a claim for aboriginal rights. As already noted, in the Calder case the majority did not decide the question of whether the Nishga had established continuing common law aboriginal title to the land in question. However Hall, J., speaking for the three dissenting judges, did consider the claim of the Nishga in some detail. The evidence that he reviewed in his judgment makes it clear that what the Nishga sought to establish was occupation of the lands in question before the coming of the "white" men.

Hall, J. noted that Calder, in cross examination, stated that "[f]rom time immemorial the Nass River Nishga Indians possessed, occupied and used the Nass Valley....[t]he Nishgas have never ceded or extinguished their aboriginal title within this territory."<sup>124</sup> Hall, J. also noted some of the testimony of Dr. Duff. In this testimony Dr. Duff was asked "Who has, since time immemorial, inhabited the area delineated on the map ? " and he replied "The Nishga Indians."<sup>125</sup> In another portion of Dr. Duff's testimony, quoted by Hall, J., Dr. Duff stated that:

All of the surrounding tribes knew the Nishga as the homogenous group of Indians occupying the area....they knew them collectively under the term Nishga. They knew that they spoke their own dialect, that they occupied and were owners of the territory....<sup>126</sup>

While it seems clear that Hall, J. was considering circumstances that existed historically, not current circumstances, the question of precise time at which occupation, or customary laws must be established was not considered by Hall, J. or other judges in the Calder case. There is, however, a clear indication that Hall, J. regarded aboriginal title as being established at a discrete point in time historically and also regarded extinguishment as necessary to change those rights once established. Before considering the question of extinguishment Hall, J. simply noted that "[o]nce aboriginal title is established, it is presumed to continue until the contrary is proven."<sup>127</sup>

In the Baker Lake case the Federal Court, Trial Division, considered the

requirements necessary to establish aboriginal title at common law. Mahoney, J. drew in part on the Calder case and American authority quoted in that case to conclude that there were four elements which had to be proved to establish common law aboriginal title.<sup>128</sup> Persons claiming aboriginal title, according to Mahoney, J., would have to show:

1. That they and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England. [emphasis added]<sup>129</sup>

It is clear from looking at these requirements that the question of occupation, for the purpose of establishing rights, is a question of historical occupation. The historical nature of the occupation required is also evident from the conclusion of Mahoney, J. that "to the extent human beings were capable of surviving on the barren lands, the Inuit were there; to the extent the barrens lent themselves to human occupation, the Inuit occupied them."<sup>130</sup> Mahoney, J. noted that "on the evidence before me...at the time England asserted sovereignty over the barren lands...the Inuit were the exclusive occupants."<sup>131</sup> He then concluded that "[a]n aboriginal title to that territory...vested at common law in the Inuit".<sup>132</sup> He then went on to consider the question of extinguishment.<sup>133</sup>

On the question of when the occupation had to be established the Baker Lake case is more precise than the Calder case. It has already been seen that one of the four requirements Mahoney, J. indicated was occupation as a fact before England asserted sovereignty over the lands. On this point Mahoney, J. noted a Supreme Court of Canada decision for the proposition that time immemorial runs back to the date of assertion of English sovereignty.<sup>134</sup>

The fact that Mahoney, J. uses the word "asserted" could be used to support the conclusion that he considers the relevant time to be when England showed a clear intention to acquire the area not when they had physically acquired control of the area. However, he does not discuss the issue of what actions are necessary

to assert "sovereignty".

The time at which a right by customary law or occupation as a fact must be established may be very important, particularly if Metis people want to make claims, as Metis, to the land they occupied, as opposed to the lands their Indian ancestors occupied before "discovery". Flanagan uses the fact that the Metis, by definition, could not have been in occupation before England asserted sovereignty to argue that they can not claim aboriginal common law title.<sup>135</sup>

However, the precise time when aboriginal title to land is established at common law is a question which is beyond the scope of this work. It is sufficient for our purposes to note that aboriginal rights to land refer to the lands occupied at a particular point in time in history or lands to which there was a customary law right at a particular point in time. The relevant date may have been as late as when the control over the area was actually established or as early as when the Crown showed an intention to acquire the area, but it is unlikely that it would extend to the present.

### C. Treaty And Other Rights Of Aboriginal People

Aboriginal rights, based on the common law, can be seen as the foundation of certain others rights which aboriginal people may claim today. The Royal Proclamation, 1763 could be regarded as an early recognition of common law aboriginal rights to lands. The Proclamation reserved certain lands for the Indians and prohibited private purchase of them stating:

And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom we are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds....<sup>136</sup>

It has already been seen that this document was regarded as a foundation for aboriginal rights in the St. Catherine's case.<sup>137</sup> Hall, J., however, concluded in the Calder case that the Proclamation was not the source of aboriginal rights to lands originally occupied but was "declaratory and

confirmatory of aboriginal rights."<sup>138</sup> Similarly Steele, J. in the trial level judgment of the Bear Island case noted that:

The only difference between the common law and the Royal Proclamation is that under the Royal Proclamation the relevant date for determining aboriginal rights is 1763, whereas at common law the relevant date for determining aboriginal rights is the coming of settlement. In all other respects, the aboriginal rights of the Indians and the Crown is the same.<sup>139</sup>

The other major rights of aboriginal peoples that are based on common law rights are treaty and land claim settlement rights. It seems clear that the necessity for treaties and land claim settlements resulted, at least in part, from the fact that aboriginal people were regarded as having rights to the land they occupied. Although, as was noted by the Supreme Court in the Sioui case, a treaty can deal with matters other than land cessions such as political or social rights.<sup>140</sup> The fact that treaties were necessary to deal with lands occupied by original inhabitants was affirmed by various laws.

The Royal Proclamation, 1763 recognized the necessity for treaties. The Indians' right to the land they occupied was recognized by this document and the government was confirmed as the middleman, between the original occupants and settlers, in the settlement of these rights.<sup>141</sup> The treaty making process was formalized as the Crown monopoly on purchase of Indian land was confirmed.<sup>142</sup>

Other laws also recognized that treaties were required because the original occupants had rights to the land they occupied. In 1869 and 1870 the territories of the Hudson's Bay Company were purchased and the North-Western Territory was acquired.<sup>143</sup> The 1870 Order-in-Council admitting Rupert's Land and the North Western Territory into the Union clearly expressed the need for agreements concerning the rights of the original inhabitants. It provided that "the claims of the Indian tribes to compensation for land required for the purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown its dealings with the aboriginals."<sup>144</sup>

Similarly the first Dominion Act, passed in 1872, dealing with the sale of Crown land, provided that "[n]one of the provisions of this Act...shall be held

to apply to territory the Indian title to which shall not at the time have been extinguished."<sup>145</sup> The Manitoba Act<sup>146</sup>, passed in 1870 and the Dominion Lands Act<sup>147</sup>, passed in 1874 also provided for the extinguishment of Indian title to lands prior to settlement.

As well the Federal Government disallowed an Act concerning Crown land in British Columbia because no provision was made for surrender of Indian title prior to settlement.<sup>148</sup> Although there was subsequently a political accommodation,<sup>149</sup> at the time of the disallowance it was stated that:

There is not a shadow of doubt, that from the earliest times, England has always felt it imperative to meet the Indians in council, and to obtain surrenders of tracts of Canada as from time to time such were required for purposes of settlements.<sup>150</sup>

Another example of legal reinforcement of the necessity for treaties is the 1912 boundaries extension legislation for both Ontario and Quebec which made special provisions requiring treaties with the Indians.<sup>151</sup>

Many of the treaties, because they were required before lands occupied by aboriginal people could be settled, recognized their title to this land and at the same time extinguished it. Although some treaties were not made for the purpose of extinguishing land rights and opening lands up for settlement,<sup>152</sup> many of the treaties speak of Indians conveying land to the Crown.<sup>153</sup> Indeed it could be said that the necessity to extinguish Indian title was the major reason behind treaties made during certain periods of Canadian history. Mr. Justice Hall stated in the Calder case:

Surely the Canadian Treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other purpose did they serve? If they were not intended to extinguish the Indian right, they were a gross fraud and that is not to be assumed.<sup>154</sup>

On this point Hall, J. quoted from Johnson, J.A. in the Sikyea<sup>155</sup> case where he stated that "[t]he Government of Canada has treated all Indians across Canada...as having an interest in the lands that required a treaty to effect its surrender."<sup>156</sup> Hall, J. concluded that the "[t]reaties made with Indians of the Canadian West covering enormous tracts of land....were a recognition of Indian title."<sup>157</sup>

The idea that the treaties recognized and extinguished aboriginal people's title to the land they occupied can be seen from the 1888 case of St. Catherine's Milling and Lumber Co. v. The Queen.<sup>158</sup> In this case the Federal Government argued, although unsuccessfully, that full title to the land had been given to them by the Indians through Treaty No. 3.<sup>159</sup> Such an argument clearly involves a recognition that Indians had rights to the land to convey.

Some of the Federal-Provincial agreements which followed the decision in this case made specific reference to the fact that, prior to surrender, Indians had land rights to the territories they occupied. For example the 1924 Ontario Agreement provided that:

Whereas from time to time treaties have been made with the Indians for the surrender for various considerations of their personal and usufructuary rights to the territories now included in the Province of Ontario....<sup>160</sup>

In addition to recognizing and extinguishing land rights these treaties also created continuing special status for these groups. The treaties can be viewed not so much as creating rights but as recognizing rights that already existed and extinguishing some of them while preserving others.<sup>161</sup> Although the treaties were entered into, at least in part, because aboriginal people were recognized as having common law rights, those aboriginal people who signed treaties could thereafter claim rights based on these treaties alone, without reference to prior existing common law rights.

Like the treaties, land claim settlements also extinguish certain rights while recognizing others as continuing. The purpose of these claim settlements was expressed, by the Federal Government, to be to "translate the concept of 'aboriginal interest' into concrete and lasting benefits in the context of contemporary society."<sup>162</sup> In short the "objective of the claims is to translate the aboriginal interest into particular benefits that will promote social, cultural and economic continuity of aboriginal society."<sup>163</sup>

Like the common law rights they are based on, treaty and land claim settlement rights are created at a certain point in time. The significant point in time is when the agreement was made. In the case of claims to land owing due

to treaties or land settlement claims it is even clearer that the group need not be occupying the land to make the claim based on the agreement. If this was the case, then these rights could cease to exist simply because the group could not occupy the land promised to them.

In the same way that common law rights can be seen as the basis for the treaties, the treaties themselves have become the basis for certain other rights. When the Federal Government transferred the ownership of natural resources to the prairie provinces in 1930 they made provision for protection of Indian rights just as they had when boundary extension legislation was passed for Quebec and Ontario.

The Natural Resources Transfer Agreements, which were made part of the Constitution, preserve the "Indians'" right:

of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.<sup>164</sup>

This right is similar to one that was given by the numbered treaties except that it is limited to harvesting for food and the area which a person could hunt or fish on is not the land ceded by his or her aboriginal group but any unoccupied Crown land in the three prairie provinces. One author notes that the Supreme Court of Canada has declared on three occasions that the purpose of these agreements was to effect "a merger and consolidation" of the treaty rights of Indians.<sup>165</sup> In the recent Horseman case the Supreme Court affirmed that this is the effect of these agreements.<sup>166</sup>

Section 35 of the Constitution Act, 1982 on the other hand, provides that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."<sup>167</sup> The full extent of the rights this includes is beyond the scope of this work. The question of when a right is "existing" will be considered when the extinguishment of the rights of aboriginal people is considered. It is sufficient, at this point, to note that section 35 rights depend on the prior existence of common law aboriginal rights or treaty or land claim rights.

Common law rights then can be viewed as the basis for such actions as the Royal Proclamation, 1763, treaties and land claims settlements. The basis for treaty rights may be the common law rights of the original inhabitants, but treaties themselves now provide an independent source of rights for those who have signed them. However, to the extent that a particular treaty did not extinguish all the common law rights of its signatories, they may be able to claim these rights as well. Other constitutional rights are also based explicitly or implicitly on treaty and/or common law rights. The source of these rights is the Constitution. However, only those with aboriginal or treaty rights could claim rights under section 35.

D. Conclusion

The important point in the case of both treaty and common law rights is that they were originally created because of the circumstances which existed either when sovereignty was acquired, as evidenced by the intention of the Crown to do so, or when England gained control of what is now Canada through actual settlement of the land, by force of arms and through agreements. For some aboriginal people the source of their rights is historical customary law or original occupation. The source of some of the rights of other aboriginal people is now the treaties which recognized some aboriginal rights as continuing and some as continuing with modifications, extinguished some of the rights, and created new compensatory rights.

Whether the rights are based on customary law, original occupation or the treaties, it is apparent that current exercise of these rights is not determinative of who is entitled to these rights. This is so in the case of common law aboriginal rights because they are established by the circumstances at a certain historical point in time, not by current situation. This of course does not mean that these rights can not be extinguished. It only means that if they were established at a certain point in time, these rights must be extinguished, in some manner, before they can cease to exist.

Slattery does argue that it is possession at time of the surrender that is relevant for determining who has rights which must be extinguished. He bases this on his interpretation of the doctrine of aboriginal title developed by Chief Justice Marshall as well as practical considerations.<sup>168</sup> The logic behind this approach appears to be that:

the rights of the group as against the Crown and other outsiders were governed by uniform rules flowing from the Proclamation and the common law, while the rights of group members inter se were governed by the rules peculiar to the individual group. The latter could be altered in the same manner as other group customs by a general change in attitude and practice, or deliberate amendment by competent bodies.<sup>169</sup>

However, this logic could not apply to situations where outsiders, such as the government, have determined who now exercises rights in a particular area. In

this situation, the fact that the rights of members are determined by the group would argue against current exercise of the rights determining who is entitled to them.

In the case of treaty rights it is clear that the agreement itself, not what has happened in fact, is determinative of who is entitled to the rights in question. Treaty rights, like common law aboriginal rights, can likely be extinguished but this does not change the fact that initially entitlement is determined by the treaty. The Supreme Court considered the question of how treaty rights are affected by subsequent circumstances in the Sioui case.<sup>170</sup> In this case it was argued that "non-user of the treaty over a long period of time may extinguish its effect."<sup>171</sup> Lamer, J., speaking for the court, rejected this argument stating that "a solemn agreement cannot lose its validity merely because it has not been invoked..."<sup>172</sup>

It can be concluded that, because of the historical sources of these rights, who is entitled to the rights of aboriginal people is not determined by current exercise of the rights unless outside influences have not determined who is currently exercising the rights. However, the difficulty is that, although the rights of aboriginal people were fixed at a certain point in time, aboriginal groups have not remained unchanged since the time that the rights were created. The emergence of new groupings of aboriginal people may not have created new rights in the emerging groups. This would depend both on when the new groups emerged and the theory adopted concerning when common law rights are established. However, the emergence of new groupings also did not mean that these rights ceased to exist, unless they were extinguished. There may now be more than one group, which emerged from a single historical group which was originally entitled to the rights. The question is which group or groups are entitled to share in the rights vested in the original group.

The fact that these rights are historical, in that they were vested in groups existing at the time of "discovery" or the time the treaty or other agreement was entered into, will help to answer the question of who is entitled to these rights today. The source of the rights of aboriginal peoples indicates

that for a person or group to be entitled to these rights today there must be a connection to the originally entitled group. The source of these rights also indicates that who is connected to this group can not simply be determined by who is exercising these rights today. How individuals or groups today can show a connection to those groups originally vested with these rights will be considered after the nature of aboriginal rights has been discussed.



## Chapter III

NATURE OF THE RIGHTS OF ABORIGINAL PEOPLEA. Introduction

Given the sources of the rights of aboriginal people, who is entitled to these rights today depends on association with an originally entitled group. Just as the source of the rights of aboriginal peoples indicates who is entitled to these rights, the nature of these rights also determines who can claim them.

These aboriginal rights were originally bestowed on organized societies, but groups other than organized societies can claim these rights once established. However, these rights are collective rights. Based on the nature of the rights of aboriginal peoples, it will be concluded that an individual can only claim these rights if he or she is part of a collectivity, and that, in some circumstances, only a collectivity as a whole can claim these rights.

B. Occupation As An Organized Society

As has been seen, customary law or prior occupation of what is now Canada could be regarded as sources of common law aboriginal rights and as the basis for entering into treaties or agreements which gave aboriginal peoples certain rights. Aboriginal rights, at least those based on customary law, were created because the aboriginal groups formed what could be called "organized societies".

That an organized society is required to establish aboriginal rights under customary law is made clear by the fact that, at common law, there is what is referred to as a level of development test. Even after it was determined that conquered inhabitants continued to have rights, whether they were Christians or pagans, there was still the question of the level of development of aboriginal societies.<sup>173</sup> In the 1919 case of In Re Southern Rhodesia Lord Sumner held that "some tribes are so low on the scale of social organization that their usages and

conceptions of rights and duties are not to be reconciled with the institutions or ideas of civilized society...".<sup>174</sup>

The theoretical question of the level of development required to vest rights in those originally occupying the land is beyond the scope of this work. It is sufficient to note that when the courts have considered the basis for common law aboriginal rights it has been described as occupation as an organized society. Hall, J., in the Calder case concluded that "the Nishgas in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law...".<sup>175</sup> Mahoney, J. in the Baker Lake case noted that "[w]hile the existence of an organized society is a prerequisite to the existence of an aboriginal title, there appears to be no valid reason to demand proof of the existence of a society more elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights, sufficiently defined to permit their recognition by the common law upon its advent in the territory."<sup>176</sup>

The rationale for requiring an organized society is that common law rights are based on the laws or customs of the originally occupying people. Laws and customs, by their nature, are only created by societies. As Mahoney, J. stated, in Baker Lake, the "thrust of all the authorities is not that the common law necessarily deprives aborigines of their enjoyment of the land in any particular but, rather, that it can give effect only to those incidents of that enjoyment that were, themselves, given effect by the regime that prevailed before."<sup>177</sup>

The treaty making process also involved recognition of the original political separateness of tribes arising from their indigenous legal systems. It was apparently accepted that the traditional aboriginal governments had the power to surrender the tracts of land in question on behalf of their tribes.<sup>178</sup> Dickson, C.J.C. in the Simon case, in giving the judgment of the Supreme Court, held that, "[t]he Micmac Chief and the three other Micmac signatories, as delegates of the Micmac people, would have possessed full capacity to enter into a binding treaty on behalf of the Micmac."<sup>179</sup> As well, in many treaties the

"undersigned Chiefs and Headmen on their own behalf and on behalf of all other Indians inhabiting the tract within ceded" undertook a number of continuing obligations.<sup>180</sup> These included such things as to "maintain peace and good order between each other and between themselves and other tribes of Indians" as well as "between themselves and others of Her Majesty's subjects."<sup>181</sup>

It seems clear that to establish aboriginal rights due to the existence of customary law, the aboriginal group must have existed as an organized society. What characteristics a group must exhibit to meet this requirement is not entirely clear. However, it is sufficient for our purposes to conclude that these rights were vested in groups which operated as societies in the sense that they exercised law making functions of some nature.

#### C. When An Organized Society Must Exist

Assuming that at least some aboriginal rights were originally created because aboriginal people formed organized societies, it is still necessary to keep in mind the distinction between the characteristics of an aboriginal group necessary to establish that they were entitled to rights at the time the rights were initially created, and the characteristics that are necessary to establish entitlement to those rights once they were established. The fact that entitlement resulted from the existence of organized societies does not mean that only aboriginal groups which are organized societies can claim any rights as aboriginal people.

Logically speaking, an organized society should only be required to exist at the time when the recognition of the customary laws of the group, by the British common law, created the rights in question. The time at which the customary laws of the original inhabitants would entitle them to rights as against the Crown has already been considered. It has been seen that there may be some dispute concerning when customary law must exist. However, it is clear that the relevant date for the existence of customary law is not the date when the rights are claimed but the time when sovereignty was acquired, either through

physical control or through a clear intention to acquire the area, depending on the theory adopted.

There is judicial support for the position that the requirement for an organized society refers to the status of the group at some point in history. Hall, J., in the Calder case, noted that the Nishga were and are "a distinctive cultural entity...".<sup>182</sup> Hall, J. then appeared to regard distinctiveness as a prerequisite, but not necessarily as an organized society. Mahoney, J., in the Baker Lake case, stated that the plaintiffs must prove, among other things, "[t]hat they and their ancestors were members of an organized society."<sup>183</sup> However, when he considered this requirement he confined his consideration to the historical context, concluding that the "Inuit had an organized society."<sup>184</sup> [emphasis added]

To strictly require an organized society, in the sense that the group is still capable of performing law making functions, could defeat any claim to common law aboriginal rights. As Hall, J. himself noted in the Calder case, regarding the rights of prior occupants after discovery, "their rights to complete sovereignty as independent nations were necessarily diminished...".<sup>185</sup> By virtue of the common law, then, these groups no longer had the authority to make laws, at least ones which would affect their position regarding the settlers.

It is unnecessary for a group to be an organized society to claim common law aboriginal rights because the laws which the rights are based on are the laws of the original groups and because the rights once created by the existence of customary laws continue subject to extinguishment. It seems clear that the same reasoning would apply to treaty rights. There is no reason to require an organized society for these rights to continue to exist, once established.

#### D. Collective Nature Of The Rights Of Aboriginal People

The fact that an organized society may not be required to claim existing rights of aboriginal people does not mean that these rights are not group rights.

Both treaty and common law rights have been described as collective rights. Pentney notes that the use of the term "peoples" in the aboriginal rights provisions in the Constitution makes it clear that the rights involved are collective or group rights.<sup>186</sup>

The sources of aboriginal and treaty rights indicate that the rights were group, not individual rights. Prior to "discovery" aboriginal people occupied this land as groups. McNeil notes that "indigenous occupation and use was more often collective, with members of the group sharing the lands as a community."<sup>187</sup> He concludes that "the communal nature of most indigenous occupation is a fact which can not be denied."<sup>188</sup> Similarly, the laws regarding entitlement to land, that were recognized by the common law, were made by the group as were the treaties by which these rights were extinguished.

The conclusion that both aboriginal common law rights and treaty rights are collective rights has received judicial recognition. In the Calder case Hall, J. quoted from the Judicial Committee of the Privy Council decision in Amodu Tijani v. Secretary of Southern Nigeria.<sup>189</sup> He quoted from this judgment for the purpose of considering how proof of Indian title was to be established.<sup>190</sup> Part of what Hall, J. quoted included the following passage:

The title, such as it is, may not be that of the individual...but may be that of a community. Such a community may have the possessory title to the common enjoyment of the usufruct, with customs under which its individual members are admitted to the enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession.<sup>191</sup>

Since the common law recognized the rights that were previously established, the right would be the right of a group, not the individual, to the extent that this was how land was held prior to discovery or settlement. It is arguable that, regardless of the land holding pattern of the group, the right is still a group right in relation to the subsequent occupants. The common law dealt with the respective rights of the original occupants and the settling nation. It did not concern itself with rights as between the original occupants. Even if the custom or law did not provide for communal holding, a law is by definition the product of a group, and it is the indigenous law which is recognized by the

common law.

Morrow, J., of the Northwest Territories Supreme Court, in Re Paulette, considered aboriginal title to be a communal right.<sup>192</sup> His decision was reversed by the Court of Appeal and this reversal was upheld by the Supreme Court of Canada, but the decisions at these levels did not deal with the character of aboriginal rights.<sup>193</sup>

The nature of claims to aboriginal rights was considered in the Dumont case by the Manitoba Court of Appeal.<sup>194</sup> This case concerned whether an action for a declaration as to validity of certain laws should be allowed to proceed to trial. The legislation in question was "enactments...implemented ostensibly to facilitate the land distribution policy enunciated by...the Manitoba Act."<sup>195</sup> The plaintiffs were individual Metis, the Manitoba Metis Federation and the Native Council of Canada. They alleged, among other things, that the validity of the legislation would affect their negotiations regarding aboriginal rights.

Twaddle, J.A., speaking for the majority, concluded that the statement of claim should be struck because no declaration concerning the validity of the legislation could be useful in negotiations concerning Metis aboriginal rights.<sup>196</sup> Essentially, what Twaddle, J.A. appeared to conclude was that any claim under the Manitoba Act could not be a claim to an aboriginal right because the rights under this Act were individual rights. For this reason the effect of the legislation in question on the individual rights in this Act, as opposed to on any aboriginal rights the Metis may have, would not be directly relevant to the settlement of an aboriginal claim.

Twaddle, J.A. noted that "[t]he fact that the Metis might acquire a community of interest in a land claims agreement does not mean that the plaintiffs are claiming that such an interest in land was given to half-breeds by the [Manitoba] Act...".<sup>197</sup> Twaddle, J.A. went on to conclude that the Manitoba Act itself clearly gave grants to individuals.<sup>198</sup>

Based on the fact that the Act dealt with individual rights, while the claim that was alleged to be affected was for communal aboriginal rights, Twaddle, J.A. found that no declaration as to validity of legislation affecting

these individual rights would be relevant to settlement of the claim. He stated that "the court is being asked to consider...the constitutional validity of spent legislation which does not affect anyone's current rights...".<sup>199</sup> He then concluded that "the rights affected were the statutory rights of individuals" and that the persons claiming these rights, in this litigation, are not individual representatives of those affected but "descendants whose degree of relationship is not stated."<sup>200</sup>

Clearly the nature of the rights of aboriginal peoples was not the major issue before the court. The court also was not called upon to determine if the Metis might have communal aboriginal rights arising from a source other than the Manitoba Act, although they did consider the difficulties that such a claim might face.<sup>201</sup> However, it is clear from the reliance that Twaddle, J.A. places on the fact that the Manitoba Act deals with individuals' rights, as a basis for finding that the validity of legislation affecting those rights would not affect a land claim settlement, that he regarded a land claim settlement as a communal right.

The dissenting judge, O'Sullivan, J.A., more clearly characterized the nature of aboriginal rights as communal rights. He concluded that "what we have before us in court at this time is not the assertion of a bundle of individual rights but the assertion of the rights and status of the half-breed people of the western plains."<sup>202</sup> He concluded that "it is in the development of law to deal with claims of 'peoples' that lies the best hope of achieving justice and harmony in a world full of minority groups."<sup>203</sup>

The judgment of the Manitoba Court of Appeal was reversed by the Supreme Court. Wilson, J., in delivering the judgment of the court, first held that, as the outcome was not "plain and obvious" or "beyond doubt", the statement of claim could not be struck out.<sup>204</sup> Wilson, J. went on to find that the constitutionality of legislation could be determined in the courts and that the courts could grant declaratory relief in aid of extra-judicial claims in an appropriate case.<sup>205</sup> In their judgment the Supreme Court did not deal with the nature of aboriginal rights.

In the trial judgement in the Bear Island case Steele, J. considered the

nature of claims to aboriginal rights. He concluded that "[a]ny such rights are communal rights in the band, tribe or nation...[t]hey are not individual or family rights."<sup>206</sup> An appeal of this decision was dismissed but in this judgment the court did not consider the nature of aboriginal rights.<sup>207</sup>

The fact that treaty rights are collective or communal rights has also received some judicial recognition. In the Pawis case Marceau, J. of the Trial Division of the Federal Court stated that the Treaty under consideration, "by its terms, is made with the Ojibway people collectively."<sup>208</sup> He went on to note that:

Those Indians who signed the Treaty are referred to in it as "principal men of the Ojibway Indians". The Treaty provides for the annuity payments to be made "to the said Chiefs and Tribes". The surrender is referred to in the Treaty as being by "the said Chiefs and Principal men, on behalf of their respective Tribes or Bands". It is stated that the lands reserved "shall be held and occupied by the said Chiefs and their Tribes in common...The Treaty allows "the said Chiefs and their Tribes the full and free privilege to hunt over the territory...."<sup>209</sup>

This case concerned a particular treaty but it seems clear that the same reasoning could be applied to other treaties. As Bruce Wildsmith notes: "Indian treaties were made with particular tribes and not with individual Indians."<sup>210</sup>

The idea that the rights of aboriginal people belong to aboriginal groups is reinforced by considering various proposals for defining who is entitled to these rights. It will be seen that no matter what approach is used the common factor is that these definitions depend on the individual's association with a group, which it is assumed is the group entitled to the rights in question. These definitions have no meaning in the absence of such a group. However, depending on the method used, the group may be anything from an existing community to a category based on genetic similarities.

The method favoured by most aboriginal groups and adopted by the government when changes were made, recently, to the Indian Act<sup>211</sup> is that aboriginal groups should themselves determine who their members are. However, this method does not mean that the group which is entitled to this right need not be identified. Even if it is the right of self-determination which is being recognized, rather than more specific rights such as rights to a particular piece of land, it is

necessary to determine what group is entitled to that right.

Hudson notes that "a purely subjective definition...produces problems where there are a number of indigenous groups within a state and interface between the groups may become important."<sup>212</sup> However, the problem of interface between aboriginal groups is not created by subjective definition of the groups by themselves, but by a lack of a comprehensive definition of which groups are entitled to which aboriginal rights. In other words, the right of a group to define who is entitled to aboriginal rights depends on some objective criteria for determining which groups have the aboriginal right to determine membership.

Self-identification by an individual with a group also depends on the existence of a group vested with aboriginal rights. Like group self-identification, individual self-identification assumes the existence of a group at the time of the identification. Hudson notes that if it is "applied in isolation from other methods it can produce uncertain group parameters."<sup>213</sup> However, as in the case of group identification, this problem is solved through definition of the groups vested with the rights. If the group, not the individual, is vested with the rights, then membership in the group need not be determined in order to recognize the existence of the rights.

Other methods for determining if an individual is entitled to aboriginal rights have been proposed, but they too rely on the existence of a group. The individual is required to have certain characteristics in relation to that group. Douglas Sanders identifies three different bases for determining who is included in or excluded from a group: blood, kinship or lifestyle.<sup>214</sup>

A "blood" requirement could be described as relying on a person's biological relationship to a group. This may be called "blood", "race", or "descent" depending on the relationship required. A blood system, such as used by the Jicarilla Apache Tribe in the United States, uses a charter group and a requirement for a certain percentage of blood for subsequent generations, resulting in no status being gained by marriage and children of mixed marriages of a certain number of generations having no status.<sup>215</sup>

Using "blood" requirements to define a group does not prevent the need to

define the group that is entitled to these rights any more than having the group define itself does. Although it would be relatively simple to use the blood system for subsequent generations, it is still necessary to somehow create a charter group and the blood system itself does not dictate how this would be done. However, unlike methods such as self-identification by individuals or groups, a blood system does not require that the group, which is identified as having the rights, exist as a current community. In this case the group could simply be those who can show descent of a certain degree from aboriginal ancestors.

Kinship requirements also focus on an individual's familial ties to a group and therefore require that there be an identified group entitled to the rights in question. In the case of kinship ties the group could be either a current group or a group that existed at some identified point in the past.

The "lifestyle" method of determining membership in a group could include any cultural attributes such as religion, language or customs. Implicit in a lifestyle test is the idea that the individual's lifestyle is the same as that of an identified group which is entitled to the rights in question. Identification of those entitled on the basis of lifestyle implies that there is an existing group which has a distinct lifestyle, although it would be possible to require that an individual follow the lifestyle of a group that no longer exists.

The important point then is that, although an organized "society" may not still be required simply to exercise rights of aboriginal people that were established by original occupation, customary law, or agreement, these rights are nonetheless collective or communal rights. This is indicated both by judicial comment on the nature of these rights and also by considering methods which may be used to define who is entitled to the rights of aboriginal people.

E. Who Is Entitled To Collective Rights

Having shown that the rights of aboriginal people are collective rights, how does the collective nature of the rights affect who is entitled to these rights? Pentney notes that the distinction between collective and individual rights has been expressed as being that "[i]ndividual human rights...are bestowed upon every single human being personally" while "[c]ollective human rights are afforded to human beings...in conjunction with one another as a group - a people or a minority" and as such they must be "exercised jointly rather than severally."<sup>216</sup>

Pentney elaborates on the consequences of a right being a collective right stating that:

Group rights benefit some particular class or category within a society, and inure to the benefit of the members of the group through the group; that is, by virtue of their membership these people are entitled to the benefits accorded to the group which are identified as group rights. An assertion of such a right is meaningful only if the person is a member of the group, however that status is determined.<sup>217</sup>

Pentney concludes that "[a]boriginal rights have always inured to the benefit of native groups, and they are therefore collective rights, to be asserted by native people as members of or on behalf of, a particular group."<sup>218</sup>

Pentney touches on two factors that make a right a collective right. The first is that the person is entitled to these rights by virtue of membership in a group and the second is that these rights can only be exercised through a group. There is a difference between group rights that simply belong to a person because they are part of a group, but can be exercised by an individual, and group rights which belong to a group and can only be exercised by the group, or someone representing the whole group.

Wildsmith notes that although treaties were not made with individual Indians, but with particular tribes, "probably each member of that tribe has the right to claim the benefit of the treaty and to insist on its compliance."<sup>219</sup> He, then, would place treaty rights within the category of rights that can be exercised by an individual, although the individual's entitlement is based on

being part of the group entitled to the rights.

On the other hand, McNeil appears to place common law aboriginal rights to possession of land among those rights which can only be exercised through a group. He considers who the beneficiaries of an common law occupation based title would be. He assumes the case of "an indigenous group associated together as a community and collectively and exclusively occupying a discernible tract of land at the moment the Crown acquired sovereignty."<sup>220</sup>

McNeil considers two possibilities. The title could vest in some members or leaders of the group on behalf of the group, or it could vest in all members of the group equally.<sup>221</sup> McNeil concludes, however, that:

due to their association as a community, no member would have a severable individual share. Each member's interest, like that of a member of a club or other unincorporated association, would last only as long as membership in the group was maintained. Upon death, resignation, or expulsion, a member's interest in the communal property would terminate. By the same token new members (whether by birth or acceptance into the group) would automatically become entitled to equal interests in the communal property.<sup>222</sup>

Whether the rights of aboriginal people are collective in the sense that they must be exercised by the group as a whole or only in the sense that an individual must be part of a group to be entitled has not been considered in detail by the courts. This is in part because, at least until these rights were protected in the Constitution, rights of aboriginal people, with the exception of treaty rights in some circumstances, were not generally enforceable.

The Federal Court in the Pawis case appears to have come to the conclusion that an action for breach of a treaty would have to be taken by the group as a whole. This case concerned an action alleging that a treaty hunting and fishing right was breached by certain legislation.<sup>223</sup> Marceau, J. stated that "[s]ince the Treaty was negotiated and entered into with the Ojibway Indians taken as a group, it seems to me that an action based on the Treaty, alleging breach of the promises subscribed therein towards the group, could only be instituted by the contracting party itself, that is to say the group."<sup>224</sup> He continued by elaborating on what he meant by this, stating that "[w]hat I mean is that the treaty having been negotiated and entered into with the Chiefs in the name of all

of the members of their bands, it could not be contemplated that a right of action for eventual breach thereof was to accrue to each Ojibway Indian, and each of his descendants individually and personally."<sup>225</sup>

A similar conclusion could be drawn from the decision in the Dumont case concerning communal rights to lands. One question considered by the majority of the Manitoba Court of Appeal was whether the Metis were claiming that "a community of interest in land" was given "to half-breeds by the Manitoba Act."<sup>226</sup> Twaddle, J.A., for the majority, came to the conclusion that the Metis could not make such a claim since some Metis retained their rights under the Act.<sup>227</sup> It appears then, that in the opinion of Twaddle, J.A., a claim to a collective right in land must be made by the group as a whole not by those individuals within the group denied the right.

O'Sullivan, J.A. took a different approach. As already noted, he clearly regarded the rights of the Metis concerning entitlement to communal lands as a collective right. O'Sullivan, J.A. noted that the Metis were recognized as having rights by section 35 of the Constitution Act, 1982 and concluded that "it is impossible in our jurisprudence to have rights without a remedy."<sup>228</sup> He then questioned who could assert the rights of the Metis if not the plaintiffs in this case.<sup>229</sup> O'Sullivan, J.A. found that "[e]ach individual plaintiff can...prove indisputably membership in the Metis nation."<sup>230</sup>

O'Sullivan, J.A., however, does not clearly indicate the nature of the claim that he regarded an individual member of a group as being able to make. He may not have been concluding that each individual member of the group would be individually entitled to have his or right fulfilled. He may have simply been saying that individuals and their associations could make claims on behalf of the group.

As has already been noted, the judgment of the Court of Appeal in this case was reversed by the Supreme Court. The Supreme Court did not comment on whether a claim could be made that the Manitoba Act gave the Metis a communal title or who could exercise the right to that title. However, unlike the majority at the Court of Appeal, the Supreme Court did not rule out the possibility that a

declaration, concerning legislation which affected the Manitoba Act, could help the Metis in negotiations concerning establishing communal title.<sup>231</sup>

In the Twinn case six individuals were suing on behalf of their six bands, as constituted before the 1985 amendments to the Indian Act<sup>232</sup>, alleging that these amendments violated their aboriginal and treaty right to self-identification.<sup>233</sup> The Federal Court, Trial Division, considered a motion to strike the action. One question which was raised was whether the individual plaintiffs could carry such an action on behalf of those who were band members before the 1985 amendments. Strayer, J. noted that the fact that unconstitutional action by Parliament is alleged, itself supports the standing of a plaintiff to sue.<sup>234</sup>

He went on to say that it is possible that the plaintiffs could have sought the declaration as individuals without a representative action.<sup>235</sup> However, he did not find it necessary to make this decision since the action was taken as a representative action. Strayer, J. held that in any case it was "entirely appropriate that the other members of the band other than the 'returnees' introduced by the 1985 amendments should be joined as plaintiffs in a class action...".<sup>236</sup> He noted Bear Island<sup>237</sup> at the trial level and the fact that it was held in that case that the rights were communal and concluded that "it is therefore appropriate that those persons who claim to belong to the relevant community to which the right adheres should be joined as plaintiffs...".<sup>238</sup>

Strayer, J. concluded that the fact that the plaintiffs may not succeed in showing that there was such a right and that it belonged to them was not a reason to disallow them bringing the action.<sup>239</sup> He also did not regard the fact that some persons included in the action may not be "aboriginal" as fatal to the action. Strayer, J. found that status Indian persons without aboriginal blood may still be aboriginal under section 35 of the Constitution Act, 1982 and, even if they were not, they would still have a sufficient interest to require constitutional action.<sup>240</sup> He noted that, based on the Pawis case, if treaty rights were involved, a class action was necessary.<sup>241</sup>

Despite these authorities, there are many examples of cases where certain

rights of aboriginal people have been claimed by individual members of a group entitled to those rights. However, because of the limited circumstances in which aboriginal rights were enforceable it may be difficult to generalize about who can claim collective rights of aboriginal people from these decisions.

Until recently most of the cases involving enforcement of rights of aboriginal people concerned giving effect to treaty or Natural Resources Transfer Agreement hunting and fishing rights in preference to provincial laws. The reason why such rights have prevailed over provincial law is beyond the scope of this work. The significant point is determining who was allowed to claim these rights, individual members of a group entitled to them or the group itself. The answer appears to be that individuals on their own behalf have been allowed to claim the protection that these rights bestowed.

Both the Frank<sup>242</sup> and Moosehunter<sup>243</sup> cases are examples of where the Supreme Court of Canada has found that an individual was entitled to claim the rights specified in the Natural Resources Transfer Agreements, as against provincial legislation. In neither of these cases was the question raised whether the individual was entitled to assert what is presumably a collective right. The most that can be said about these cases, and others like them, is that the court operated on the assumption that individuals could exercise and enforce the rights considered.

The Simon case is an example of a Supreme Court of Canada decision where it was found that an individual was entitled to be protected by treaty from provincial laws concerning hunting.<sup>244</sup> The court in this case considered what entitled an individual to the protection of a particular treaty without explicitly addressing the implication in the Pawis case that treaty rights belong to the group as a whole. The requirements that the court outlined in this case for being entitled to the protection of a treaty will be considered later. For the time being, the important point is that the court did not explicitly find either that an individual had to be a member of a group to be entitled or that only the group as a whole could claim the protection of the treaty against legislation.

Since the enactment of section 35 of the Constitution, aboriginal rights are also protected against contrary legislation in some circumstances. The Sparrow case is an example of a situation where an individual member of a band alleged that his common law rights were protected against contrary legislation by section 35.<sup>245</sup> The Supreme Court ordered a new trial to determine if the legislation was inconsistent with the protection in section 35 without raising the question of whether an individual could assert what was described as a "right held by a collective" and a collective right.<sup>246</sup>

The possible limit to these cases, as precedent for individual enforcement of aboriginal or treaty rights in general, is illustrated by the Chevrier case, decided by the Ontario District Court.<sup>247</sup> In this case the accused claimed that he was protected against the application of a provincial hunting law by treaty.<sup>248</sup> Wright, D.C.J. noted that the Provincial Court Judge had ruled that the treaty right to hunt was a community right which could only be upheld by a representative action.<sup>249</sup> This opinion was likely based on the Pawis case<sup>250</sup> in which, as has been noted, the court found that an action for breach of treaty had to be taken by the treaty signatories as a group.

Wright, D.C.J. did not agree with the opinion of the Provincial Court Judge and simply held that "[i]n my opinion there is a difference between one who passively raises such right as a defence and one who actively seeks to assert an alleged right in order to secure a benefit under the treaty."<sup>251</sup> This basis is adequate to distinguish this case from the Pawis case where the action was based on breach of the treaty, not claiming the protection of the treaty against the application of law.

However, it is interesting to note that even if the distinction made by Wright, D.C.J. is accepted the circumstances under which a representative action would have to be taken would still be limited. Treaty rights by their very nature are not generally directly enforceable. It is possible that, even after section 35 of the Constitution was enacted, these rights are protected against contrary legislation only, as opposed to being made generally enforceable. For this reason one of the major ways in which these rights will be enforced will likely continue

to be against contrary legislation of some kind.

In any case, it is clear that entitlement to all rights of aboriginal people is based on being part of a group in some sense. If this were not the case aboriginal people could not claim any rights to which the rest of society is not entitled. At the very least, those who are entitled to the rights of aboriginal people must be distinguishable as a group from the rest of society.

Not all rights of aboriginal people, however, are based on being part of a group that is an existing community and not all rights of aboriginal people can only be exercised by a group. This is evident from cases in which rights, such as hunting and fishing rights, were enforced without any consideration of whether the individual was a "band" member. One particularly clear example is the Chevrier case where the individual was not covered by the Indian Act definition of "band member" but was still found to have treaty rights.<sup>352</sup> Logically, the question should depend on the nature of the right. It is easy to see how a claim to communal title to land based on original occupancy could only be made by a group that existed as a community, not by individual members of a more loosely identified group. The same could be said of the right to self-government.

Other rights, however, could be claimed and exercised by an individual, although his or her ability to do so would depend on association with the entitled group, whether that group consisted of a community or simply of the minority identified as "aboriginal" or "native". One example that seems clear from the cases is treaty or Natural Resources Transfer Agreements hunting, fishing or trapping rights. It is perhaps significant that cases in which these rights were enforced by individuals generally concerned hunting or fishing outside of reserve lands. It could be that use of land as an incident of aboriginal possession, whether that use is hunting or some other use is a right to be claimed by the group, while use of land which aboriginal peoples do not have possessory rights to, at common law or by treaty, is a right which can be claimed by individuals.

Other treaty rights, such as the right to annuity payments or presents, exemptions from taxation, medical and educational benefits may be in a position

analogous to off-reserve hunting and fishing rights. This means they could be claimed by individuals, not the group as a whole, assuming the individuals were members of the entitled group.

In conclusion one could agree with Pentney when he states that the identification of the beneficiaries of aboriginal rights must "reflect their collective nature."<sup>253</sup> Pentney further emphasizes this point when he states that an individual can not assert a collective right unless a group exists.<sup>254</sup> For this reason he asserts that if "[n]ative groups freely chose to assimilate into the dominant culture(s) in this country, it would be nonsensical for an Indian individually to assert an aboriginal right."<sup>255</sup> He concludes that "[t]he right would have been extinguished with the group's loss of identity."<sup>256</sup>

While it is true that a collective right could not be asserted if there was no longer an identifiable part of society which could claim to be distinct and claim rights on this basis, the question of the sense in which a group must exist in order to entitle its members to collective rights remains. Between being an existing society, living together in a discrete geographical location according to the historical traditions of the group, and being assimilated so as to be indistinguishable from any other segment of society, there are any number of different possibilities. If the fact that a group is not assimilated entitles its members to exercise collective rights, then more loosely defined groups, consisting perhaps simply of all those who are "Indian", may qualify for these rights.

#### F. Conclusion

It has been seen that aboriginal rights were originally bestowed on organized societies occupying this land prior to discovery or settlement. It has also been seen, however, that a group need not be an organized society to claim these rights today. Despite this, these rights are collective rights because they were given to groups, not individuals.

The fact that these rights are collective rights tells us that there must

be an identifiable group on which to bestow the rights and that, in some cases at least, the group as a whole must exist in such a way that it can exercise the rights. One way of determining who is entitled to aboriginal rights then is to consider whether the person is part of a group that can be entitled to and/or exercise collective rights.

## Chapter IV

DEFINING ABORIGINAL COLLECTIVITIESA. Introduction

The nature of the rights of aboriginal people determines that these rights can only be claimed by individuals who can be identified as belonging to a group, or in some cases only by groups as a whole. Entitlement to these rights today depends on a connection with the group which was originally entitled to the rights in question. It is now necessary to consider both what characteristics a group must have to claim collective rights, and how such a group or its members could show entitlement to the historical rights of an original aboriginal group. Clearly, the existence of a group that can claim collective rights will be vital when the rights are such that they can only be claimed by a group as a whole. On the other hand, a group may not exist in the same way when the rights in question can be claimed by individual members of the group.

B. Groups Entitled To Collective Rights

The concept that rights can belong to a group is not limited to the common law or to the question of aboriginal rights. It will be helpful to consider how groups entitled to collective rights generally may be defined. Aboriginal groups entitled to collective rights may share some of the characteristics which define these groups, although there may be other requirements as well necessary to define the aboriginal groups.

In international law communities are given certain rights. The Permanent Court of International Justice defined "community" in part as follows:

a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity....with a view to preserving their traditions....<sup>257</sup>

The court went on to say that "[c]ommunities are of a character exclusively minority and racial, ... [and their] existence... is a question of fact; it is not a question of law."<sup>258</sup>

While the characteristics identified and the observations made may or may not be relevant to the question of aboriginal collectivities, they do raise several interesting points. A number of characteristics of communities are identified. These include geographical location, blood, culture and lifestyle. The extent to which these characteristics must exist, however, is not made clear.

Although the community must exist in a locality or a country, it is not clear that they must be the only ones occupying a particular geographical area or that they must all live in a single geographical area. It would be possible to be united in culture and lifestyle as well as blood and not physically exist in one place. Community is defined, by the Webster Dictionary, as both "all persons living in a particular locality" and as "a group having interests or religion in common."<sup>259</sup> It is possible that cultural and racial ties then may be sufficient, even if the group does not exclusively occupy one geographical site.

The definition of a community does imply that the culture must be distinct from that of other groups as mention is made of "traditions of their own". The use of "traditions" would imply some allegiance to the past in elements of culture, such as language, religion and lifestyle. It is, however, doubtful that a group whose traditions were evolving or had changed would be excluded.

The idea of being united by race is similarly vague in that the extent to which the group must be racially distinct is not specified. A "community" must be a group connected by a common race but it seems unlikely that a certain amount of intermarriage with persons of other races would exclude a group from status as a "community". Once again, the important point appears to be that as a group they can be distinguished from others on the basis of race.

The idea that the existence of a community is a question of fact, not law, does not mean that the law can not identify the characteristics that make a group constitute a community. It means that the law can not create a "community"

through legal distinctions, but merely can recognize an existing community as such. This may be very relevant to the question of what collectivities are vested with aboriginal rights.

By this definition, in international law, a community is a group that is distinct from the rest of society, on the basis of their race, culture, language or religion who wish to continue to be distinct in this way. The concept of a group that is distinct on the basis of race and culture may be broad enough to include groups united through a common language or religion if that is an element of their distinct culture and is indicative of their racial distinctiveness.

Although the choice of the group to continue to be a group is an essential element of being a community, it seems unlikely that groups based entirely on personal choice, without any cultural or racial distinctiveness, such as trade unions, could meet the definition of a community. Such a group may have collective rights but not as a community. On the other hand, a group which was not created through personal choice could become a community if it met the requirements of being distinct on the basis of race and culture and came to view itself as a distinct group.

Certain characteristics, then, are suggested by this definition, but the degree to which these characteristics must exist or how a community can be distinguished from other social groupings is not considered. This definition also was not specifically intended to apply to aboriginal collectivities. Other definitions of those entitled to collective rights may answer these questions. Various methods, which may be used to identify who is entitled to aboriginal rights by considering who is "aboriginal" or "Indian", may indicate something about the characteristics that make a group capable of exercising the rights of aboriginal people.

One method, which has been noted, is to allow such groups to define themselves. Since the rights of aboriginal people are collective rights, accepting the decision of a community on membership could be viewed as in keeping with or necessary for the recognition of such rights. However, for our purposes it is sufficient to consider what this method of defining aboriginal groups

indicates about the nature of these groups.

An aboriginal group defining itself is based on the idea that aboriginal rights at common law amounted to a recognition of the indigenous populations' sovereignty before contact and the continuation of aspects of this sovereignty that were not inconsistent with the settlement of the country. As Hudson states, "[i]t is submitted that one aspect retained was the ability to define their human boundaries."<sup>260</sup> Hudson describes this method as "self-management" and defines this as:

a process designed from the perspective of the indigenous group [that]....requires acceptance by the dominant society of the solutions adopted by the natives....[and] allows the indigenous groups to choose elements of separation which serve their self-identified interests.<sup>261</sup>

This makes it clear that the actual criteria used are not important because the distinguishing feature of this method is acceptance of the group's decision, however that is made.

The decision by the Ontario High Court of Justice in the Bear Island case<sup>262</sup> represents one of the only judicial opinions on the point of who is entitled to aboriginal rights in principle. In this case the court took the position that who was entitled depended on who the group accepted as a member. This case involved a claim for aboriginal title based on the common law. The action was taken on behalf of all members recognized by the "Indians" themselves, and referred to as the tribe, and on behalf of the registered band members.<sup>263</sup>

Steele, J. noted that aboriginal rights pre-date any treaty or the creation of any reserves and then concluded that to share in aboriginal rights "a person must be recognized by a band as an Indian, but need not be a registered Indian as defined by the Act."<sup>264</sup> Steele, J. made no attempt to define the group which is entitled to aboriginal rights. He found that these rights exist in bands, tribes or nations. He did not discuss how it is determined if a group is a band, tribe or nation. His conclusion that a person must be accepted by the "band" does not answer these questions. Steele, J. stated earlier that he would refer to the group consisting of those recognized by the "Indians themselves" as members as the "band" and the registered group as the "registered band".<sup>265</sup> When this

judgment was appealed the question of who is entitled to aboriginal rights was not addressed.<sup>266</sup>

Certain conclusions, however, about what makes a group a collectivity can be drawn from the idea that entitlement to aboriginal rights is based on acceptance by a group. This implies that the group must be an existing group, since it could not otherwise exercise the power to determine membership. It may also be regarded as implying that the group is an entity which regards itself as distinct. Both these requirements were also seen in the test in international law for the existence of a "community". Finally, if this power is seen as the continuation of the common law right to have laws recognized, it may indicate that the group must be a society in the sense that it is capable of exercising legislative powers.

On the other hand, if the method used is the persons' biological or familial relationship to the group, then this simply requires that the group can be distinguished from the rest of society based on race and/or kinship. Similarly, if the method used is whether the person has the same culture or follows the same lifestyle as the group, then the group must be distinguishable on the basis of culture or lifestyle from the rest of society. Again, however, the degree to which the group must be distinguishable from others is not clear from simply considering how membership in the group may be determined.

McDonald considers the question of the nature of "Indian" collectivities not in regard to what characteristics entitle them to aboriginal rights but in regard to the perceived conflict between the "collective right to self-determination" and the "individual right to equality."<sup>267</sup> Nevertheless, what McDonald has to say about the nature of "bands" under the Indian Act may be relevant to the question of the nature of collectivities entitled to collective rights. McDonald first distinguishes between collectivities and aggregates. He states that "[w]hen we talk about a collectivity as opposed to an aggregate, we are talking about a whole as opposed to its parts."<sup>268</sup> He further notes that a collectivity is "self-collecting" while an aggregate is collected by others.<sup>269</sup> He equates a collectivity with a social group defined as "a group which has a

distinct existence apart from its members and, also...an identity."<sup>270</sup> Although this definition is more general than the definition of community, which has been considered, it is equivalent to it at a basic level. Like a community, a collectivity exists in reality, not just on paper over a period of time. As well, a collectivity has an identity that makes it distinct from other groups and is formed by its members through self-collection, not legal distinctions.

McDonald goes on to consider types of collectivities. He identifies W or will (choice) based collectivities and R or recognition based collectivities.<sup>271</sup> McDonald points out three common characteristics of these collectivities, that is: self-collection, a view by the members that what is recognized or chosen is significant to them, and the fact that the matter chosen or recognized matters to the collectivity as a collectivity not just as individuals.<sup>272</sup>

In so far as the question of self-collection is concerned, some groups collected by legislative definitions may also collect themselves, although using divisions not originally created by them. McDonald indirectly touches on this when he notes the relationship between "W" and "R" collectivities. He notes that a "R" based collectivity can give rise to a "W" based collectivity and that a "W" based collectivity can over time give rise to an "R" based collectivity when "new loyalties...are recognized as natural" as in the case of the "alteration of collective identity over time."<sup>273</sup> Just as this is true, it is also possible that an aggregate, consisting of a group defined by artificial distinctions, could come over time to accept themselves as a collectivity with "natural" loyalties.

After defining these two types of collectivities McDonald goes on to argue that "R" factors are more important than "W" factors "because they are more basic or deeper than W-factors."<sup>274</sup> He quotes the work of Fiss in which it is stated, concerning these types of collectivities, that the "well-being or status [of group members] is in part determined by the well-being or status of the group."<sup>275</sup> He goes on to consider "bands" as "R" based collectivities.<sup>276</sup> The essential element of an "R" based collectivity then is that the members are distinct from others in some ways and that they identify with each other on this

basis.

Evelyn Kallen considers the question of social groupings which have claims to certain rights in considerable detail in her book Ethnicity and Human Rights in Canada.<sup>277</sup> She identifies three types of collective rights: cultural group rights, national group rights and aboriginal rights.<sup>278</sup> Each right depends for its existence on both recognition of that type of right by the society in which it exists and the existence of a group with certain characteristics. Kallen notes that groups claiming aboriginal rights, as is the case with other collective rights, are "ethnically specific".<sup>279</sup> She states that the most important criterion of the concept of ethnicity is common ancestry or ancestral origin.<sup>280</sup> She further identifies common ancestry as "implying at least three criteria: biological descent from common ancestors; maintenance of a shared ancestral heritage and attachment to an ancestral territory or homeland."<sup>281</sup> She notes that biological descent underlies physical distinctiveness, while ancestral territory underlies distinctiveness arising from national origin, and maintenance of an ancestral heritage underlies sociocultural distinctiveness based on such things as language or religion.<sup>282</sup> This description of ethnicity is what Kallen calls the "new" ethnicity.<sup>283</sup> Kallen notes that ethnicity "was conceived as an attribute of an organized and cohesive group whose members shared distinctive bio-cultural attributes...transmitted from generation to generation...".<sup>284</sup> Kallen notes that ethnicity, defined as it was in the past, could be measured objectively, but the concept of the "new" ethnicity requires a more subjective approach.<sup>285</sup>

This subjective approach arose in order to explain the persistence of ethnic groups even when territorial, cultural, and physical distinctiveness were lost to a certain extent through contact with other groups.<sup>286</sup> In the face of these losses it is the maintenance of ethnic boundaries through self-ascription or ascription by others which is primarily responsible for the continued existence of viable ethnic collectivities.<sup>287</sup> In this sense an ethnic group need not have national or geopolitical boundaries to exist, rather the norm has become that they exist within these boundaries.<sup>288</sup>

Another important point is that a group based on ethnicity need not remain static over time. Kallen notes that pressures resulting from contact with other societies can and has given rise to new ethnic collectivities which develop over time due to such things as intermarriage between two groups, as in the case of the Metis.<sup>289</sup> She notes that "Canadian Indian" was not an ethnic category that existed prior to contact and that only recently have Indian organizations have begun "to mobilize around the Indian concept...on the basis of one or another of the current Canadian categories of Indians."<sup>290</sup>

In terms of the rights which a group may have, she makes the important distinction between ethnic categories and ethnic groups. This could be regarded as the same as the prerequisite in international law that a group exist in fact to be a "community" and the distinction made by McDonald between aggregates and collectivities. She describes ethnic categories as "arbitrary, artificial categories...designed for analytic purposes...or...statistical ends" and ethnic groups as "actual sui generis social collectivities organized on an ethnic basis...".<sup>291</sup> Kallen points out that collective rights given to minorities under the United Nations Human Rights Covenants are based on the existence of such minorities as sui generis ethnocultural minorities distinguished from others on the basis of having "real" culture that is transmitted through the generations.<sup>292</sup>

The contrast between the old and the "new" concept of ethnicity tells us something about the requirements a group would have to meet to be considered an ethnically based group capable of claiming collective rights. Such a group need not be completely distinct in terms of where or how they live or how they look from other groups. More important is whether the persons within it and others outside of it view them as distinct. In addition, a group need not have existed in the form it now exists over a long period of time in order to be a viable ethnic group. An ethnic group can evolve over time and still not lose its character as a group, as judged by the internal and external identification of its members.

These fundamental requirements could also be seen in the definition of "R"

based collectivities. The definition of communities in international law would also be consistent with this definition, depending on how the requirements for race, culture and locality were interpreted. The various methods for determining who is a member of an aboriginal group also point to the idea that this group is a group which regards itself as having an identity and which is distinguished by itself and others on the basis of race and culture.

The elements that make a group capable of possessing collective rights have been considered, and it has been seen that, although a number of sources point to similar elements, the degree to which these elements must exist is not clear. It is likely that the degree would depend to a large extent on whether the rights asserted were collective, in the sense that they had to be exercised by the group as a whole or only in the sense that a person could claim the rights on the basis of membership in the group. If a group as a whole is going to assert the rights, then by definition the group must exist in a more cohesive form. If the rights are given to individuals because of their membership in a group, then the group need only exist to the extent that it is possible to say if the person belongs to the group or not. In this sense even something as general as being racially or culturally "Indian" could constitute the requisite group membership.

### C. Collectivities Entitled To Aboriginal Rights

The fact that a group exists which is capable of exercising collective rights can not determine that group's entitlement to the rights of aboriginal people. A group that is a collectivity must exist for aboriginal rights to be claimed, but clearly not all groups that are collectivities are entitled to the rights of aboriginal people. The characteristics which a collectivity or its members must exhibit to entitle its members to rights as aboriginal people needs to be considered.

Some of these characteristics have already been suggested by the definition of communities in international law, by consideration of methods used to determine membership in aboriginal groups, by Kallen's definition of groups

entitled to collective rights and the concept of "R" based collectivities. These would include being distinct on the basis of race and culture. In the context of aboriginal rights, this would mean being distinguishable from the rest of society on the basis of descent from one or more of the aboriginal races and having a culture that is distinct from that of the rest of society based, at least in part, on the traditions of aboriginal people. The group must also wish to preserve its identity as a group. To claim collective aboriginal rights exist, aboriginal groups must have common bonds of culture and ancestry, but they need not live in a single geographical area or not have changed or evolved over time.

However, as well as being a "community" an "ethnic group" or an "R" based collectivity, for a group to have aboriginal rights, it must also have certain other characteristics. It has been seen that many of the rights of aboriginal peoples are determined by treaty, other agreement, prior occupation or historically existing customary law. For this reason, in order to be entitled to these rights an aboriginal group today must show a connection to the groups in which these rights were vested. Since aboriginal groups have evolved from the time the rights were established, it is not always possible to point to a single aboriginal collectivity and say that they are the collectivity entitled to the treaty or the common law rights of the group that originally occupied that territory.

It has been seen that the source of the rights of aboriginal people simply indicates when a group, existing at the time of discovery or the time of the agreement, will be entitled to aboriginal rights. The source of aboriginal rights, original occupation as an organized society or customary law, does not indicate who is entitled to these rights today. This is because prior occupation as an organized society is not a requirement for entitlement to existing rights, rather it is a requirement for the original establishment of these rights. These rights once established continue, unless extinguished, even when the group originally vested with the rights no longer exists as a single group.

In order for a collectivity to be entitled to exercise aboriginal rights today, the association that the collectivity must have with the historically

entitled group must be considered. This includes the question of whether the whole collectivity must be associated with a particular historical group or whether different members of the same collectivity can be associated with different historical groups.

The persons who originally occupied this land were distinct from the settlers in terms of both their culture and their race. This would indicate that an association with an original group could be made through descent or through showing a common culture with an original group. These two possibilities must be considered, as well as the question of the degree of descent or cultural affiliation which is required to show entitlement to any rights.

#### 1. Association Through Descent

##### a. Arguments concerning association by descent

In order to be entitled to their rights today, one association that a group or an individual could have with a historically entitled group is descent from that group. The usefulness of this method can be seen through various ways that can be used to determine membership in an aboriginal group. Academic and judicial opinion on the relationship between those who are entitled to these rights and the originally entitled groups also indicate that descent from the original occupants is an important indicator of who is entitled to the rights of aboriginal people today. Some methods for determining membership in an aboriginal group indicate that the existing group is connected to an original group or groups through descent. If membership is determined on the basis of descent or on the basis of aboriginal blood, the connection that is made with an originally entitled group or groups is descent from that group(s).

Hudson considers a racial criterion and notes that it "assumes a correlation between the objective amount of blood and the subjective degree of nativeness or distance from the dominant norm."<sup>293</sup> Hudson goes on to say that it is "essentially racist in attributing a particular set of cultural attributes

to a racial group."<sup>294</sup> The assumptions that Hudson makes appear to be that the true basis on which we wish to distinguish "them" from "us" is that they have a distinct culture and that being racially distinct does not indicate that a person is also culturally distinct. Clearly, race does not determine what cultural attributes a person has, and accepting such an idea implies racism by assuming that certain races are only capable of developing certain cultures.

However, if it is assumed that we wish to distinguish "them" from "us" by determining not whether they possess a distinct culture today, but whether their ancestors were the original inhabitants of this country, then race is perhaps the only way of doing this. As Hudson himself notes, it is "inescapable that aboriginal nations [are] made up of those with Indian or Inuit ancestry."<sup>295</sup> Hudson considers descent as a separate mechanism from race but notes that they produce similar results.<sup>296</sup>

Hudson further notes that this method is accepted by indigenous groups as one method but that the idea is viewed with hostility by the Federal Government when it is applied to limit a person's access to political power in a defined territory.<sup>297</sup> This position could be regarded as somewhat hypocritical by the government because the Indian Act<sup>298</sup>, as will be seen, uses ancestry, although not race, to determine who has rights on reserves. The distinction between race and ancestry only exists to the extent that the group from which ancestry is required cannot be distinguished from the rest of society on the basis of belonging to one of the aboriginal races.

While it could be argued that the group covered by the Indian Act cannot be distinguished on the basis of race, it would be perhaps more logical if they were. This is because those who originally inhabited what is now Canada were in fact distinguishable from the settlers based on their race. Therefore, the ancestors of these people, if that is who we wish to single out for special rights, will also be distinguishable on the basis of race. If a person's biological relationship to a group is a valuable method of determining whether they are entitled to aboriginal rights, it is assumed both that the group is distinguishable on the basis of race and more importantly that it is descent from

those who were originally entitled which determines entitlement today.

Other sources also indicate that descent, at least in some cases, is the association which a group or an individual must show with the originally entitled group. Pentney appears to regard descent from aboriginal people as an important factor in determining entitlement. He considers the question of who is entitled to aboriginal rights in the Constitution. However, because section 35 protects aboriginal and treaty right that "exist", rather than creating new rights, being entitled to section 35 rights is equivalent to being entitled to aboriginal and/or treaty rights.<sup>299</sup>

When considering who is included in section 35, Pentney does not focus explicitly on the groups which are vested with these rights, but rather directs his attention to how membership in an aboriginal collectivity should be defined for constitutional purposes. In considering the membership question, however, he does touch on the association required with an historically entitled group.

Pentney argues that it is the responsibility of the courts to determine membership in a group claiming aboriginal rights under the Constitution since the courts interpret the Constitution.<sup>300</sup> He accepts that membership in a group is in most cases a "prerequisite" to entitlement, but he finds that neither Parliament or the representatives of the groups making the claims can define membership.<sup>301</sup> The fact that Pentney considers descent an important factor in determining entitlement to aboriginal rights is clear from the minimum requirement that he proposes an individual must meet, before the courts should accept his or her membership in an aboriginal group as entitling the person to aboriginal rights. He proposes that an individual must have some "Inuit" blood before his or her membership in an "Inuit" group would entitle that person to aboriginal rights.<sup>302</sup> In regard to the "Metis", Pentney also concludes that the minimum necessary for a court to accept an aboriginal community's definition of itself would be some aboriginal ancestry.<sup>303</sup> Pentney directly endorses the idea that descent determines entitlement to aboriginal rights in the case of "Indians". Pentney notes that it may be possible to develop a "charter" list of "Indian groups" from which entitlement today could be determined.<sup>304</sup> To do so

he notes that the Royal Proclamation, 1763, later statutes, Royal Commissions to traders or colonial governors, and treaties making reference to "Indians" or "particular tribes of Indians" could be consulted "to determine if a particular Indian tribe or band was recognized within Canadian territory at Confederation."<sup>305</sup>

Kallen also endorses the idea of descent determining entitlement. She concludes that aboriginal rights are not dependant on having status.<sup>306</sup> She notes that those who do not have legal status whose ancestors did not settle their aboriginal claims could make claims today.<sup>307</sup> What Kallen appears to be dealing with here is the question of who can make claims to aboriginal common law rights, on the basis that these rights are unextinguished. Clearly, the fact that a person's ancestors settled their claims to aboriginal rights, through treaty or some other mechanism, would only affect the person's claim to the rights extinguished by the agreement. It would not affect the person's claim to rights based on the agreement itself.

In Kallen's opinion, then, an individual can make a claim to common law rights if his or her ancestors had an unextinguished claim. However, it is not clear from Kallen's comments whether the individual must belong to a group in which all or most of the members are descended from the originally entitled group or if the individual himself or herself only must have descended from the originally entitled group.

The question of what association an individual or a group must have with the group originally entitled to the rights of aboriginal people, as opposed to what makes a group originally entitled to these rights, has not been extensively considered by the courts to date. There is some indication, however, especially in the case of treaty rights, that descent from those originally entitled is the controlling factor.

One of the issues raised in the Supreme Court of Canada by the Simon case was the question of the appellant's entitlement to whatever protection was afforded by the treaty in question.<sup>308</sup> Dickson, C.J.C. in considering this question began by noting that the trial judge had assumed the appellant was "a

direct descendant of the Micmac Indians, parties to the treaty."<sup>309</sup> He then noted that the Appellate Division held that "the appellant had not established any connection by 'descent or otherwise' with the original group of Micmac Indians...".<sup>310</sup> Dickson, C.J.C. then concluded that, in his view, "the appellant has established a sufficient connection with the Indian band, signatories to the Treaty of 1752."<sup>311</sup>

It seems clear that the connection that Dickson, C.J.C. regarded as necessary was that of descent. He first noted that the appellant is a registered "Indian" and member of a Micmac Indian band living in the same area as the original Micmac Indian tribe.<sup>312</sup> While this observation may seem to imply that current residence or legal status could determine entitlement, Dickson, C.J.C. went on to clarify the relevance of these observations. He concluded that:

This evidence alone, in my view, is sufficient to prove the appellant's connection to the tribe originally covered by the treaty. True, this evidence is not conclusive proof that the appellant is a direct descendant of the Micmac Indians covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac would be able to establish descendancy. The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present day Shubenacadie Indian would otherwise be entitled to invoke based on this treaty.<sup>313</sup>

What must be established then is descent from the original group and Dickson, C.J.C. simply addressed the issue of how this could be done. The question of what would happen if a person could establish descent, but not current residency or legal status as an "Indian" or a band member, was not raised by the facts of this case.

The Simon case was applied by the Nova Scotia Provincial Court in the Googoo case.<sup>314</sup> In the agreed statement of facts it was accepted that the accused was a registered Indian and a member of the Whycocomagh band living on that band's reserve.<sup>315</sup> After considering the Simon case, O'Connell, P.C.J. concluded that "[t]here is sufficient evidence to prove that the accused is Whycocomagh Micmac Indian and a descendant of a member of the original Micmac Indian Band at Whycocomagh, covered by the relevant treaties."<sup>316</sup>

In the Chevrier case the Ontario District Court also found that a descendant of the original signatories was entitled to the rights bestowed by a treaty.<sup>317</sup> What is interesting about this case is that the descendant was not a registered Indian under the Indian Act.<sup>318</sup> After noting this Wright, D.C.J. simply held that "[t]his accused has inherited the right to hunt granted to his ancestors."<sup>319</sup>

The dissent in the Dumont case, at the Manitoba Court of Appeal, appeared to apply the question of descent to inheritance of aboriginal rights to lands.<sup>320</sup> O'Sullivan, J.A. regarded the Metis in this case as asserting communal rights to land.<sup>321</sup> In considering who was entitled to make this claim, he stated that the individual plaintiffs could show membership in the Metis nation and then noted that "[t]heir genealogical records are unparalleled in modern societies."<sup>322</sup> Clearly such records are only relevant if descent is regarded as the basis for determining whether an existing collectivity and its members are entitled to the historical rights of an original aboriginal group. This issue was not addressed by the Supreme Court on the appeal of this case.<sup>323</sup>

It has been seen that descent is an important factor in determining entitlement to the rights of aboriginal people, through methods for defining membership in aboriginal groups as well as academic and judicial opinion. In the case of treaty rights, descent has been endorsed by the Supreme Court of Canada as a method of determining entitlement.<sup>324</sup>

If descent is going to be used as the means of determining if a group or individual is entitled to rights today, then the group from which descent is required must be established. Pentney suggests that these groups are those existing at the time of confederation.<sup>325</sup> This seems somewhat arbitrary since aboriginal rights were not created upon confederation. The Canadian Government merely assumed the obligations taken on by the British Crown during settlement. A more logical date may be when the rights were originally established. The question of when common law aboriginal rights are established has already been considered. It was concluded that they would be established at the time which sovereignty was acquired over the area by Britain, but that depends on which

theory was adopted as it could mean anything from when Britain claimed sovereignty to when Britain actually gained control of the area, by force or otherwise.

If a claim was based on a treaty right, then the "charter" group could be defined as those who were parties to the treaty. In this case there is the advantage of a written record, assuming it accurately reflects who was a party. Hudson notes that residency could be required at a certain point in time, such as when a treaty is signed or a land claim settlement is made.<sup>326</sup> As Hudson notes, if this method is used then other methods can be utilized to determine who is part of the group today, such as descent.<sup>327</sup>

Pentney also refers to the groups being "recognized".<sup>328</sup> Since the whole point is to determine who has aboriginal rights aside from simply accepting the government's opinion on this, it may be more logical to consider the historical evidence of their existence as a group rather than their recognition as such by the government.

#### b. Degree of descent required -

##### The "Half-breed" policy

If descent is going to be used to associate individuals or groups with originally entitled groups then, the question of the degree of descent required must be addressed. From the nineteenth century when the first definition of "Indian" was enacted, through 1982 when the Constitution was amended, and up until the latest changes on this matter to the Indian Act<sup>329</sup> in 1985, a review of government policy and legislation indicates that the government has never regarded full aboriginal blood as necessary to entitle an individual to the rights of aboriginal people.

Before 1876, when Indian legislation was consolidated in The Indian Act, 1876<sup>330</sup>, Indian legislation was passed for certain specific purposes. The first legal definition of Indian appeared in the 1850 An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada.<sup>331</sup> As the title would

indicate, this Act was limited to what was then lower Canada and concerned protection of Indian lands. As the title would also indicate, the Act did not create "Indian" property rights. The lands and property already belonged to the "Indians". The purpose was to protect them from use by those not entitled. This legislation then dealt with access to the land rights of aboriginal people.

The basic requirements in this legislation were that the person be "of Indian blood" and "reputed to belong to the particular Body or Tribe of Indians" interested in the lands in question.<sup>332</sup> These qualifications created what can be called the charter group. Certain descendants of this group were specifically included in the definition of Indian. Nevertheless, descendants of any type were not excluded if they were of Indian blood and were members of the group in question.

Persons who had one parent with these characteristics were included.<sup>333</sup> This inclusion may have been made for the sake of clarity or because the persons referred to in it would not be considered of Indian blood or would not be considered part of the tribe or both. These individuals may not have come within the expression "of Indian blood" because one parent was white or they may not have belonged to the particular tribe because one parent belonged to another tribe.

Since there were two requirements for membership in the charter group, the specific inclusion of those who had one parent in the charter group may not have been intended to make any distinction between full-blooded persons and those who were not. It may have been intended to distinguish between those who had two parents who belonged to the particular group and those who had only one. In any case, assuming a distinction on the basis of blood was implied, those of less than full Indian blood were not excluded but were simply included through descent, not membership in the charter group.

The two other specific inclusions in this legislation dealt with relations not descendants. Those related to the charter group through kinship, shown by marriage or adoption in infancy, were also included, provided they resided with the tribe.<sup>334</sup> As was the case with those who had one parent in the charter group

these persons may or may not have met the two requirements of blood and membership.

Descendants of all those included in the charter group, as well as those included in the definition of Indian by reason of marriage or adoption, were also included.<sup>335</sup> Descendants of persons who were within the definition of Indian, because one of their parents was a charter group member, but who were not in the charter group were not included. This means that the children who were the product of two generations of marriages to persons who did not meet one or both of the basic requirements, of Indian blood or tribal membership, were excluded.

This could be seen as excluding those of less than one-quarter Indian blood, unless they married into the group. However, this is only true if the expression of "Indian blood" was confined to those who had full Indian blood. As already noted, the specific inclusion of the descendants does not mean that descendants could not be within the charter group. For this reason these inclusions do not themselves imply that "Indian blood" means full Indian blood. The inclusions may have only been necessary to deal with children whose parents did not belong to the same Indian group.

This definition was controversial<sup>336</sup> and it was amended in 1851, but the geographical area covered by it was not expanded.<sup>337</sup> The basic requirements of Indian blood and tribal membership remained unchanged.<sup>338</sup> Some of the specific inclusions were changed. A person who had one parent who was a member of the charter group was again included if they resided with the group, but, in addition, an individual who had one "Indian" parent was included if they resided with the tribe.<sup>339</sup> This is problematic because if who was "Indian" was self-evident the definition would not be required in the first place. However, it was likely intended to cover the situation where neither parent belonged to the charter group but one parent was of Indian blood and belonged to a tribe other than the one with whom the child was residing.

Whereas previously only descendants who had at least one parent who belonged to the charter group were included, now the descendants of anyone who was Indian according to the definition in the Act were included if they resided

with the group.<sup>340</sup> This would mean that the descendants of someone who was already connected to the group by only one "Indian" or charter member parent would be included presumably even if that person did not marry an "Indian" or a charter member. It is easy to see how after many generations of including descendants in this unlimited way, persons with little Indian blood or connection to the tribe could be included in the definition.

It has been seen that both the 1850 definition of Indian and the amendments to it in 1851 concerned entitlement to the lands of certain Bodies or Tribes of Indians. These provisions did not define Indian for every purpose. In 1857 legislation was passed, in Upper Canada, including a definition of Indian which was much more comprehensive in nature. This Act entitled, An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province and to Amend the Laws Respecting Indians<sup>341</sup> restricted the application of the Upper Canada Protection of Indian Property Act<sup>342</sup> to certain defined persons. It further provided that "such persons only shall be deemed Indians within the meaning of any provision of the said Act or of any other Act or Law in force in any part of this province by which any legal distinction is made between the rights and liabilities of Indians and those of Her Majesty's other Canadian subjects."<sup>343</sup> Clearly, this definition, where applicable, would to a certain extent control access to rights of aboriginal people.

Those entitled to be legally Indian were:

Indians or persons of Indian blood or intermarried with Indians, who shall be acknowledged as members of Indian Tribes or Bands residing upon lands which have never been surrendered to the Crown (or which having been so surrendered have been set apart or shall then be reserved for the use of any Tribe or Band of Indians in common) and who shall themselves reside upon such lands.<sup>344</sup>

The fact that Indian was defined to include both "Indians" and "persons of Indian blood" indicates that the expression "of Indian blood" was not confined to full blooded Indians. The inclusion of both these expressions only makes sense if "Indian" refers to full-blooded person and "of Indian blood" refers to those of less than full Indian blood.

Unlike the 1857 Act which defined Indian for all legal purposes, An Act Providing for the Organization of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordinance Lands<sup>345</sup>, passed one year after confederation, did not define Indian for all purposes. Instead, the 1851 definition was used "[f]or the purpose of determining what persons are entitled to hold, use or enjoy the lands and other immoveable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada ...".<sup>346</sup> Despite the more limited nature of this Act, it is clear that the persons included were regarded as being entitled to certain land rights of aboriginal people.

In 1869 Indian legislation was passed which modified and extended the provisions of the 1868 Act.<sup>347</sup> The 1869 Act was intended to be read as one with the 1868 Act.<sup>348</sup> Again there was no general definition of an Indian. However, if an Indian was enfranchised under this Act, he or she was no longer an Indian for the purposes of laws making distinctions between the rights of Indians and other subjects.<sup>349</sup>

Instead of a general definition of Indian, for the purpose of determining who is entitled to hold and enjoy Indian land enacted in 1868, the definition was continued but was modified in one respect. The 1869 legislation specifically excluded, for the first time, persons who may have been of Indian blood and members of the tribe. Indian women who married men who were not "Indian" were excluded as were the children of these marriages.<sup>350</sup> However, it is difficult to view the exclusion even of the children of these mixed marriages as being based on blood percentage. Children of men who married women who were not "Indian" were not excluded.<sup>351</sup>

Another exclusion which was more clearly directed towards blood percentage was the exclusion of persons with less than one-quarter Indian blood from sharing in any annuity, interest or rents of the tribe, band or body of Indians.<sup>352</sup> This exclusion, however, did not mean that these persons were not considered "Indian" or band members. On the contrary, the section specifically refers to the division of these funds "among the members of any tribe, band, or body of Indians"<sup>353</sup> and

then goes on to exclude less than one-quarter blood Indians from the division. Such an exclusion would not be necessary unless some persons of less than one-quarter Indian blood were in fact members otherwise entitled to share in the distribution of funds.

When comprehensive Indian legislation was passed in 1874, a definition of Indian was again included.<sup>354</sup> This Act provided that it was to be construed as one with the 1868 and 1869 Acts.<sup>355</sup> Indian was now defined generally, not simply in reference to who was entitled to Indian lands.<sup>356</sup> A general provision such as this in an enactment without further qualification would presumably mean that these people were Indian for the purposes of this Act. A person covered by this definition would then be considered Indian regarding all provisions contained in the 1868, 1869 and 1874 Acts. This would include liquor restrictions, being allowed to settle on Indian lands and enfranchisement provisions, which would determine when a person would no longer be considered "Indian".

Apart from being more comprehensive than any earlier definition, with the exception of the one enacted in 1857, the 1874 definition differed little from earlier definitions. Basically the 1851 definition as re-enacted in 1868 and modified in 1869 was used with one exception. The 1874 Act required that the individual "participate in the annuities and interest moneys and rents" of a tribe, band or body of Indians".<sup>357</sup> This, when read with the 1869 exclusion of persons of less than one-quarter Indian blood from such distributions<sup>358</sup>, means that for the first time persons were excluded from a definition of Indian based on degree of Indian blood. This exclusion was not, however, absolute as those of less than one-quarter Indian blood were only barred from the distribution of Indian funds if the Chief certified that they were of less than one-quarter Indian blood and the Superintendent General of Indian Affairs sanctioned this.<sup>359</sup>

Legislation regarding Indians was consolidated in The Indian Act, 1876.<sup>360</sup> This Act defined Indian in a new way and also defined certain other relevant terms for the first time. These definitions remained basically unchanged until 1951. Because of the comprehensive nature of The Indian Act, 1876, the definition of Indian had considerable impact on those to whom it applied. This

included determining who was entitled to certain rights of aboriginal people.<sup>361</sup> As with the other definitions of Indian that have been discussed, this definition followed the format of creating a charter group, including certain others in the definition and specifically excluding others from the definition, even if they would be within the charter group. The formula of Indian blood combined with membership in an aboriginal group was used once again in this legislation to define the charter group. The charter group consisted of males of Indian blood reputed to belong to a band.<sup>362</sup> Any child of a member of the charter group and any woman who was lawfully married to a member of the charter group was included.<sup>363</sup>

The requirement that a person be "of Indian blood," or be adopted, as has been seen, appeared in all prior definitions of Indian by legislation. The phrase "of Indian blood" does not clearly indicate the degree of blood required. The specific inclusion of those who had one parent who was not "of Indian blood" in earlier legislation does not mean that those of less than full Indian blood were not covered by this expression. As well the use of both this expression and the term "Indian" in the 1857 definition implies that "of Indian blood" included persons who were not full blooded Indians.

The question of whether "of Indian blood" meant full Indian blood was considered in the Howson case in 1894.<sup>364</sup> Here the court had to determine if a person whose father was white and whose mother was Indian and who was a member of an Indian band, living on a reserve and sharing Indian treaty payments, was a "male person of Indian blood reputed to belong to a particular band".<sup>365</sup> It was argued that Indian blood meant full blood or that the blood of the father was to govern.<sup>366</sup> Wetmore, J. held that the "popular and ordinary meaning" of Indian blood would include blood from a mother or father.<sup>367</sup> Wetmore, J. also rejected the argument that Indian blood required full Indian blood on the basis of the

intention of the Act stating that:

It is intended to apply to a body of men who are the descendants of the aboriginal inhabitants of the country, who are banded together in tribes or bands,....It is notorious that there are persons in those bands who are not full blooded Indians...but whose associations, habits, modes of life, and surrounding generally are essentially Indian....<sup>368</sup>

The Howson case, as well as the definitions of Indian prior to 1876, support the position that prior to this time those of less than full Indian blood were still regarded as being entitled to the rights of aboriginal people. Other governmental action also supports this position.

In general, it could be said that those of less than full Indian blood were regarded as having common law rights and some were given the option of taking treaty depending on their mode of life. As Cumming and Mickenberg state, the:

general attitude of governments has long been that all Métis were treated as having native rights and those of mixed blood who lived as Indians were given the option to be dealt with as full-blooded Indians.<sup>369</sup>

One writer argues that in the Royal Proclamation, 1763<sup>370</sup>, which acknowledged Indians' land rights, no distinction between Indians and Métis was intended.<sup>371</sup> He bases this argument on the fact that the drafters were aware of the existence of the Metis but made no distinction regarding them.<sup>372</sup>

The government in fact passed legislation specifically intended to extinguish Half-breeds' common law rights thus acknowledging that they must have existed in the first place. The Manitoba Act, passed in 1870, provided that whereas it was:

expedient towards the extinguishment of the Indian Title to the lands in the Province...to appropriate [certain land and to] ...divide the same among the children of the Half-breed heads of family residing in the Province.<sup>373</sup>

Another Act was passed in 1874 which acknowledged that no provision had been made regarding the extinguishment of the rights of Half-breed heads of family and made provisions for these persons to receive land or scrip with which to buy Dominion land.<sup>374</sup> The Dominion Lands Act, 1879 made similar provisions for the Métis of

what was then called the North West Territories.<sup>375</sup>

Although special provisions had been made prior to 1876 for extinguishing Métis or Half-breed land rights, such persons were not, prior to this time, barred from entering into treaties with the Federal Government thus extinguishing their rights in this manner. Shortly after the passage of the Manitoba Act, the government entered into negotiations with the Indians of southern Manitoba, and the Indian Commissioner explained to the Métis that lived with the Indians that they could take treaty or scrip.<sup>376</sup>

The head of the Treaty Commission, established by the Federal Government to negotiate treaties with the Indians and Métis of northern Alberta, Commissioner David Laird, made a similar statement explaining that:

The reason the government does this [gives script] is because the Half-breeds have Indian blood in their veins, and have claim on that account...Half-breeds living like Indians have the chance to take treaty instead, if they wish to do so.<sup>377</sup>

Similarly, the 1906 Order-in-Council setting up the Commission for Treaty Number 10 gave the Métis the choice of whether to take scrip or treaty.<sup>378</sup>

These policy statements suggest that Half-breeds, both before and after the passage of special legislation designed to extinguish their rights, were, at least if they lived with the Indians, given the option of taking treaty. The Robinson Treaties, concluded in 1850, specifically included Half-breeds.<sup>379</sup> It has also been noted, regarding these treaties, that the Indians themselves urged the recognition of Half-breed claims.<sup>380</sup>

An adhesion in 1875 to Treaty Number 3 in Ontario specifically dealt with Half-breeds. It provided that:

whereas the Half-breeds above described by virtue of their Indian blood, claim a certain interest or title in the lands or territory

and went on to extinguish that claim according to the provisions of the treaty.<sup>381</sup> Again, as with the Robinson Treaties, the Indians urged that the Half-breeds be included. One of the chiefs stated, during the negotiations that "We wish that they should be counted with us, and have their share of what you

have promised".<sup>382</sup> In the Chevrier case the Ontario District Court found that an ancestor of the original signatories was entitled to the treaty rights notwithstanding the fact that he was of mixed blood.<sup>383</sup> There is evidence then that the government, the courts, and the Indians do not regard full Indian blood as a prerequisite to having common law rights or being included in treaties.

It can be concluded from government policy and legislation that prior to 1867 persons would not be excluded from having aboriginal rights simply on the basis that they were not full-blooded Indians. This conclusion is supported by the definitions of "Indian" which used the general term "Indian blood" and by the governmental policy of acknowledging the common law rights of Half-breeds and giving them the option to take treaty.

The exclusion that first appeared in 1869, regarding persons of less than one-quarter Indian blood, did not appear at all in the 1876 legislation. The Indian Act, 1876, however, did exclude certain Half-breeds and also attempted to provide for different treatment of Half-breeds in the future.<sup>384</sup> The necessity for such a provision is itself evidence that prior to its enactment simply being a Half-breed was not a bar to being "Indian". Wetmore, J., in the Howson case, held that the specific exclusion of certain Half-breeds would not be necessary if Indian blood required full blood.<sup>385</sup> Indeed, the same could be said of the specific exclusion of persons with less than one-quarter Indian blood in 1869.

The 1876 Act provided that "no Half-breed in Manitoba who has shared in the distribution of Half-breed lands shall be accounted Indian ...".<sup>386</sup> This, it is important to note, is not a general exclusion of anyone who is of less than full Indian blood but only of those indicated within that province.

Half-breed heads of family were not originally entitled to land distribution so the next part of section 3(e) was presumably designed to deal with those not entitled to "Half-breed lands". It provided that:

no Half-breed head of a family (except the widow of an Indian, or a Half-breed who has already been admitted into a treaty), shall unless under very special circumstances, to be determined by the Superintendent or his agent, be accounted an Indian, or entitled to be admitted into any Indian treaty.<sup>387</sup>

This then is both an acknowledgement that in the past such persons were accounted Indian and admitted to treaty and an attempt to stop this practice at least as regards Half-breed heads of family.

The definitions of Indian and band member, which have been considered, remained unchanged regarding the inclusion of those of less than full Indian blood until 1951.<sup>388</sup> There continued to be, however, exclusions based on characteristics other than Indian blood, such as intermarriage.<sup>389</sup> With the new Indian Act<sup>390</sup> of 1951, who was included changed considerably. Those included in this Act, like those included in the 1876 Act, were entitled to certain rights of aboriginal people, including access to reserve lands.<sup>391</sup> For this reason it could be argued that the government regarded those included as being entitled to the rights of aboriginal people.

Indian was simply defined, by the 1951 Act, as a person who was registered as an Indian or entitled to be registered as such pursuant to the Act.<sup>392</sup> The registration sections, like other provisions defining Indian that have been considered, defined a group that may be regarded as the charter group and then specified certain inclusions to and exclusions from this group. Paragraphs (a) and (b) of section 11(1) defined what may be regarded as the charter group. Paragraph 11(1)(a) included anyone who, under the 1868 Act as amended in 1869 and 1874, was entitled to the land of a tribe, band, or body of Indians as of May 26, 1874.<sup>393</sup> As has already been seen, the 1868 Act determined that all those of Indian blood who were reputed to belong to the aboriginal group and those who had one parent who met these requirements or who were the wives of those who met these requirements were entitled to the land of the band, tribe or body of Indians.<sup>394</sup> The 1869 and 1874 amendments excluded those of less than one quarter Indian blood in some cases, as well as Indian women who married men who were not Indian and their children.<sup>395</sup> What is important to note about this part of the charter group is that a person could not be included in it simply because they were within the definition described. They must have been entitled to be within the group described in 1874. The other part of the charter group was defined by paragraph 11(1)(b) and only required that a person be a member of a band.<sup>396</sup>

Those related to the charter group by marriage or descent were included with some restrictions on both. What was provided for in section 11 was descent through the male line. This was done through three provisions. The first entitled all males directly descended in the male line from the charter group.<sup>397</sup> The second entitled the legitimate children of a male member of the charter group or a male descendant of the charter group.<sup>398</sup> This latter inclusion referred to illegitimate male children. The third entitled the illegitimate children of women who were members of the charter group or women who were descendants of males in the charter group or males descended in the male line, unless the Registrar was satisfied that the child's father was not Indian.<sup>399</sup>

Section 12 identified a number of groups that were not entitled.<sup>400</sup> These people, regardless of whether they came within the charter group or the other inclusions in section 11, were not Indian. Two of these exclusions concerned Half-breeds. It has already been noted that certain Half-breeds were excluded in 1876 for the first time and that a policy was set up to prevent Half-breed heads of family from being "accounted Indians" in the future.<sup>401</sup> The 1951 Act excluded any person who received Half-breed lands or scrip and their descendants.<sup>402</sup> This is similar to the 1876 exclusion except that it was no longer restricted to those in Manitoba and the descendants of those who received scrip were now also excluded. As with the 1876 provision, this exclusion was not based on blood percentage so much as lifestyle since these people originally were given the choice between taking scrip or treaty.

Another exclusion in section 12 could be viewed as dealing with blood percentage. Children born to status male persons whose mothers and whose fathers' mothers were only status because they married status men were excluded.<sup>403</sup> This can be called the "double-mother" rule. If all those who were status, except by marriage, were full-blooded Indian and all those who received status only through marriage were white this would amount to a restatement of the one-quarter blood rule, first enacted in 1869. However, all those entitled to status in 1951 were not full-blooded as the one-quarter rule had not applied since 1876 and the exclusion of Half-breeds was limited to certain Half-breeds. For these reasons

many of those initially entitled under 11(1)(b) as "band members" would be of less than full Indian blood. In addition, a person who was entitled to be Indian only through marriage to an Indian may in fact have been a full-blooded yet unregistered Indian. Since neither being status or being non-status depended on the degree of Indian blood a person had, the double mother rule did not impose a blood percentage requirement.

Indian women who married men who were not registered Indians were still excluded.<sup>404</sup> It was not necessary in this legislation to specifically exclude the children of these marriages since, as has been seen, descent had to be traced through male ancestors. In any case it seems clear that neither the exclusion of these women or their children was based on blood percentage as both men who married women who were not Indian and the children of these marriages were included.

In 1958 section 12 was amended to provide that Half-breeds who were registered as "Indians" as of 1958 and their descendants were not barred from registration for having received lands or scrip.<sup>405</sup> This simply meant that no one's registration, before 1958, could be challenged on this basis. The need for this section clearly points to the fact that some people who were not of full Indian blood and who had even received scrip were included in the Act.

No other significant changes were made to the definition of Indian, concerning the amount of Indian blood that was required, in the Indian Act until 1985.<sup>406</sup> As in 1951, the Indian Act currently defines Indian as a person who is registered or is entitled to be registered under the Act.<sup>407</sup> Section 6 specifies who is entitled to be registered.<sup>408</sup> It provides that a person is entitled to be registered if they were previously registered or they were previously entitled to be registered.<sup>409</sup> As of 1985, then, the Indian Act determines the status of anyone born before it came into effect in the same way their status would have been determined under previous legislation except in certain cases.

Section 6 also includes the members of a body of persons declared on or after April 17th, 1985 to be a band.<sup>410</sup> Although the wording of the Act is somewhat ambiguous on this point, if someone was not a member of the band at the

time the band was declared to be a band, they would likely only be entitled to be registered through the other provisions of the Act.

Other parts of section 6 deal with persons who were excluded or omitted by previous legislation. These provisions attempt to correct the limitations on the group covered by the Indian Act in 1951 and previously. Those who lost status because their mother and paternal grandmother gained status by marriage are reinstated.<sup>411</sup> Those who lost status because they were illegitimate and their registration was protested on the basis of their father not being status were reinstated.<sup>412</sup> As well, women who lost status because they married men who were not Indian were reinstated to the charter group, but not their children.<sup>413</sup>

The charter group, as of 1985, is not static. Also included in it are any children of two people who are within section 6.<sup>414</sup> This is another way of saying that after two generations of marriages to persons who are outside of section 6 the child will not have status. It is a requirement of one quarter status "blood". This is confirmed by the fact that a child who has one parent who is a charter group member has status<sup>415</sup> while a child who has one parent with status but who is not in the charter group will not have status. In the latter case, the child would not have one-quarter status "blood" because the status parent was already the product of a marriage to a person who was not status.

Like the "double-mother" rule enacted in 1951, the requirement for one-quarter charter group "blood" is not a requirement for a certain percentage of Indian blood. Since Indian blood requirements only applied in limited circumstances in the past, those who are currently in the charter group are almost certainly of varying degrees of Indian blood.

Currently the Indian Act, like previous Acts, specifies that certain persons are not entitled to be registered.<sup>416</sup> There is no reference to excluded "Half-breeds" or their descendants in this legislation. However, those excluded by the 1951 Act on this basis would continue to be excluded. This is so because a person must be entitled to be registered under prior legislation unless he or she can come within a specific inclusion. As noted, there is no specific inclusion regarding previously excluded "Half-breeds" or their descendants.

Prior to 1985 the definition of Indian and the definition of band member were closely related. The amendments in the 1985 Act made a significant change by creating for the first time the possibility of being a band member without being "Indian". As is the case in the definitions of "Indian", persons who were members of a band prior to the new legislation continue to be entitled to band membership.<sup>417</sup> Anyone who is a member of a group that is declared to be a band is also entitled to be a band member under the 1985 legislation.<sup>418</sup>

Persons entitled to automatic reinstatement to band membership and those entitled to be reinstated to status, however, are not the same. The automatic band membership reinstatement leaves out all persons who would have status reinstated but not as a charter member and also some who had status reinstated as charter members.<sup>419</sup> Those reinstated to status because they lost status due to the "double mother" rule are automatically reinstated to band membership.<sup>420</sup> If the band did not assume control of the membership within two years, certain other persons are entitled to band membership. This includes any person who has status and who has one parent who is a band member.<sup>421</sup> Before that a person could only become a band member if both parents were band members.<sup>422</sup>

It is clear from this review of government policy and legislation that full Indian blood is not regarded as a prerequisite to entitlement to the rights of aboriginal people. The one-quarter blood rule only existed between 1869 and 1876 and only between 1874 and 1876 did it exclude persons from being "Indian". Prior to that it only related to participation in the distribution of annuities. The expression "of Indian blood" was used and it has been seen that this likely does not mean of full Indian blood. "Half-breeds" were excluded, but only in certain circumstances, and even then their rights were recognized through other legislation or because they were included in treaties with the Indians. The current rules regarding the degree to which a person must be descended from someone who has status or band membership do not create a blood requirement because those who currently have status or band membership are of varying degrees of aboriginal blood.

The government's position may be a significant factor that the courts would

consider if faced with the question of the degree of descent necessary to establish entitlement to aboriginal rights. However, the Supreme Court in the Sparrow case stated that "historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but it is also incapable of, in itself, delineating that right."<sup>423</sup> Constitutional provisions, then, may be more persuasive than government policy. In this regard, the important point would likely be not who is "Indian" within section 91(24) of the Constitution<sup>424</sup> but who is an aboriginal person within section 35 of the Constitution.<sup>425</sup>

Section 91(24), because it concerns the division of powers, by its very nature concerns who has control over "Indians" and "lands reserved for Indians" not whether certain persons have rights to Indian land or other rights as aboriginal people. Even if it were found that those of less than full blood were not "Indian", they could still have rights as aboriginal people. In this case the Federal Government may not have the power to legislate for these people, but they could still have access to the rights of aboriginal people.

If the Federal Government has jurisdiction over particular aboriginal rights, such as rights to "Indian lands" or treaty rights, it could likely recognize anyone as entitled to these rights including those who were not 91(24) "Indians". This point is illustrated by the Chevrier case.<sup>426</sup> In this case the accused, who was "of mixed blood", claimed a treaty right to be protected against a provincial hunting law.<sup>427</sup> After finding that the accused was entitled to the benefit of the treaty, Wright D.C.J. concluded that:

Whether the accused is an 'Indian' within s.91(24) of the Constitution Act, 1867 I need not say. The accused claims a birthright granted by the Crown in exercise of its jurisdiction over Indians, and the province, having no jurisdiction over Indians as such, has no power to take away a right originally granted to Indians even though the present holder of that right may not be an Indian.<sup>428</sup>

The point that Wright, D.C.J. made is that, if the control of the right is within federal jurisdiction, it is of no consequence that the person may not be "Indian" within the meaning of section 91(24) of the Constitution. The power over the right is sufficient to give Parliament the jurisdiction to recognize anyone, even

those not covered by section 91(24), as entitled to that right. The question of what rights of aboriginal people have within federal jurisdiction is beyond the scope of this work. It is sufficient to note that the division of powers should never apply to separate an individual from a right of aboriginal people to which he or she is entitled. The division of powers then is relevant, not to who is entitled to the rights of aboriginal people, but to who has control over these rights.

On the other hand, section 35 deals with the rights themselves, not who has control over them. Subsection 35(1) provides that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."<sup>429</sup> [emphasis added] Subsection 35(2) states that "[i]n this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Metis peoples of Canada."<sup>430</sup> Of course this section does not bestow any rights on the Metis, who by definition are of less than full Indian blood. It only protects such rights as they may have. However, it would be logical to conclude that the Metis have some rights which can be protected by section 35. Otherwise their inclusion can not be explained except as a cynical attempt to give the appearance of recognizing rights without doing so.

The inclusion of Metis in the definition of aboriginal people in section 35 was considered by the dissent in the Dumont case at the Manitoba Court of Appeal.<sup>431</sup> This question was not considered by the majority or by the Supreme Court in reversing the judgment of the Court of Appeal.<sup>432</sup> After quoting section 35, O'Sullivan, J.A. stated:

I know there is a school of thought that says that the framers of the Constitution were of the view that the Metis people as such had no rights and that a cruel deception was practised on them and on the Queen, whose duty it is to respect the treaties and understandings that she has entered into with her Metis people. But I do not subscribe to this school of thought.<sup>433</sup>

In conclusion, it can be said that it seems unlikely that the fact that a person is not of full aboriginal blood would mean that he or she was not entitled to any of the rights of aboriginal people. This can be seen from government policy and legislation and by the inclusion of the Metis in section 35 of the

Constitution. Assuming that full blood is not required, it is not clear what degree of descent from an originally entitled group is necessary. The government did use a one-quarter blood rule but only for a limited period and in limited circumstances. Once it is accepted that full blood is not required there does not seem to be any logic to preferring certain percentages of aboriginal blood over others. For this reason, as will be seen, other factors may have to be considered as well as descent.

## 2. Association Through Cultural Attributes

### a. Arguments concerning association by culture

Cultural attributes are another way of connecting an individual or a group with an originally entitled group. Cultural attributes would include such things as lifestyle, customs, beliefs, traditions, religion and language. It has already been seen that the collective nature of aboriginal rights determines that an individual must belong to some type of collectivity to be entitled to these rights. This, by definition, would include being in some respects culturally distinct from others in society. The question is whether an individual or a group must show a connection to an originally entitled group by having similar cultural attributes.

Pentney suggests that, in addition to looking at acceptance by an Inuit group and blood, the courts should also consider lifestyle, language and kinship.<sup>434</sup> He also states that "[i]f the Metis as a people can evolve over time and grow in numbers other than by direct descent, it is essential that these criteria be examined in order to define this group today."<sup>435</sup> The characteristics that Pentney proposes for defining membership in the non-historical "Metis" are the same characteristics suggested in regard to the "Inuit", that is ancestry, kinship, culture, community acceptance, lifestyle and self-identification.<sup>436</sup>

What Pentney appears to be saying is that it may be necessary to define

"Metis" as a people who exist today rather than defining "Metis" groups in the past, considering those groups "charter" groups and having persons define themselves through ancestry from this group. This can be contrasted with his position regarding the definition of "Indian" which was based on historical and ancestral considerations. Although Pentney does not explicitly deal with why he would take a different approach in the case of the Metis, as opposed to the Indians, the reason appears to be that he is dealing with two different questions. In one respect the point that Pentney makes is well taken: in determining what groups of aboriginal peoples, whether Metis or Indian, are collectivities capable of possessing collective rights, consideration must always be given to current existing groups. In determining if a current group meets the definition of collectivity, as has been seen, the lifestyle or culture of the group will be relevant. However, a lifestyle or cultural attributes test could have certain drawbacks if used to determine the entitlement of a group or an individual to the aboriginal rights of an originally entitled group.

Some would argue that way of life or culture can and should be used for this purpose. In so far as aboriginal title as opposed to treaty rights is concerned, one author has questioned whether this right is inherited through descent from aboriginal people and would instead rely on the question of lifestyle. Flanagan traces the emergence of the concept that "aboriginal title could be transmitted through racial inheritance, even though the descendants' way of life might differ radically from that of their ancestors."<sup>437</sup> He observes that the idea was first raised in negotiations with Ottawa by Father Ritchot, representing the Metis.<sup>438</sup> Flanagan notes that government Ministers argued against special Metis rights stating that "the inhabitants of the North-West claiming and having obtained a form of government suited to civilized men, ought not to claim the privileges accorded to Indians."<sup>439</sup> He then notes that Ritchot in response "insisted that the Metis, in claiming the same rights as other Canadians, had no intention of 'losing rights which they can have as descendants of Indians'."<sup>440</sup> Flanagan concludes that there is no evidence that the Ministers accepted "Ritchot's theory of Metis aboriginal title inherited from Indian

ancestors."<sup>441</sup> He concedes that the Manitoba Act, drafted while negotiations were ongoing, "bore some traces of Ritchot's inheritance theory" in that it provided that "whereas it is expedient, towards the extinguishment of the Indian Title to land in the Province to appropriate a portion of such ungranted lands....for the benefit of the families of the half-breed residents."<sup>442</sup> Flanagan contends that it is difficult to determine what was meant by linking the grant and the extinguishment of Indian Title through the "unhelpful word 'towards'".<sup>443</sup>

Flanagan does note that Macdonald, in the House of Commons, stated that the grant was "for the purpose of extinguishing Indian title" and that he later stated that "[t]hose half-breed had a strong claim to the lands, in consequence of their extraction, as well as from being settlers."<sup>444</sup> However, he also notes that fifteen years later Macdonald told the House that "[w]hether they [the Metis] had any right to those lands or not was not so much the question as it was a question of policy to make arrangements with the inhabitants of the Province."<sup>445</sup> Flanagan contends that despite this the "clock could not be turned back."<sup>446</sup> He concludes that as a consequence the Manitoba Act remained, and when the Dominion Lands Act was passed it "imitated" this Act in stating that the grants were to "satisfy any claims existing in connection with the extinguishment of Indian Title, preferred by half-breed residents in the North-West Territories."<sup>447</sup>

It is possible that at least some representatives of the Canadian Government did not think the Metis had aboriginal rights. However, as has already been seen, there is a considerable amount of evidence that indicates that the government did not regard full aboriginal blood as prerequisite to having rights as an aboriginal person. What Flanagan appears to conclude is that since full aboriginal blood was not required to establish aboriginal rights and there was some doubt about whether the Metis had aboriginal rights, this doubt must have been based on their lifestyle. On this basis he goes on to conclude that a traditional lifestyle is necessary to show entitlement to aboriginal rights and that, therefore, these rights are not inherited.

The conclusion that aboriginal rights are not inherited is untenable. Clearly, these rights can be inherited, otherwise no living aboriginal person could claim these rights. None of the judges in the Supreme Court of Canada in the Calder case suggested that aboriginal title ended when those occupying the land before discovery were no longer living.<sup>448</sup> Those who occupied the land when it was "discovered" in the sixteenth, seventeenth and eighteenth century are not still alive. The question is not so much whether these rights can be inherited but whether they can be inherited by those who no longer live as aboriginal peoples did when this land was settled by Europeans and those who are partly descended from non-aboriginals.

Flanagan appears to conclude that the fact that a person is not a full-blooded aboriginal is not a bar to aboriginal rights, but that the fact that his or her lifestyle is not the traditional lifestyle of aboriginal peoples is. However, in doing so he appears to confuse the characteristics necessary to establish aboriginal title and the characteristics necessary to be able to continue to claim that title once it is established. It has already been noted, when the source of aboriginal rights was discussed, that Flanagan argues that aboriginal rights are based on the fact that the prior occupants were nomadic hunters, not farmers. The reasons for concluding that this may not be the basis of aboriginal title have been discussed and will not be repeated here.

What is important is that Flanagan first argues that it is style of life that determines original entitlement, not aboriginal blood. He considers whether the Metis can pass the test developed in the Baker Lake case for establishing aboriginal title.<sup>449</sup> Flanagan argues that "[t]o the extent that the Metis led a truly aboriginal life they were not distinct from the Indians; and to the extent that they were distinct from the Indians, their way of life was not aboriginal."<sup>450</sup> He makes reference to the fact that those mixed-blood people who lived with Indians were allowed to take treaty.<sup>451</sup> Having concluded that the occupation by the Metis did not create aboriginal rights in these people, he uses this conclusion to support the idea that these people did not inherit rights from their "Indian" ancestors. At one point Flanagan notes two possible arguments

concerning the basis for Metis aboriginal title. He notes that the Manitoba Act could be seen as viewing Metis as a "distinct aboriginal people like Indians" or as maintaining an "inherited share of Indian Title."<sup>452</sup> What Flanagan fails to do is to distinguish between these two bases for a claim.

His arguments concerning the source of aboriginal title can only, even if accepted, relate to whether the Metis have an original claim as a distinct aboriginal peoples. The fact that the Metis group itself may, according to Flanagan, not meet the requirements to establish such title does not mean that they have not inherited this title. Clearly, Flanagan regards his arguments concerning why the Metis are not entitled to original title as conclusive of whether they are entitled to inherited title. He offers no other support for his conclusion that aboriginal rights are not inherited by blood alone.

Cultural attributes, which would include more than the lifestyle of the individual, are relevant to determining entitlement to aboriginal rights to the extent that they will determine if a collectivity exists which can claim these collective rights and whether a particular person is a member of a collectivity. If Flanagan's theory regarding the source of aboriginal rights is accepted, then cultural attributes may also be relevant to the question of original entitlement. However, it has drawbacks as a method of connecting an existing group or an individual with an originally entitled one to determine if the group or person still has rights today.

Sanders contends that it would be impossible to formulate a test for style of life in the abstract and that therefore ad hoc decisions would have to be made.<sup>453</sup> For this reason it could be argued that this method is too vague to connect a specific group with an originally entitled group based on their continuing the lifestyle of that group. The same argument could also be made even if culture in the broader sense, as including such things as art, music, values and view of the world, was used. Although it is relatively easy to determine whether a group exists today that is culturally distinct from the rest of society, it would be very difficult to determine which group or groups have continued the culture of a particular aboriginal group that existed historically.

This is so because in many cases aboriginal groups have evolved and changed in such ways that there is no one group which represents a group that existed when this land was settled. A requirement for a cultural connection to an original group could also result in the existence of rights being dependant on no change or evolution in an aboriginal culture. Hudson considers the requirement of kinship or common culture with the community. He notes that this requirement "assumes that objective and identifiable characteristics of a group differentiate its members from the dominant society", such as language or way of life.<sup>454</sup> He goes on to say that this approach "assumes the fixation of certain indigenous traits and may not provide for the incorporation of beneficial elements of the dominant society's culture of technology."<sup>455</sup> The stagnating effect of such a method would depend on the aspects of culture that were used. Some aspects of culture, such as way of life, are more likely to evolve and change while others, which are not as closely related to the physical existence of a people, such as art and music, would likely remain even when the way of life of the people had changed due to a changing environment.

b. The degree of cultural affiliation required -

The assimilation policy

If an individual or a group has to show a connection with an originally entitled group through cultural attributes, the question of how closely that person's or that group's culture must be related to that of an original aboriginal group arises. It seems repugnant to require that aboriginal people maintain their culture unchanged to be entitled to aboriginal rights, especially since change was necessitated by the coming of the Europeans. The aboriginal people who once occupied this entire land had to undergo immense changes simply because the Europeans now occupied the land as well. The Metis culture is an early example of adaptation to changing circumstances. In addition to those changes brought about by the physical presence of the Europeans and the affect they had on the physical, social and economic environment, the original people

were encouraged and in some cases forced to abandon their ways in favour of the "white" peoples' ways by government policy and legislation.

To argue that aboriginal cultures which have evolved and changed over time should not be deprived of aboriginal rights on this basis is not to say that aboriginal people who are completely assimilated continue to have aboriginal rights. It has already been seen that the fact that aboriginal rights are collective rights means that a collectivity which is both racially and culturally distinct, to a certain extent, must exist. However, the requirement for a collectivity, as has been seen, would not bar groups which had evolved from other groups or groups whose traditions had changed from having aboriginal rights so long as they could still be identified as a group.

A review of some government policy and legislation concerning aboriginal people indicates that the government for many years openly attempted to destroy the aboriginal way of life, and that to a certain extent they regarded changes to the aboriginal way of life as ending the need for special rights for these people. This attitude would support the idea that aboriginal rights are dependant on the group maintaining a traditional way of life. However, it will be seen that the government itself eventually abandoned both the assimilation policy and the idea that aboriginal rights are only relevant for those who maintain a traditional lifestyle.

The assimilation policy was born soon after the period of initial contact and continued for many years. The most obvious example of this during the initial period of contact was the drive to Christianize the Indians. This can be seen even as early as 1670 when King Charles II instructed the Colonial Governors to "consider how the Indians and slaves may best be instructed and invited to the Christian religion..."<sup>456</sup> Once peace was established in North America and the Indians were no longer required as military allies, it was the idea that Indians should live as "white men" that came to dominate British policy.

Certain psychological influences played a part in the adoption of the assimilation policy. Upton explains the relationship between the fact that the British saw the extremely detrimental effects their presence had on the Indians

and the growth of the assimilation policy as follows:

Guilt had to be atoned for by accepting responsibility for the protection and civilization of inferior and perverse people. For if the natives were debauched by white contact it was partly their own fault. Hence they must be made over into white men.<sup>457</sup> [emphasis added]

To this end the Indian Department was removed from the military and restored to civil administration with the policy of "gradually reclaiming the Indians from the state of barbarism and introducing amongst them the industries and peaceful habits of civilized life."<sup>458</sup> This policy was to dominate the relationship between the Indians and the British and later Canadian Governments for many years to come.

To implement this policy, Indians were to be collected together and assisted by means of religion and education to "civilization."<sup>459</sup> Superintendent J.W. Keating in testimony to the Commission on Indian Affairs noted that "educating the children, and placing them among already settled and civilized Indians, who pay regular attention, to farming, would be the readiest mode of bringing the heathens to the right way."<sup>460</sup> For the purposes of collecting Indians together to be assimilated, lands were "reserved" for Indians in a new sense. Previously, lands had been reserved for Indians under the Royal Proclamation, 1763 in recognition of their common law rights to the land they occupied prior to any purchase by or surrender to the Crown. Reserves were established during this period as alternatives to direct incorporation of Indians into white society designed to settle, educate and christianize the Indians as well as introducing agriculture among them.<sup>461</sup>

Patterson observes of this period that "[m]any Europeans, including Indian affairs administrators...spoke of the Indian as undergoing the transition, in isolation and on reduced land to westernization."<sup>462</sup> Philip Mason, in examining patterns of racial dominance, proposes four groupings: dominant, paternalistic, competitive and racially fluid.<sup>463</sup> He finds that Indian/white relations in Canada tend towards dominance as the Indians' land is required so they are put on reserves for extinction or the creation of a plural culture.<sup>464</sup> He goes on to note that there are also elements of paternalism in that the dominant white

society attempts to integrate the Indians into it.<sup>465</sup>

Protection of Indian lands during the early nineteenth century was based partly on a recognition of land rights but also on the need to have reserves where Indians could be "civilized" and to protect Indians until they could cope with white society. It is this kind of policy that would support the idea that aboriginal rights are only relevant for those who require "protecting" and "civilizing". The thinking behind such protectionist measures can be seen in the case of Totten v. Watson decided in 1858.<sup>466</sup> This case concerned whether the 1850 Upper Canada Act applied to lands to which individual Indians had acquired fee title. Robinson, C.J., for the court, in finding that it did not, first noted that "from the earliest period the government has always endeavoured, by proclamation and otherwise to deter white inhabitants from settling on Indian lands...".<sup>467</sup> He went on to find that such a policy did not apply to land granted in fee to individual Indians, such grants being very unusual and "only to leading persons among the Indians" who, "it might be assumed, had sufficient intelligence to take care of their property."<sup>468</sup> The reference to "sufficient intelligence" in considering the application of the legislation makes it clear that the basis for the decision was not whether the Indian in question had the right to the land but rather whether he required protection from white society or not.

More and more the policy of treating Indians differently was seen as a temporary measure on the way to assimilating aboriginal people so they would no longer require special "rights". These concepts culminated in the 1857 Gradual Civilization Act.<sup>469</sup> The title alone clearly shows both what the British felt was the current relationship with the Indians as well as what they planned for the future. Indians were to be "civilized", but gradually; therefore, they would continue to have special status for a limited period of time. These goals were stated in the preamble to the Act as follows:

Whereas it is desirable to encourage the progress of Civilization among the Indian Tribes in this Province, and the gradual removal of all legal distinctions between them and her Majesty's other Canadian subjects....<sup>470</sup>

For this purpose male Indians who wanted to "avail themselves" of the provisions of the Act could be enfranchised and become legally non-Indian.<sup>471</sup>

Although the policy of assimilation had not been in operation for a long period of time relative to the length of time during which the British and the Indians had been in contact, it was already evident that there were problems. Special Commissioners were appointed in September 1856 to investigate the failure of the various Indian "experiments" and the slow progress towards "civilizing" them.<sup>472</sup> Although admitting that progress had been slow, they concluded in 1858 that "it may fairly be assumed to be established that there is no inherent defect in the organization of the Indians, which disqualifies them from being reclaimed from their savage state."<sup>473</sup> The government, however, chose to remain committed to the assimilation policy and rather than considering changing what they perceived as the desired relationship between Indians and whites they proposed new, more aggressive, means of achieving assimilation. For this purpose the Commissioners advocated provisions to gradually do away with tribal organizations.<sup>474</sup>

Like British Governments had, Canadian Governments would respond to the failure of Indians to assimilate with stronger measures which controlled more elaborately the everyday life of aboriginal people. After confederation the Canadian Government did not depart from the British Government's policies towards Indians and in this regard passed the Management of Indian and Ordinance Lands Act<sup>475</sup> in 1868 and the Gradual Enfranchisement Act<sup>476</sup> in 1869. These Acts were described by the Deputy Superintendent of the Indian Branch of the Department of the Secretary of State as "designed to lead the Indian people by degrees to mingle with the white race in the ordinary avocations of life."<sup>477</sup> The Gradual Enfranchisement Act provided for granting life estates and eventually patents in lands held on reserves by Indians based on the degree of civilization, integrity and sobriety of the Indian in question.<sup>478</sup> The Act gave the Governor-in-Council the power to impose the Euro-Canadian political ideal of elected local government on bands.<sup>479</sup>

When the first Indian Act was passed in 1876 sections four to ten

introduced the location ticket for individual holding of parcels on the reserve.<sup>480</sup> This was designed to facilitate assimilation by replacing the traditional Indian communal pattern of landholding with the British concept of individual possession. Sections sixty-one to sixty-three provided for the election of chiefs and councils and gave Indians more control in local government.<sup>481</sup> Ironically, although this provision would appear to recognize the Indians' common law right to govern themselves, it was in fact designed to encourage assimilation. The government assumed that "substitution of limited local administration for existing tribal organizations would accelerate the assimilation process."<sup>482</sup>

Enfranchisement, the final step in the assimilation process, was also provided for "sober and industrious" Indians who would, with the consent of the band, receive patent to the land they held on the reserve after three years of probation.<sup>483</sup> Enfranchisement was automatic if the person held a university degree or entered into certain professions.<sup>484</sup> By providing for the dispersal of the reserve as Indians became assimilated this legislation continued the policy, apparent from the initial conception of reserves, of using reserves as a temporary basis for assimilation and then dismantling them when this goal was achieved. The "government's determination to make the Indians into imitation Europeans and to eradicate the old Indian values through education, religion, new economic and political systems, and a new concept of property"<sup>485</sup> is made abundantly clear in this legislation.

In the 1884 amendments the policy of destroying Indian culture to replace it with white values reached new heights with a provision prohibiting the "Potlatch" and "Tawanawa" dance ceremonies.<sup>486</sup> In addition, the enfranchisement provisions were strengthened to encourage more enfranchisement. Taxes were suspended on enfranchised Indians and band consent could be eliminated.<sup>487</sup>

The Indian Advancement Act, 1884<sup>488</sup> was also passed at this time. Although this Act extended slightly the powers of a band council to which it applied over such things as taxes, police and public health,<sup>489</sup> it also increased the powers of the Superintendent-General to direct band affairs. He, and his agents, called

elections, supervised them, called band meetings, presided over them, and advised the band council.<sup>490</sup> The Act represented the further erosion of traditional Indian governments and their replacement with the form of government used by other Canadians. The Act was to be made applicable to bands by order of the Governor-in-Council if the bands were "considered fit."<sup>491</sup> However, as a matter of policy, it was only to apply at the request of a band.<sup>492</sup> Such consent from the Indians was not in fact forthcoming. Agents in Nova Scotia, New Brunswick, Quebec and Ontario found bands were either "incapable" of taking on the responsibilities or refused to do so.<sup>493</sup> Most field officers felt that Indians wanted to retain their tribal government and non-taxable status.<sup>494</sup>

As the last decade of the nineteenth century approached the "slow transition of western bands to a self-supporting agricultural life and the reluctance of eastern tribes to adopt more advanced self-governing schemes disillusioned many Indian Affairs officials."<sup>495</sup> Such disillusionment seemed justified in light of the fact that by 1897 only the Mississaugas of the Credit in Ontario and the Caughnawaga Mohawks of Quebec had accepted the government's "self-governing" scheme.<sup>496</sup>

The fact that the assimilation policy had not been a success was not for want of trying on the part of officials of the Canadian Government. In 1889 Indian Commissioner Hayter Reed informed Superintendent-General Edgar Dewdney that:

The policy of destroying the tribal or communist system is assailed in every possible way and every effort made to implant a spirit of individual responsibility instead.<sup>497</sup>

The traditional Indian occupation of hunting and fishing was regarded as a drawback to encouraging farming, considered a civilizing economic base, as well as preventing Indian children from receiving a white education as they would be absent for long periods of time from school.<sup>498</sup> For this reason this occupation was discouraged. For this purpose the Indian Act was amended in 1890 to allow the Superintendent-General by public notice to make the game laws of Manitoba and the North West Territories applicable to Indians in such areas.<sup>499</sup> In 1894 the Indian Act was amended again to require compulsory school attendance and to give

the Governor-in-Council the power to establish boarding schools for Indians.<sup>500</sup> These measures were aimed at bringing Indian children to accept white culture by giving them a white education and in certain cases separating them physically from their own people.

By the early twentieth century protection and control of Indians had reached new heights with twenty-six sections of the Indian Act, 1906 devoted to offences and penalties and forty-six sections devoted to the management of Indian lands and timber resources.<sup>501</sup>

Enfranchisement had been seen as the final step in assimilation, however, the Indian Department was frustrated by the refusal of bands to approve enfranchisement of Indians who did not possess location tickets.<sup>502</sup> In 1918 the government sought to remedy this situation. The Indian Act was amended to provide that Indians who held no land on a reserve, did not reside on a reserve and did not follow the Indian mode of life could, upon application, be enfranchised without band consent and simply receive a share of the band funds.<sup>503</sup>

Two years later further measures were taken to speed up enfranchisement. Deputy Superintendent-General Scott argued in 1920 that the Act's enfranchisement provisions had to be changed. He explained to a Special Committee of the House of Commons that:

after one-hundred years...it is enervating to the individual or to a band to continue in that state of tutelage when he or they are able to take their position as...citizens...That has been the whole purpose of Indian education and advancement since the earliest times. One of the very earliest enactments was to provide for the enfranchisement of the Indian...Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question and no Indian Department....<sup>504</sup> [emphasis added]

To this end in 1920 the Indian Act was amended to allow the government, acting through a board, to enfranchise Indians without their consent.<sup>505</sup> This section was removed after being in force for only two years.<sup>506</sup> However, in 1933 compulsory enfranchisement was reinstated.<sup>507</sup> This time it could not take place in violation of Indians' treaty rights.<sup>508</sup>

Section eight of the 1930 amendments provided that the Superintendent-

General could operate farms on reserves and employ persons to instruct Indians in farming.<sup>509</sup> This indicates that the government felt that Indians had not yet adopted the "civilized" means of sustaining themselves, that is agriculture, so they still required special "help" before they could be assimilated.

It can be seen through the review of government policy so far, that assimilation and destruction of the aboriginal way of life was nothing less than a major preoccupation of government policy and legislation. It can also be seen that the government regarded abolition of aboriginal people's traditional lifestyles as ending, to a certain extent, the requirement to recognize them as having distinct rights. However, the failure of the policy to completely assimilate aboriginal people has also be seen.

During the early post World War II period, the idea was explicitly voiced for the first time that assimilation was necessary for aboriginal people to assume the rights and responsibilities of other citizens. This idea could be seen as supporting the proposition, made by Flanagan, that aboriginal rights are for "uncivilized" nomadic people and do not continue when their way of life has changed. However, it will also be seen that this idea was eventually rejected by the aboriginal people and government. Once the idea that aboriginal rights were incompatible with having the rights of a citizen was rejected, the concept arose that aboriginal people can claim, as the Metis argued many years ago, "the same rights as other Canadians" without "losing the rights which they can have as descendants of Indians".<sup>510</sup>

In contrast to the somewhat ad hoc policy during the Depression and World War II, after the war ended there was renewed interest in Indian legislation culminating in the passage of a new Indian Act in 1951.<sup>511</sup> Two new and important concepts arose during this post-war period. The first was the idea that it may not be necessary for Indians to give up their culture entirely in order to assimilate to white society. In this regard the new Minister of Mines and Resources, J. Allison Glen, declared that "[t]he Indian should retain and develop many of his native characteristics."<sup>512</sup> This was in marked contrast to the policies of the previous century whereby every effort was made to coerce Indians

to give up their values and way of life in favour of white ones. At this point, however, although elimination of Indian culture was no longer considered a desirable goal, elimination of special rights for aboriginal people still was.

The other new concept that arose during this period concerned why assimilation was still considered a desirable goal. The assimilation policy arose in the early nineteenth century due to the combination of a number of factors including the need to justify the existence of the Indian Department while reducing its expenditures, the internal and external pressures not to abandon the aboriginal people, and the need to open up aboriginal land for white settlement. External pressures would again play a part in the adoption of a new reason to promote assimilation. Public interest in aboriginal affairs was considerable during this period due in large part to the strong aboriginal contribution to the war effort.<sup>513</sup> This public concern was directed at what was regarded as discriminatory treatment or the "second-class citizen" status of the Indians under the Indian Act.<sup>514</sup> Assimilation and ending Indian special status were considered desirable because elements of that status, designed to protect and "civilize" Indians, were now considered discriminatory.

Interested groups, such as veterans' associations, called for a Royal Commission investigation.<sup>515</sup> Although this was considered in 1946, a Joint Committee of the House of Commons and the Senate was formed instead to consider the Indian Act.<sup>516</sup> This Committee continued until 1948.<sup>517</sup> The Committee, like the groups which had placed pressure on the government to form it, endorsed the goal of assimilation to make Indian people "equal" with other citizens. Their stated objective was:

To abolish gradually but rapidly, the separate political and social status of the Indians (and Eskimos); to enfranchise them and merge them into the rest of the population on an equal footing.<sup>518</sup>

It is interesting to note that in their desire to see the treatment of Indians as inferior citizens ended, the other basis for Indian special status, their historical rights, which in no way implies any kind of inferiority to the rest of society, was apparently forgotten. It was, however, recognized that Canada had both a "moral responsibility" and a "legal obligation" to provide Indians

with social services.<sup>519</sup>

The concept that special status must be eliminated in favour of equality with other citizens did not necessarily meet with the approval of Indian people. The Committee heard for the first time, when considering Indian policy, directly from Indian groups.<sup>520</sup> One example of the Indian people's attitude towards being made equal can be seen in their attitude towards receiving the right to vote. While clearly this fundamental right of citizens was considered an important aspect of making these people "equal", some testifying before the Committee took a different view. The Indians of the Coldwater Reserve simply stated:

We do not understand that.<sup>521</sup>

While Chief Blair Peter of the Shulus Reserve stated:

I do not want to be turned into a white man. I do not vote. I am Indian.<sup>522</sup>

Despite any doubts that Indian people may have expressed concerning becoming "equal" and thus losing their special status, the Committee did make a number of recommendations designed to ensure this would occur. In addition to the recommendations regarding equality already noted, the Committee also made recommendations designed to end Indian special status. One way to bring Indian special status to an end was to eliminate exclusive federal jurisdiction over them. In this regard the Committee recommended Federal/Provincial agreements to bring Indians under provincial programs and legislation.<sup>523</sup> Specifically, the incorporation of sufficiently "advanced" reserves within the terms of provincial municipal statutes was recommended.<sup>524</sup> To further the goal of assimilation it was also recommended that Indian children be educated with non-Indian children.<sup>525</sup>

The assimilation policy was to be continued with a new emphasis on allowing Indians to retain their culture and on the idea that they should become "equal" with the rest of society. In this regard Prime Minister Louis St. Laurent in 1949 decided to combine the Indian Department, formerly under the Secretary of State, with the Department of Immigration and Citizenship explaining that:

It was felt that it would have some psychological effect to say that these three activities dealing with human beings and which are designed to bring those human

beings to the status of full citizenship as rapidly as possible were under one head.<sup>526</sup>

The culmination of the Committees' work and other consultations<sup>527</sup> was the passage of the revised Indian Act in 1951.<sup>528</sup> During the debate on the passage of this Act the Minister of Citizenship and Immigration outlined the purpose of the Act as integration, indicating that this meant "the status of having privileges, duties and responsibilities equal to those of other Canadians, and exercising them in the same manner that we do."<sup>529</sup> The fact that special status was to be replaced with equality reflects the growth of this concept since the end of the War, while the use of the word "integration" as opposed to "assimilation" reflects the new concept that Indians should retain aspects of their culture. The new Act attempted to reflect these concepts of equality for Indians without necessarily destroying their culture, and, in doing so, it met most of the criteria established by the Committee.<sup>530</sup>

The Committee recommendation that Indians be subject to provincial legislation was reflected in a provision in the Indian Act which made Indians subject to provincial laws of general application to the extent that they were not inconsistent with treaty rights or the Indian Act.<sup>531</sup> The Committee recommendation concerning extending the franchise to Indians was adopted in the Dominion Elections Act<sup>532</sup> of 1950 although it was subject to Indians waiving their treaty rights to tax exemption.<sup>533</sup> This shows the idea that Indians' achieving equality was dependent on their giving up their special rights.

In the years following 1951 up until 1969 fewer changes were made to the Indian Act than had been made in the past, and the government continued with the policies begun in the post World War II period. The view that Indians were an ethnic group like any of the other groups that had come to make up Canada's population and that they, like these groups, should assimilate while retaining aspects of their culture was becoming more evident. Patterson notes one prominent view of Indians is that they are an ethnic group which together with others constitutes the cultural background of Canadians and contribute their element to the whole "cultural mosaic."<sup>534</sup> Staats in his 1964 article "Some Aspects of the Legal Status of Canadian Indians" expresses this view when he states that:

The abolition of reserves does not mean that Indian culture or heritage must be discarded. It is not only possible but desirable that when a minority racial group is absorbed into a multi-racial community such as Canada, it should retain its language and distinctive customs.<sup>535</sup>

Similarly in a pamphlet published by the Diefenbaker Government Indian culture was portrayed as being incompatible with Canadian civilization although its great contribution in the past was not to be forgotten.<sup>536</sup>

Indian culture was seen as something of value in much the same way that an antique is, as a curiosity to be safely preserved and viewed in a museum, but not something of usefulness in everyday life. Patterson notes in this regard that "Indian culture is seen as largely static, something which can be left behind and replaced by a new 'western' identity."<sup>537</sup>

In keeping with the view of Indians as a minority group which should assimilate to the Canadian culture, some amendments were passed to achieve "equality" for Indians. In 1956 the intoxicant provisions of the Indian Act were amended to bring them more in line with provincial law.<sup>538</sup> Prohibition of possession of intoxicants on a reserve now only applied with band consent.<sup>539</sup> In 1960 Indians were given the right to vote in federal elections and at the same time maintain their tax exempt status.<sup>540</sup> This is in notable contrast to the earlier provision extending the franchise to Indians, as this had required the Indians to give up their special rights in order to vote. This is one of the first provisions reflecting a policy, which was to develop later, that aboriginal people do not need to give up their historical rights to achieve equality with other citizens.

As in 1951 there was also a move to give control of Indian affairs to Indian people, but again this was based on the idea of making Indians "equal" with other citizens and not on a recognition of historical rights. In 1961 compulsory enfranchisement was removed from the Act.<sup>541</sup> The basis for allowing Indians to control their own affairs was expressed by Guy Favreau in his remarks to the House of Commons in 1963 where he stated:

We must make it possible for them [Indians] of their own free will and their own time, to regain self-confidence...and achieve control under their own

leadership....This result, when attained, will eliminate the need for special programs, special legislation and special services. As long as these are required, the goal of independence on an equal footing with other Canadians will not have been accomplished.<sup>542</sup>

By 1967 certain aspects of the post World War II Indian policy had become more prominent than others. Although the concept that Indians should have equality with other citizens continued to exist, the idea that any kind of special rights was inconsistent with equality was no longer so evident. In 1967 Hawthorn and Tremblay prepared A Survey of Contemporary Indians of Canada<sup>543</sup> for Indian Affairs. They recommended that:

Indians should be regarded as "citizens plus;" [as] in addition to the normal rights and duties of citizenship, Indians possess certain additional rights as charter members of the Canadian community.<sup>544</sup>

The "citizens plus" concept indicates that it is possible for Indians to retain those aspects of their special status based on historical rights while at the same time become "equal" citizens. As well, during this period of time Indian Affairs was given status as an independent Department in conjunction with Northern Development rather than being merely a branch of the Department of Immigration and Citizenship.<sup>545</sup> These were clear indications that special rights for aboriginal peoples is not dependent on their not having the rights of citizens.

The "citizen plus" recommendation explicitly adopts the idea that must have been behind the continued recognition of Indians' historical rights in the 1951 Indian Act and the extension in 1960 of the vote to Indians without taking away their tax exemption. The Hawthorn/Tremblay report was published by Indian Affairs showing some acceptance of it by them.<sup>546</sup> The Minister of Indian Affairs, Arthur Laing, appeared to adopt the "citizen plus" concept in a 1968 publication Choosing A Path where he stated that "equality must include the right to choose a way of life which recognizes the Indian values and also the right to enter the mainstream of Canadian life."<sup>547</sup> This represents a continuation of the idea, first seen in the late 1940's, that Indians could retain certain aspects of their culture. However, with the creation of the "citizen plus" concept, this idea was extended to include a recognition that not only Indian culture but also Indian

special status could and should be retained.

Regardless of how far the government may have come towards accepting that Indians could have aboriginal rights and the same rights of other citizens, the 1969 Statement of the Government of Canada on Indian Policy<sup>548</sup> was a clear rejection of these trends. In the 1969 "White Paper" the government rejected special status both as a temporary measure during the process of assimilation and as a permanent position based on Indians' historical rights.

Assimilating the Indians or making them "equal" had been nothing short of a colossal failure. Assimilation had not occurred. Indians still existed and as a legally, economically and socially deprived group when compared to other Canadians. The government recognized the desperate position of the Indians and fixed the blame on special status stating "special treatment has made of the Indians a community disadvantaged and apart."<sup>549</sup> For this reason, special status, now termed discrimination, was to be ended by removing the legislative and constitutional basis of discrimination and providing services on a "need" basis through the same channels as other citizens were provided with these services.<sup>550</sup> By following this program the government would end the special treatment of Indians designed to ensure their assimilation.

The government seemed equally eager to end Indian special status based on their historical rights. The government did state "lawful obligations" should be recognized, and for this purpose proposed the appointment of a Commissioner to inquire into and report "upon how claims arising in respect of the performance of treaties...and the administration of lands and moneys...for the benefit of Indians may be adjudicated."<sup>551</sup> However, the Commissioner's jurisdiction was quite narrow and this, coupled with the recognition of "lawful obligations", appeared to be designed to settle claims so those rights could be terminated as opposed to continued.

That the government did not regard Indians' treaty or common law rights as a basis for permanent special status can be clearly seen in this policy paper. The government allowed that it was prepared to give treaty Indians transitional "free" hunting, but, far from viewing them as a basis for continuing special

status, dismissed the treaties stating:

The significance of the treaties in meeting the economic, educational, health and welfare needs of the Indian people has always been limited and will continue to decline.<sup>552</sup>

Regarding the aboriginal common law rights these treaties were based upon, the government stated that:

These are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to Indians as members of the Canadian community.<sup>553</sup>

Both the legal foundation for Indians' special status based on treaty or common law rights and the "moral" foundation based on protection, civilization, and equalization were considered and discarded, and Indian special status was to end immediately.

Considering the unenthusiastic response of the Indian people to ending special status, even when this special status involved numerous restrictions on their lives, it should have been easy to predict their response to this new policy. There was a "storm" of protest by Indians which eventually led by 1973 to the withdrawal of the policy.<sup>554</sup> Tobias contends that this later acceptance by the government of special status legally was simply another repudiation of the method not the goal of assimilation.<sup>555</sup> Douglas Sanders, on the other hand, states that:

The most significant development in post-war Canadian aboriginal policy is the acceptance of the idea that Indian communities should have continuing special status within Canadian federalism. Earlier ideas that special status was only a stage in the transition to integration or that special status was a trap which limited the rights of Indian people have given way.<sup>556</sup>

Sally Weaver notes that the new direction of the government, after the withdrawal of the white paper, reflected the earlier policies of the mid-1960's and took two forms: 1) cautious and selective reaffirmation of special rights and 2) a new approach to Indian consultation.<sup>557</sup>

The following statement of the Minister of Indian and Northern Affairs Warren Allmand in 1977, would appear to support the conclusions of Weaver and Sanders that Indian special status was now accepted and that increased

consultation with Indians was to be the rule:

Our policy now is that we should only make changes in the Indian Act or any other Indian regulations or laws or policies in full consultation with Indian people. It is also the policy that we should not phase out Indian status, but reinforce it in the ways you wish us to reinforce it.<sup>558</sup>

As Sanders noted, this acceptance of Indian status as a permanent feature of Indians' relationship to society involved not only a rejection of special status as a means to achieve assimilation but also a rejection of the idea that special status was incompatible with Indian "equality." This is evident in the remarks Prime Minister Trudeau made in 1970 to a joint meeting of the Indian Association of Alberta and the National Indian Brotherhood where he stated:

I'm sure that we were very naive in some of the statements we made in the [white] paper. We had perhaps the prejudices of small "l" liberals, and white men at that, who thought equality meant the same law for everybody.<sup>559</sup>

The idea that special rights of any kind conflicts with equality appears to be rejected. The government also recognized continuing Indian special status in a number of ways. In 1976 the Department of Indian Affairs and Northern Development stated that "some degree of Indian status will continue, certainly as long as it is perceived as needed both by the government and by people recognized as 'Indian' under Canadian law...".<sup>560</sup> This statement could be regarded as indicating that the government still viewed special status as a transitional measure. However, what could be regarded as the final step in the rejection of the idea that aboriginal rights are a temporary measure designed to deal with uncivilized people, is the protection of these rights in sections 25 and 35 of the Constitution Act, 1982.<sup>561</sup>

There are then a number of reasons for rejecting the idea that aboriginal individuals or groups must maintain a traditional way of life or culture to continue to be entitled to aboriginal rights. Perhaps most important is the fact that the basis for these rights is prior occupation and this would not change regardless of whatever changes there were in aboriginal groupings or aboriginal ways of life. Equally as important are that many of the changes that took place were forced on these peoples and that the government itself appears to have

rejected the ideas that aboriginal rights are a temporary measure designed to ensure the gradual assimilation of the "uncivilized" aboriginal people and that aboriginal people must choose between being citizens and having rights of aboriginal people.

On the other hand, although there is no reason to require that aboriginal people continue to live as they did when this land was first settled by the Europeans, the very nature of the rights of aboriginal people requires that those claiming these rights be in some respects culturally distinct from the rest of society. A requirement that the person belong to a group that is culturally distinct, however, would not mean that the group would have to carry on the same culture as a particular historical aboriginal group. This would allow for the use of broader cultural characteristics than simply lifestyle, as well as the use of characteristics that had developed after the time of initial settlement.

#### D. Conclusion

A number of different factors, then, are involved in determining who is entitled to the rights of aboriginal people. Both Kallen and Pentney, among others, view these rights as collective rights. However, in addition to being collective rights, these rights are also historical rights. The collective nature of these rights indicates that they belong to a group. The historical nature of these rights indicates that it is an association with an originally entitled group that entitles a person to these rights.

Descent from those who were historically entitled is perhaps the only workable way of determining who today are the lawful successors to those originally entitled. This is particularly evident in light of changes in cultural practices and outside induced changes to group membership through legislation. Association with the original group through cultural practices and lifestyle necessarily excludes those who were forced to abandon this lifestyle and many other aspects of their culture. It also excludes new groups which have developed their own culture that may be aboriginal but not specific to a particular

original aboriginal group. Descent seems to be a particularly useful tool in these circumstances, that is where the group has been changed from the outside and the culture has also changed considerably since the time of original entitlement.

Hudson discusses the difficulties of determining membership through an individual's relationship with a base population defined in a finite way at a certain point in time.<sup>562</sup> He notes that it "can often be arbitrary and serves administrative convenience."<sup>563</sup> There does not seem to be any a priori logical degree or type of relationship a person should have with an historical group to still be considered connected to that group. Hudson goes on to find that this method is commonly used regarding the distribution of benefits.<sup>564</sup> Hudson also notes that "over time an increasing number of individuals who identify themselves as indigenous may be denied status because of administrative criteria."<sup>565</sup>

The concerns Hudson raises in regard to defining entitlement based on an association with a finite group defined at a certain point in time clearly apply to the use of descent as a means of determining entitlement. If a person is not required to have full "aboriginal blood", as one would assume is the case due to the inclusion of "Metis" in the Constitution if nothing else, the problem is the degree of blood which should be required. Since there is no self-evident logical reason for requiring any specific degree of blood, such requirements could be viewed as arbitrary.

One way of getting around this problem is to require only some unspecified degree of aboriginal blood and add another requirement. Since aboriginal rights can only be exercised by or through a collectivity, it would make sense to combine a descent requirement with a requirement that the person be a member of a collectivity. However, there is still the question of the relationship between the descent requirement and the requirement of membership in a collectivity.

The characteristics of a collectivity have been considered and it has been seen that a group may be a collectivity notwithstanding that its members do not live together in one place. To be a collectivity, however, a group must view itself as a single group and there must be ancestral and cultural ties as well.

None of these characteristics would exclude a group which was not living on a reserve or a group that was not living in a single geographical area. Neither would the requirement that the person be descended from those originally entitled exclude such persons. However, if the collectivity as a whole has to be descended from the aboriginal group in which the rights claimed were vested, then anyone who is not part of the group which can point to this descent would not have rights. The result then is that persons who belong to aboriginal collectivities made of persons descending from different original groups would have no rights. This would have the effect of depriving a person who belongs to an aboriginal collectivity and who is descended from an original group of any rights.

This solution, that the whole group must be descended from one original group, would be compatible with the idea that aboriginal rights are collective rights. This is so because entitlement would be determined based on membership in an existing group, provided it could show it was a collectivity and that it descended from the originally entitled group. It can be argued that the concept of aboriginal collectivities only makes sense in relation to groups descended from distinct aboriginal groups. The concept of "Indian" is somewhat unique in that it originated as a label applied, not by members of a group in reference to themselves, but rather by outsiders to what they perceived to be a group. One author notes that, although "the question: 'What is an Indian?' ought logically to precede consideration of the nature of Indian groupings...most definitions of Indianness which have some claim to validity include, to a greater or smaller degree, reference to groupings."<sup>566</sup>

The natural groupings, then, were not all Indians as one, but rather distinct groupings of people whose only common feature was their prior existence in America before the coming of the Europeans. Hertzberg makes this point when she notes that:

The men who rediscovered America in the fifteenth and sixteenth century had names for themselves which indicated some recognition of a common identity. Whatever part of the Old World they came from and however deep their divisions, they were also Europeans, sharing a sense of place and differentiating themselves from men elsewhere.<sup>567</sup>

She goes on to note that, on the other hand:

The men whom the Europeans discovered on these continents seemed to have no such common ideas of themselves. Their sense of place was localized and their religions tribal.<sup>568</sup>

She states that, in fact, "the indigenous societies of the New World were in many important respects far more culturally diverse than those of the discoverers."<sup>569</sup> Although Indians as a group did not exist as a social or political entity, they were considered a single group by Europeans to whom "their resemblances outweighed their differences."<sup>570</sup>

Logically, then it could be argued that those who are entitled to these rights must be distinguishable as the descendants of a particular group of aboriginal people since "Indians" did not exist as a group when the rights were created. However, it must not be forgotten that aboriginal collectivities can and have evolved over time. Patterson makes the point that:

The Indians, of course, did not think of themselves as "Indians", this category was invented and applied by the Europeans and eventually taken up by the people so denominated...[who] far from having a common sense of identity and purpose...were very diverse in their political groupings.<sup>571</sup>

The possibility exists then for the elements of various distinct aboriginal collectivities to merge over time and become a group identifiable on the basis of being "Indian". It has already been seen that this evolution alone should not be regarded as ending the rights of these people.

The idea that aboriginal groups today must be identifiable as the descendants of a particular historical aboriginal group would involve a rejection of both the idea that aboriginal peoples can change over time without losing their rights and the idea that only changes to the group done by the group itself

can affect who is entitled to these rights. If one rejects the idea that an aboriginal group must be descended as a whole from a single original group, then the question is what group is entitled. If it was accepted that no group exists which reflects the original group entitled to the rights, then the solution could be to recognize all the descendants of the original group as having rights. This, however, may in part be a rejection of aboriginal rights as collective rights because this group may or may not consider itself a single group at this time or exist as a group. However, the collective nature of these rights could be recognized by requiring that the person be a member of a group identified on a more general level as aboriginal or "Indian". The collective nature of these rights would also be recognized in the fact that it is descent from a group which entitles a person.

This solution does present some problems. The argument could be made that this would not be workable because the rights must be exercised by a group not by a coalition of members from various groups who are associated only by descent with certain rights. This would only be true, however, in the case of rights which are collective in the sense that they must be exercised by the group as a whole. As has already been seen, all the rights of aboriginal people do not come within this definition of collective rights. Even in the cases where the rights must be exercised by the group as a whole, if it is remembered that determining who is a member is the function of the group and that the group is only recognized for the purpose of determining who has the power to determine membership, then these matters could be worked out internally.

Alternatively, the persons who are recognized as having rights, but who are not part of a group made up entirely of people who are entitled to those particular rights, could have their rights recognized in a way that took this into consideration. This would include the idea that the originally entitled groups are now represented by both these more general groups and the groups who are descended from a particular group. In other words, the rights of those groups consisting of mixed ancestry may have to be fulfilled in other ways than by having their members join the group from which they were descended.

The conclusion that a person need not belong to a group which is entirely descended from a single original aboriginal group to be entitled to the rights of aboriginal people would have the effect of dividing limited resources among more persons. Natural resources, by their nature, exist in finite amounts. The rights of aboriginal people are limited by the fact that new rights are not created simply because aboriginal groups may have evolved or changed over time. They are also limited by the extent to which the government is prepared to recognize them, although this has changed to a certain extent with the enactment of section 35 of the Constitution Act, 1982. The limits based on historical occupation, customary law, and treaty terms could be addressed through a more generous interpretation of these matters when necessary. These concepts themselves are flexible enough to accommodate all the descendants of the aboriginal people in some form. The real limit is the amount the government is going to spend, and this cannot determine entitlement in principle.

The idea that aboriginal groups entitled to rights of aboriginal people do not need to exist in the same form as they originally did to be entitled to rights can be seen in Pentney's discussion of how to define "Metis".<sup>572</sup> The reason for this appears to be that the "Metis" as a people are not a static group which ceased to evolve after the time of their initial appearance. While this is obviously true of the "Metis", whose evolution as a people cannot be denied because it happened after the "discovery" of Canada, it is not a phenomena that is limited to the "Metis". "Indian" groupings have also evolved over time and have been influenced, as have the "Metis", in their development by the presence of the settlers who now make up most of the population of what is now "Canada". This approach has the advantage of recognizing that aboriginal rights were vested in aboriginal collectivities which were social and political realities and as such would naturally grow and change over time without losing their rights, so long as they were not assimilated.

## Chapter V

HOW LEGISLATION AFFECTS ENTITLEMENTA. Introduction

The question of who is entitled to the rights of aboriginal people has been considered. What will be considered now is how legislation can affect a person's entitlement. For this purpose, jurisprudence concerning the relationship between the rights of aboriginal people and legislation will be analyzed.

The principles concerning the effect of legislation on aboriginal common law rights and treaty rights will be discussed. An attempt will be made to distinguish between situations where legislation extinguishes rights, as opposed to where it regulates the exercise of rights, prevents their exercise, or breaches them. In this regard, jurisprudence on section 35 of the Constitution, which protects "existing" aboriginal and treaty rights, may be relevant in so far as the interpretation of the word "existing" is concerned. Section 35 jurisprudence will be useful to the extent that it indicates when a right is extinguished by legislation.

The interpretation of the word "existing" raises other issues as well. Any discussion concerning when a right is extinguished in the context of section 35 assumes that section 35 only protects unextinguished rights, however defined. As well as the divergence of opinion on what rights are extinguished, other questions are raised by section 35. Even if it is accepted that section 35 protects only unextinguished rights, there is still the question of what alterations to these rights are allowable under section 35. This would include the question of the continuing legitimacy of past alterations as well as the question of future alterations or extinguishment. However, because the question that is being considered is who is entitled to unextinguished rights, these issues are of limited interest here. Assuming that there is a distinction between legislation which prevents or restricts the exercise of rights and legislation

which extinguishes these rights, it will be necessary to consider what is required to extinguish rights. It will be seen that this may depend on the type of right and also on whether the right as a whole or an individual's entitlement to an existing right is being extinguished.

### B. Common Law Rights And Extinguishment

First, it is necessary to consider the common law position concerning how common law aboriginal rights could be affected by legislation. The common law position concerning how the rights of the inhabitants of a conquered dominion are affected by laws enacted by the conquering state was set forward by Lord Mansfield in the 1774 case of Campbell v. Hail.<sup>573</sup> Lord Mansfield stated that "the laws of a conquered country continue in force, until they are altered by the conqueror" regardless of whether those conquered were Christians or pagans.<sup>574</sup> Similarly the right of the inhabitants of a settled, as opposed to conquered area, to be governed by their own laws or customs is subject to change by the settling nation. On this point in the case of Connolly v. Woolrich the court found that "[l]egislative power alone can change local law...but even the Legislature, would not exercise that power over countries where the local nations have been left in territorial possession...".<sup>575</sup> Having stated these basic rules, it is necessary to consider the extinguishment of common law rights to land as well as the extinguishment of other common law rights.

#### 1. Rights to Land

The Supreme Court of Canada considered the question of extinguishment of the aboriginal common law right to lands historically occupied in the Calder case.<sup>576</sup> In this case a majority of the court did not agree on the question of whether aboriginal title could be extinguished by general colonial land legislation. Three judges found that the title of the Nishga to the area of

British Columbia they claimed was extinguished through general colonial land enactments inconsistent with the continued exercise of their rights. Three other judges found that the title was not so extinguished. Pigeon, J. did not deal with this issue in his judgment.

Judson, J. speaking for the three judges who, along with Pigeon, J. formed a majority, stated, after describing aboriginal rights to the land they originally occupied, that "there can be no question that this right was 'dependant on the goodwill of the Sovereign'".<sup>577</sup> Judson, J. further concluded that "in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement...".<sup>578</sup>

Hall, J., speaking for the three judges who were in dissent, because they did not agree with Pigeon, J.'s opinion on the procedural point, took a different view. Hall, J. began his consideration of the question of extinguishment by stating that "[o]nce aboriginal title is established, it is presumed to continue until the contrary is proven."<sup>579</sup> After considering British and American cases on the subject Hall, J. concluded that "[i]t would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain'".<sup>580</sup> Hall, J. held that the title of the Nishga had not been extinguished noting that there "was no surrender by the Nishgas and neither the Colony of British Columbia nor the Province, after confederation, enacted legislation specifically purporting to extinguish the Indian title nor did Parliament at Ottawa."<sup>581</sup>

The question of extinguishment of aboriginal title was again raised in the Baker Lake case where Mahoney, J. considered what had been decided on this point in the Calder case.<sup>582</sup> Mahoney, J. first noted that it is within the legislative competence of Parliament to extinguish aboriginal title, but that in the case at hand there was no specific legislation which did so.<sup>583</sup> Mahoney, J. then noted that there is no Canadian legislation which indicates aboriginal title must be

extinguished in a particular way, and that the aboriginal right to hunt and fish, even when confirmed by treaty, is subject to regulation by general legislation of the competent level of government.<sup>584</sup> Mahoney, J. held that:

Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. This is as true of an aboriginal title as of any other common law right.<sup>585</sup>

Mahoney, J. concluded that Hall, J. could not have gone so far as to conclude that specific legislation is required.<sup>586</sup> Regarding what Hall, J. had said concerning a clear and plain intention to extinguish being necessary, Mahoney, J. held that this intention need not be found in express legislation but could be found in legislation which is adverse to any aboriginal right to occupy the land.<sup>587</sup> In effect, then, Mahoney, J. interpreted the requirement for a clear and plain intention as going no further than the requirement for adverse legislation proposed by Judson, J.

This interpretation of the Calder case on the point of how extinguishment can be carried out was adopted by the trial court judge in the Bear Island case.<sup>588</sup> Steele, J. noted that aboriginal rights exist at the pleasure of the sovereign and that "[a]n obvious corollary to this proposition is that aboriginal rights may be unilaterally extinguished by the Crown."<sup>589</sup> He concluded that there was no doubt that the Crown could unilaterally extinguish aboriginal rights, but that there was some question about how this could be done.<sup>590</sup> Steele, J. then adopted the opinion of Mahoney, J. in Baker Lake that specific legislation was not required. He concluded that "opening up of land to settlement pursuant to...legislation (or even in the absence of legislation) is sufficient to extinguish aboriginal rights."<sup>591</sup> This case was appealed, but the Court of Appeal found that the rights in question had been extinguished by a treaty so did not find it necessary to consider extinguishment by legislation, although they did note that the Quebec Act, 1774 repealed the procedural requirements in the Royal Proclamation, 1763 for extinguishing aboriginal title.<sup>592</sup>

In addition to going further than Mahoney, J. or Judson, J. in the Calder case had gone by finding that there was no necessity for any legislation general

or otherwise, Steele, J. also raised the idea of extinguishment by abandonment. He held that the Indian title was "extinguished because the Indians have abandoned their traditional use and occupation of the Land Claim Area" and because "there is no evidence of exclusive aboriginal use of any lands except the Bear Island Reserve continuing to the date of commencement of the action."<sup>593</sup> The idea that aboriginal rights to land can be lost by abandonment may have been accepted by Duff, J. in the 1916 Giroux case, decided by the Supreme Court of Canada.<sup>594</sup> The main point of decision in this case was whether lands set apart as a reserve, then surrendered and subsequently sold to an Indian, were "Indian Lands" exempt from seizure. All the judges rejected this view, but Duff, J., Anglin, J. concurring, considered the nature of interests held in reserve lands.<sup>595</sup> Duff, J. acknowledged that "in the event of the disappearance of the Indians" their rights could be lost.<sup>596</sup> However, this case concerned reserve lands not lands to which aboriginal people had common law title, and it may not be possible to equate extinction of a people with abandonment by a group that still exists. Bartlett notes that loss of common law rights by abandonment is in conformity with American authority and quotes from an American case where it was held that:

Indian tribes, in the absence of treaty reservation, have only an occupancy and use title...and when an Indian tribe ceases for any reason, by reduction in population or otherwise, to actually and exclusively occupy and use an area of land...such land becomes the exclusive property of the United States.<sup>597</sup> [emphasis

added]

Certain conclusions can be drawn from these cases which specifically dealt with the question of extinguishment of common law rights to occupy traditional lands. There appeared to be no doubt that these rights could be extinguished, but the question of how this could be done was still an open one. Hall, J., in the Calder case, would require a clear and plain intention, perhaps expressed in legislation specific to that purpose. Judson, J., in the same case, would simply require that the legislation be inconsistent with the right continuing. Two lower court cases appeared to have favoured the view of Judson, J., although Mahoney, J. in the Baker Lake case, would still require a clear, but not an expressed,

intention to extinguish. Steele, J., in the Bear Island case found that extinguishment was possible even without legislation, if exclusive occupation was destroyed through any means.

In conclusion, all that can be said is that because there was no binding authority on the question of how common law rights to lands could be extinguished, it was open to any court to adopt the views of either Hall, J. or Judson, J. and the Supreme Court of Canada itself would certainly be entitled to take a different view when the issue was raised again.

## 2. Other Common Law Rights

Whatever may be the requirements to extinguish common law rights to an area traditionally occupied, it is necessary to keep in mind that these requirements would only apply to this situation. Different considerations could apply to the extinguishment of common law rights which do not, by their nature, involve exclusive occupancy of the land. It will also be seen that different considerations may apply to the extinguishment of treaty rights.

An example of where different considerations could apply to extinguishment of a common law right may be the right to hunt and fish over traditional lands. This right may not be extinguished by general land legislation. It could be argued that general legislation would not extinguish this right whether Judson, J.'s, Hall, J.'s or even Steele, J.'s requirements were used. General land legislation could not be interpreted as clearly and plainly or specifically showing an intention to extinguish these rights. It also would not be inconsistent with the continued existence of these rights, because even if the land was settled this right could still be exercised. However, the manner in which hunting and fishing rights can be exercised may be modified by settlement of an area because of concerns such as safety and conservation.

It must also be remembered that these cases dealt with the extinguishment of the right itself, not the extinguishment of an individual's entitlement to an existing right. It seems clear that mere exclusion from the Indian Act is not a bar to claiming common law rights. In neither the Calder case or the Baker Lake case was the question of whether the group claiming the rights was made up of registered "Indians" raised.<sup>598</sup> The Baker Lake case was a claim by Inuit who by definition are not included in the Indian Act.<sup>599</sup>

It is implicit in the dissent and the judgment of the majority in the Dumont case, at the Court of Appeal, that exclusion from the Indian Act alone does not answer the question of a claim to land originally occupied.<sup>600</sup> Twaddle, J.A., for the majority, when considering the legal basis for a land claim by the Metis, noted that their rights may have been extinguished by the Manitoba Act,

but did not mention the exclusion of "half-breeds" from the Indian Act as a factor.<sup>601</sup> The Supreme Court, in overruling the Court of Appeal and allowing the case to go to trial, assumed at least the possibility the Metis could have the aboriginal land rights claimed, since only then could the declaration sought advance their cause in having these rights fulfilled.<sup>602</sup>

Steele, J., in the Bear Island case, clearly did not view the Indian Act as controlling who is entitled to common law rights.<sup>603</sup> This case involved a claim for aboriginal title to a large area of northeastern Ontario. The action was taken on behalf of all members recognized by the "Indians" themselves, and referred to as the tribe, and on behalf of the registered band members.<sup>604</sup> Steele, J. considered the question as to whether who was entitled to common law rights was determined by legislation. He noted that although Parliament has the exclusive power to define who "Indians" are under section 91(24) of the Constitution Act, 1867, it has not done so either generally or in respect to who has aboriginal rights.<sup>605</sup> He went on to consider the question of who is entitled to assert aboriginal rights at common law. It was argued before him that only registered Indians were entitled to claim such rights.<sup>606</sup> He noted that aboriginal rights pre-date any treaty or the creation of any reserves, and then he concluded that to share in aboriginal rights "a person must be recognized by a band as an Indian, but need not be a registered Indian as defined by the Act."<sup>607</sup>

Steele, J.'s conclusion on this point makes it clear that he regarded extinguishment of a person's entitlement to common law rights on a different basis than extinguishment of the rights themselves. He did not even address the possibility that the rights of those excluded by the Indian Act were extinguished by their inability to exercise these rights, despite the fact that he found that common law rights themselves could be extinguished in this way. Those who are not covered by the Indian Act could be regarded as being unable to exercise common law rights in a reserve because the Indian Act prevents them from exercising any rights regarding reserves.<sup>608</sup> This decision was appealed but Steele, J.'s conclusions concerning who could assert common law rights were not addressed by

the Court of Appeal.<sup>609</sup>

The difficulty is that these cases do not necessarily answer the question of whether the Indian Act extinguished the rights of persons excluded to the rights controlled by the Act. The lands to which common law title was claimed, in these cases, included lands not covered by the Indian Act because they were not reserves. However, the judgment of Steele, J., at least, strongly implies that the Indian Act definitions are irrelevant to who is entitled to common law rights.

The cases which specifically dealt with extinguishment of common law aboriginal rights to land left many questions unanswered. They did not conclusively determine what is required to extinguish common law aboriginal title to land, or deal with the question of what test should be applied when extinguishment of a different type of common law right is being considered or when extinguishment of an individual's entitlement to an existing right is in question. Another question which is not answered by these cases is the relationship between them and cases where legislation is held to override aboriginal rights, without the question of extinguishment being considered.

It could be that rights of aboriginal peoples, although they can not be exercised to the extent that legislation restricts them, may nevertheless be unextinguished. This would allow the paramountcy of legislation over these rights to continue, but would require something more to actually extinguish these rights. The likely reason why such a distinction was never considered, before the enactment of section 35, is that it would be of no practical consequence whether the legislation rendered the rights unexercisable or extinguished them. In either case the person would not be able to benefit from the right in question. This distinction between extinguishing rights and regulating or breaching them was not developed until the word "existing" in section 35 was considered by the courts. However, it is possible to see the roots of this distinction in the difference between the way the courts dealt with extinguishment of aboriginal title as compared to the regulation of aboriginal or treaty hunting and fishing rights by legislation.

The Supreme Court of Canada considered the effect of legislation on aboriginal hunting and fishing rights in the Derriksan case<sup>610</sup>, decided after the Calder judgment. In this case the Appeal Court had relied on authorities concerning the effect of federal legislation on treaty rights to find that any right the defendant had to fish in his tribe's traditional hunting grounds was subject to federal legislation.<sup>611</sup> The Supreme Court of Canada upheld the decision of the Court of Appeal. Laskin, J., in delivering the decision of the court, stated that "[o]n the assumption that...there is an aboriginal right to fish in the particular area...we are all of the view that the Fisheries Act...which so far as relevant here, were validly enacted, have the effect of subjecting the alleged right to the controls imposed by the Act...".<sup>612</sup>

It may seem strange that, in considering the effect of legislation on aboriginal common law rights, the decision in the Calder case on this point was not considered either by the appellate court or the Supreme Court. However, a careful examination of the wording used in this case shows that the courts did not regard this as a question of extinguishment. They appeared simply to be upholding the rule that legislation had to be complied with because of the paramountcy of Parliament. This is not a distinction that Mahoney, J. made in the Baker Lake case, where he considered cases regarding legislative override as applicable to extinguishment.<sup>613</sup> However, it may be the only explanation for the different approach taken in Calder when compared to Derriksan.

The distinction between restricting the exercise of rights and extinguishing them may have been made in the Kruger case.<sup>614</sup> This case, decided by the Supreme Court, concerned whether provincial legislation could override aboriginal hunting rights. One issue which was raised was whether the ruling, by the Court of Appeal, that these rights were subject to the legislation in the circumstances amounted to a "ruling...that aboriginal hunting rights could be expropriated without compensation, and without explicit federal legislation."<sup>615</sup> Dickson, J. simply found that the decision did not concern "whether aboriginal hunting rights were or could be expropriated without compensation."<sup>616</sup> He went on to say that most legislation "imposing negative prohibitions affects

previously enjoyed rights in ways not deemed compensatory."<sup>617</sup> He concluded that the Act concerned as it was with "wildlife management" was "not directed to the acquisition of property."<sup>618</sup>

It is difficult to say exactly what is meant by these statements. On the one hand, Dickson, J. could have been distinguishing between the aboriginal right to exclusively occupy certain land and the right to hunt on such land. He may have concluded that only in the case of rights to occupy land did the question of compensation arise because property rights are involved. However, as aboriginal hunting rights are simply an incident of aboriginal title, this distinction seems unfounded. Perhaps what was meant was simply that the legislation took precedence over the exercise of these rights but did not address the question of extinguishment and for this reason the question of compensation was irrelevant. Dickson, J. may have viewed the legislation as not dealing with the acquisition of property rights because it did not purport to acquire these rights from the aboriginal people for the Crown, as treaties did, but simply restricted the exercise of these rights.

It has been seen then that aboriginal common law rights could be extinguished through ordinary legislation of the competent level of government. It has also been seen that there was some dispute about whether the legislation must be specific or merely inconsistent with the continuance of the rights. Even if the rules concerning extinguishment of common law rights to land were clear, other questions remained. These included whether different rules apply to common law rights other than the right to exclusively occupy an area or to treaty rights and whether different rules apply to extinguishment of individuals' entitlement to existing rights. As well, there was the question of distinction between legislation which simply restricts the exercise of rights and legislation which extinguishes these rights. It will be seen that this last issue also arises in cases concerning treaty rights. It will also be seen that the courts in considering section 35 of the Constitution Act, 1982 have gone a long way towards answering many of these questions.

C. Treaty Rights And Paramountcy

In addition to common law aboriginal rights being extinguished through legislation, they can also be extinguished through agreement. As was discussed, when the source of the rights of aboriginal peoples was considered, the principle that these rights can be extinguished by agreement was the basis for the Royal Proclamation, 1763 reserving "Indian lands" until such time as the title was extinguished through agreements with the Crown.<sup>619</sup> Extinguishment through agreement was, as also noted, a major reason treaties were entered into.

The fact that common law rights can be extinguished by treaty raises the question of how these treaty rights can in turn be extinguished. In a number of cases the Supreme Court of Canada has held that where treaty rights conflict with legislation the legislation prevails. This is subject to the division of powers and to the protection in the Indian Act of treaty rights from provincial legislation.<sup>620</sup> In the George case the Supreme Court of Canada simply held that the paramountcy of federal legislation over treaty rights was not affected by what was then section 87, now section 88, of the Indian Act since this protection referred to provincial legislation only.<sup>621</sup>

A consideration of the exceptions to the paramountcy of legislation due to the Indian Act and the division of powers is beyond the scope of this work. What will be considered are the rules concerning the paramountcy of legislation generally over treaty rights, assuming that the legislation is within the constitutional powers of the enacting body and that the exception in the Indian Act does not apply.

One of the early Supreme Court of Canada decisions dealing with the relationship between treaties and federal legislation was the Francis case, decided in 1956.<sup>622</sup> Much of this case concerned whether the Jay Treaty was a treaty of peace and as such enforceable without domestic legislation. Kellock, J., Abbott, J. concurring, did not consider whether the Jay Treaty came into effect without legislation, but only considered whether, assuming it did, the rights under it had subsequently been affected by legislation.

On this point Kellock, J. concluded that the Indian Act offered no protection of the right alleged.<sup>623</sup> He then concluded that "the provisions of the Indian Act constitute a code governing the rights and privileges of Indians, and except to the extent that immunity from general legislation...is to be found in the Indian Act, the terms of such general legislation apply to Indians equally with other citizens."<sup>624</sup> Although Kellock, J. did not phrase it in these terms, he appeared to conclude that general legislation overrides any rights that Indians may claim. He did not express his opinion in terms of extinguishment, but simply held that the rights were affected in that the legislation applied. This is similar to the distinction in some cases dealing with common law hunting rights between extinguishment and the application of legislation. His opinion that Indians have only the rights specified in the Indian Act may be outdated since the Calder case and other cases which accept that Indian title exists independent of legislation.<sup>625</sup> However, the rule that federal legislation applies regardless of any rights that it may negatively affect became accepted as the standard rule in the relationship between legislation and both common law and treaty rights.

Almost ten years later in 1964 the question came before the Supreme Court again in the Sikyea case.<sup>626</sup> Hall, J. speaking for the Supreme Court, adopted the reasoning of Johnson, J.A. in the Northwest Territories Court of Appeal. Hall, J. stated:

On the substantive question involved, I agree with the reasons for judgment and the conclusions of Johnson, J.A., in the Court of Appeal. He has dealt with the important issues fully and correctly in their historical settings, and there is nothing which I can usefully add to what he has written.<sup>627</sup>

Hall, J. did not simply agree with the outcome reached by Johnson, J.A. He also agreed with his reasons for coming to these conclusions. For this reason, the judgment of Johnson, J.A. can be regarded as having the authority of a decision of the Supreme Court of Canada.

As would be expected, following the Francis case, Johnson, J.A. found that the valid federal legislation applied notwithstanding the existence of treaty rights. Speaking of the treaty in question, Johnson, J.A. stated "[t]his 'promise

and agreement', like any other, can, of course, be breached and there is no law of which I am aware that would prevent Parliament by legislation, properly within s.91 of the B.N.A. Act, from doing so."<sup>628</sup> After considering the terms of the treaty and the legislation in question, Johnson, J.A. concluded "the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its Regulations."<sup>629</sup> He asked "[h]ow are we to explain this apparent breach of faith on the part of the government?"<sup>630</sup> Johnson, J.A. answered this question by stating "I cannot believe that the Government of Canada realized that in implementing the Convention they were at the same time breaching the treaties that they had made with the Indians....[i]t is more likely that these treaty obligations were overlooked."<sup>631</sup> Finally, Johnson, J.A. simply held that "I can come to no other conclusion then that the Indians, notwithstanding the rights given to them by their treaties, are prohibited by this Act and its Regulations from shooting migratory birds out of season."<sup>632</sup>

The way that Johnson, J.A. expressed the relationship between the treaty rights and the legislation supports the idea that he regarded this legislation as being enforceable despite the existence of treaty rights, not as extinguishing them. Quite simply, it is not possible for legislation to be in breach of rights or to apply "notwithstanding" rights, if by virtue of that legislation these rights no longer exist. As well Johnson, J.A. never used the word "extinguish" in his judgment to refer to the effect that the legislation had on treaty rights. Indeed if a "clear and plain" intention is required to extinguish these rights, as Hall, J. held in the Calder case<sup>633</sup>, Johnson, J.A. specifically found that there was no such intention.

Some other cases applying these Supreme Court of Canada decisions, regarding the relationship between federal laws and treaty rights, also lend themselves to the distinction between the doctrine of extinguishment and the doctrine of paramountcy. The New Brunswick Court of Appeal case, R. v. Francis, decided in 1969, concerned whether a treaty right to fish was protected against federal legislation.<sup>634</sup> Hughes, J.A., for the Court, concluded on the basis of the Sikyea case, among others, that "legislation of the Parliament of Canada and

Regulations made thereunder, properly within s.91 of the B.N.A. Act, 1867, are not qualified or in any way made unenforceable because of the existence of rights acquired by Indians pursuant to treaty." [emphasis added].<sup>635</sup> Hughes, J.A. went on to say that "even if the appellant had established...a right to fish...had been conferred by an Indian treaty, the benefit of which he was entitled to claim, such right could afford no defence."<sup>636</sup> The fact that Hughes, J.A. spoke of an existing or established right points to the conclusion that the federal legislation was paramount over the right but did not extinguish it.

The Supreme Court of Canada again considered the question of extinguishment of treaty rights in the Simon case, which was decided in 1985 but dealt with a charge that was laid before the new Constitution was enacted.<sup>637</sup> What is interesting about this case is that since it concerned provincial legislation it was accepted that this legislation was not paramount over continuing treaty rights. The fact that the question of whether the treaty rights had been extinguished was considered indicates that paramountcy and extinguishment are two separate issues.

As already noted the Indian Act protects treaty rights from provincial legislation.<sup>638</sup> For this reason the Crown argued that the treaty was not validly created, that it did not protect the right to hunt in question, that the treaty had been terminated or limited, that the appellant was not covered by the treaty, and that the treaty was not a treaty referred to by the Indian Act's protective section.<sup>639</sup> Of these issues only the question of whether the treaty rights were extinguished is of interest here. It was argued that the treaty right to hunt outside of the reserve had been terminated by extinguishment.<sup>640</sup> This argument was based on the common law rule in the Johnson v. M'Intosh<sup>641</sup> and the Worcester<sup>642</sup> cases, already discussed, that the absolute title to land, originally occupied by aboriginal peoples, is in the Crown, and the Crown has the right to extinguish these rights.<sup>643</sup> On this basis it was argued that "the Crown, through occupancy by the white man under Crown grant or lease, has, in effect, extinguished native rights in Nova Scotia in territory situated outside of reserve lands."<sup>644</sup> This was supported by reference to the Calder case, among

others.<sup>645</sup>

Dickson, C.J.C. declined to answer this argument since he found that there was no evidence that the accused hunted or intended to hunt anywhere outside of the reserve.<sup>646</sup> However, what he had to say about how extinguishment could be shown is instructive. Dickson, C.J.C., first noted that "[g]iven the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises."<sup>647</sup> He further found that "[i]t is impossible for this court to consider the doctrine of extinguishment 'in the air'; the respondents must anchor that argument in the bedrock of specific lands."<sup>648</sup> Finally, Dickson, C.J.C. stated that he did not "wish to be taken as expressing any view on whether, as a matter of law, treaty rights may be extinguished."<sup>649</sup>

What Dickson, C.J.C. had to say about extinguishment of treaty rights and proof of extinguishment strongly points to the conclusion that in the cases dealing with the paramountcy of federal legislation over treaty rights the Supreme Court was not considering the extinguishment of these rights. The analysis in these cases did not proceed along the lines suggested by Dickson, C.J.C., of strict proof and tying the extinguishment to specific land. As well, Dickson, C.J.C. could hardly have regarded the question of whether treaty rights may be extinguished as something which could be left open for later consideration if this had already been conclusively determined by the Supreme Court of Canada in cases regarding the paramountcy of federal law over treaty hunting and fishing rights. The doubts that Dickson, C.J.C. expressed concerning the ability of legislation to extinguish treaty rights were not confined to situations where the legislation was provincial. If his doubts were so confined, the question would have concerned who could extinguish these rights by law, not whether they could be extinguished. Clearly the question that Dickson, C.J.C. left open was whether, not how, treaty rights could be extinguished.

Other matters also point to the fact that the courts did not, in the cases considered, decide whether treaty rights were extinguished by federal legislation. The analysis in these cases only went so far as to decide whether

there was a conflict between the right and the law. If federal law extinguished a treaty right, then provincial law would apply, notwithstanding the treaty, because the right was extinguished. As well, the effect of the legislation would continue even after the law was repealed or amended since the right was extinguished. The fact that these consequences were not considered points to the fact that the question of whether the right was extinguished was not decided. The question which remains is what rules apply to extinguishment of a treaty right, assuming that the paramountcy rules do not apply in this situation.

The Supreme Court in the Simon case did not consider how treaty rights could be extinguished in detail and in fact, as has been seen, left open the question of whether treaty rights could be extinguished.

The Supreme Court had another occasion to consider the question of extinguishment of treaty rights, as opposed to the paramountcy of federal legislation over treaties, in the Sioui case, decided in 1990.<sup>650</sup> As with the Simon case, this case concerned whether there was a treaty, within the meaning of section 88 of the Indian Act, which protected the Indians from the application of provincial legislation. One argument made by the Crown was that the treaty in question had been extinguished. Lamer, J., for the court, first considered the question of who would carry the burden of proving that a treaty had been extinguished. Lamer, J. held that:

Even assuming that a treaty can be extinguished implicitly, a point on which I express no opinion here, the appellant was not able in my view to meet the criterion stated in Simon regarding the quality of evidence that would be required in any case to support a conclusion that the treaty had been extinguished. That case clearly established that the onus is on the party arguing that the treaty has been terminated to show the circumstances and events indicating it has been extinguished.<sup>651</sup>

Lamer, J. then appears to have adopted the rule concerning onus proposed by Hall, J. in Calder, for the extinguishment of common law aboriginal rights. However, he specifically refrained from deciding if other rules proposed by Hall, J. such as the requirement for a "clear and plain" intention to extinguish, perhaps expressed in legislation specific to that purpose, would apply to treaty rights.

Lamer, J. went on to consider the evidence that the treaty had been

extinguished. He considered both the Act of Capitulation of Montreal and the Treaty of Paris of February 10, 1763 between France and England. He concluded that the treaty was not extinguished by either of these actions, noting that "[i]t would be contrary to the general principles of law for an agreement concluded between the English and the French to extinguish a treaty concluded between the English and the Hurons."<sup>652</sup> Lamer, J. went on to find that the "very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned."<sup>653</sup>

Since this case did not involve federal legislation, it is not clear what relationship Lamer, J. perceived between the rule that extinguishment could only take place with consent and the established paramountcy of federal legislation over treaty rights. Lamer, J. considered the Royal Proclamation, 1763 but concluded that there is nothing in it "which can be interpreted as an intention on the part of the British Crown to extinguish the treaty...".<sup>654</sup> Lamer, J. did not consider what the effect would have been had the British Crown unilaterally expressed such an intention without the consent of the Indian parties to the treaty.

Lamer, J. did consider the effect of provincial legislation and simply concluded that "the existence of a provincial statute and subordinate legislation will not ordinarily affect" a right protected by treaty.<sup>655</sup> Lamer, J. specifically referred to section 88 of the Indian Act in this regard.<sup>656</sup>

In a case decided just before the Sioui case, the Supreme Court did consider the question of the federal power to extinguish treaty rights. The Horseman case concerned, in part, the effect of the Natural Resources Transfer Agreements, as embodied in the Constitution Act, 1930, on the treaty rights of the individual in question.<sup>657</sup> Cory, J., speaking for the majority, first noted that the treaty right in question "clearly included hunting for the purposes of commerce."<sup>658</sup> In contrast, the Agreement in question only protected the right to hunt for food.<sup>659</sup> The question, then, was whether the treaty right to hunt for commerce was extinguished by the Agreement. Cory, J. appeared to conclude that, since the Supreme Court of Canada had held on several occasions that the

Natural Resources Agreements merged and consolidated treaty rights, they also had the effect of extinguishing any treaty hunting and fishing rights that were not protected by them. However, it could be questioned whether this conclusion was justified under the circumstances. Cory, J. himself noted that the onus of "proving either express or implicit extinguishment lies upon the Crown."<sup>660</sup> He does not explain how this onus was met in the case at hand.

Clearly, the Agreements have been interpreted as subjecting even those with treaty rights to provincial regulations concerning hunting and fishing except in the circumstances outlined by the Agreements. The Agreements, however, do not even mention the treaties let alone explicitly extinguish the hunting and fishing rights found in these treaties. None of the judgments referred to by Cory, J. deal with whether the treaty rights were actually extinguished, as opposed to simply being unexercisable or subject to regulation.<sup>661</sup> The situation, then, is analogous to where federal regulations have restricted or prevented the exercise of treaty rights. As has already been seen, it is quite possible that this resulted not from the treaty rights being extinguished but rather simply from the paramountcy of legislation over these rights. The effect of the Agreements could be to simply place provincial legislation in the same position as federal legislation, unless the right is one which is protected by the Agreements themselves.

Despite the fact that the issue could have been resolved simply on the basis that the Agreements took precedence over any treaty rights, which was as far as the Supreme Court cases relied on had gone<sup>662</sup>, Cory, J. appeared to deal with the case at hand on the basis that legislative supremacy over the right was equivalent to extinguishment of the right. He considered the arguments that there was no consent to the extinguishment or compensation given to those whose treaty rights were extinguished.<sup>663</sup> He concluded that the treaty signatories did receive "quid pro quo" in the form of an expanded area in which to hunt and fish.<sup>664</sup> On the matter of consent he simply stated that the "power of the federal government to unilaterally make such modification is unquestioned and has not been challenged in this case."<sup>665</sup> However, it could be argued that the power

which was unchallenged and well established was the paramountcy of federal legislation not the right to unilaterally and without express provisions extinguish treaty rights.

In any event, it is not entirely clear whether Cory, J. actually found that the treaty right was extinguished. He noted that "it must be remembered that Treaty 8 itself did not grant an unfettered right to hunt."<sup>666</sup> He concludes that "the 1930 Transfer Agreement did alter the nature of the hunting rights originally guaranteed by Treaty 8."<sup>667</sup> [emphasis added] However, he did not address whether the changes made by the Agreement would be beyond the regulation anticipated by the treaty itself.

Despite the implications in the Horseman case that treaty rights can be extinguished implicitly and without consent, it could be argued that what was said about extinguishment of a treaty in both the Simon and the Sioui cases should apply to any situation where extinguishment, as opposed to paramountcy, is in question. Certainly, nothing was said in either case to indicate that the rules concerning extinguishment would be different if federal legislation was in question. The Sioui case was decided after the Horseman case but Lamer, J. made no reference to the discussion in Horseman of extinguishment of treaty rights.

The paramountcy rule, unlike the rule regarding extinction of common law rights, would likely apply equally to individual entitlement as to the rights themselves. In the Chevrier case the Ontario District Court found that an individual was entitled to treaty rights although he was not "Indian" under the Indian Act.<sup>668</sup> The treaty right being claimed in the Chevrier case, however, was not a right controlled by the Indian Act.<sup>669</sup> Had the right in question been one that the Indian Act limited to those who were "Indian", the paramountcy rule likely would have applied, but the question of whether the right was extinguished would remain.

The power of legislation to override aboriginal or treaty rights appears to have been broad enough to include changing who is entitled to the rights of aboriginal peoples as well as determining which rights could be exercised. Until the Supreme Court of Canada decision in Re Eskimo,<sup>670</sup> this attitude was assumed

to extend even to the question of who was "Indian" for the purposes of being under federal jurisdiction in the Constitution. Pentney notes the position of Ritchie, J. in the Lavell<sup>671</sup> case that the government essentially should have broad discretion concerning who is covered by s.91(24).<sup>672</sup> This would in turn mean a broad discretion to include persons within federal legislation based on 91(24). Bradford Morse notes that the Indian Act controls eligibility for all special programs and services as well as for benefits under other federal legislation.<sup>673</sup> He also notes that<sup>o</sup> legislation had even been used as a constitutional definition.<sup>674</sup> It was suggested by one author that under s.91(24) a "right" to be governed by federal law may exist making the exclusion of those who "choose to adhere to traditional culture" unconstitutional.<sup>675</sup> However, as this author himself points out, the courts did in fact consider the legislative definition conclusive.<sup>676</sup>

The Indian Act definition was also considered to determine who could have rights under the Natural Resources Transfer Agreements<sup>677</sup> in some cases. The Saskatchewan Court of Appeal in the Laprise case held that the term "Indians" in the Agreements did not include "non-treaty Indians".<sup>678</sup> This could be regarded as excluding those who were not party to a treaty, as opposed to those who were not "Indian" under the Indian Act. But it is clear that Woods, J.A. regarded the definition of "Indian" in the Indian Act as the one to be used under the Natural Resources Transfer Agreements. Woods, J.A. noted that the Indian Act defined "Indian" when the Agreement was entered into and that "in the context of the matter this definition would be that intended by the parties...".<sup>679</sup> This conclusion, however, does not mean that the rights of those excluded from the Act are extinguished. By its own terms it is simply an interpretation of the word in the Agreement.

A case did not arise where an individual alleged that the Indian Act denied his or her treaty or aboriginal rights, but one can assume, at least before section 35 was enacted, that such a challenge would simply have been met with the response that federal legislation was paramount over these rights. This, however, does not answer the question of whether it extinguished the rights of those who

were not included within it.

D. "Existing" In Section 35 Of The Constitution

It has been seen that common law aboriginal rights and treaty rights could not prevail over federal legislation. However, before section 35 was enacted no distinction was generally made between whether the law extinguished the right or merely prevented it from being exercised. Constitutional rights, on the other hand, can not be extinguished by ordinary legislation, according to basic principles of constitutional law. Section 35 of the Constitution, recognizes and affirms "existing" aboriginal and treaty rights.<sup>680</sup> Whatever these rights are, they can not be abridged by ordinary legislation. The difficulty is in determining what rights are protected by this section or what rights are "existing".

The rights which can not be affected by ordinary legislation may only be aboriginal and treaty rights subject to the full powers that governments had over these rights previously. On the other hand, the rights protected may be all aboriginal or treaty rights that aboriginal peoples ever possessed in the form they originally possessed them, before they were affected by legislation. Between these two extremes, section 35 could be regarded as protecting only unextinguished rights from any alteration past or future, or protecting these rights from future alteration or extinguishment only. Section 35 could also be seen as protecting those unextinguished rights from alteration that does not meet a test of reasonableness or is not for the purpose of conservation.

The question, for our purposes, however is not what rights section 35 protects. The question is who is entitled to such rights as may be enforceable by virtue of section 35 or in any other way. What must be known, to answer this question, is whether the person is a person who is entitled to the rights of aboriginal peoples. Section 35 is relevant, then, only to the extent that it tells us when a person's entitlement to the rights of aboriginal people, whether protected by section 35 or not, may be considered extinguished by legislation.

If "existing" requires something more than simply being unextinguished, then the fact that a right is not "existing" would not be relevant to whether an individual's or group's entitlement was extinguished. The situation that will be considered is when section 35 is found to protect only rights which are not extinguished. In this case what is said about what makes a "right" extinguished or unextinguished will be relevant.

### 1. Academic Opinion

It may be helpful to consider academic opinion on when a right is extinguished, particularly that opinion which has been judicially considered. Blair, J.A., in the Agawa case, considered academic opinion on section 35 and concluded that opinion is almost unanimous "that a treaty right which has not been extinguished but merely limited or restricted by federal legislation, is an existing right within the meaning of section 35(1)."<sup>681</sup>

Blair, J.A. quoted from Pentney's work on the rights of aboriginal peoples in the Constitution. Blair, J.A. noted that the literature was reviewed by Pentney in his work and that Pentney concluded that section 35 "protects any rights which have not previously been lawfully extinguished."<sup>682</sup> Pentney also noted the argument made by Sanders that section 35 could not "revive rights which had been lawfully ended."<sup>683</sup> The question is how can rights be lawfully ended.

Because the Agawa case dealt with a regulation which restricted the exercise of a right, as opposed to prohibiting it, Blair, J.A. did not have to consider whether the denial of a right meant that it was lawfully ended or extinguished. However, many of the academic opinions he considered did elaborate on when a right is extinguished.

The academic opinions on what distinguishes an extinguished right from one which is not extinguished include the opinion of Professor McNeil, quoted in the Agawa case.<sup>684</sup> McNeil suggests that a "workable test that might be applied to determine whether a particular right has been extinguished or merely rendered unexercisable would be to ask whether the right would be restored if the

legislation affecting it was repealed."<sup>685</sup> Blair, J.A. noted that Professor Zlotkin approved of this test in his writing on section 35.<sup>686</sup> Pentney also approved of this test in his work on aboriginal rights in the Constitution.<sup>687</sup> He noted the argument made by McNeil concerning whether a right is extinguished or simply unexercisable.<sup>688</sup> Pentney concluded that this argument comes closest to the "mark".<sup>689</sup>

Pentney argued that the conclusion that "existing" means "not extinguished", rather than "not subject to any restriction" is supported by principles applicable to other rights guarantees.<sup>690</sup> He argued that rights, even if they can not be freely exercised or asserted, continue to be rights.<sup>691</sup> He contrasted "extinguishment" with regulation noting that regulation is not a final termination of a right but a temporary and limited abrogation "which in no way impairs the ultimate existence of the right."<sup>692</sup> Pentney appears to interpret the proposition made by McNeil as distinguishing between rights which can be exercised in a limited way and rights which can not be exercised at all. It is, however, possible to interpret the test that McNeil proposes as going further than simply saying that restricted rights are not extinguished. In fact, it is possible to interpret it as justifying the conclusion that a breach of a right does not extinguish it. If legislation breaching a right was changed or removed, then the right would presumably still exist. Once the legislation was repealed the question would be whether the person was entitled in principle to the right in question. Only matters which affect the basis of entitlement could extinguish a right so that it could not be exercised even if the legislation was changed.

The same reasoning that Pentney uses to justify restrictions not extinguishing rights could be used to justify breaches not extinguishing rights. Clearly a breach of a right does not mean it does not exist or, as noted, there could never be a violation of a right.

If only matters which go to entitlement in principle could be seen as extinguishing a right, then this would justify the position of Sanders, quoted by Blair, J.A. that "[t]he consensual loss of treaty rights...would be confirmed, but the non-consensual loss...would not be."<sup>693</sup> If rights have been extinguished

through an agreement, then this affects entitlement in principle because the basis for entitlement is changed.

Another possibility considered by Blair, J.A. is that proposed by Slattery. Blair, J.A. quoted from Professor Slattery who concluded that "[o]ne must distinguish here between a statute that specifically nullifies a treaty right and an enactment that merely fails to implement or observe it."<sup>694</sup> The idea that a right can only be extinguished by specific legislation is similar to the test proposed by Hall, J. in Calder for the extinguishment of common law rights to land, that is the existence of a clear and plain intention to extinguish.

For our purposes it may be possible to distinguish between when rights are being sought and when a person is seeking to be included within already recognized rights. Although simple denial of a right may be enough to extinguish a right, it is difficult to see how this could be justified as enough to extinguish the right of an individual to an existing right. The government may be able to decide not to recognize certain rights, but if they recognize a right, then not recognizing a certain person as having this right is likely not enough to extinguish the entitlement of the person.

A right by its very nature applies to certain persons, and if that right is not created by legislation, then it is not to legislation that one should look to determine who is entitled. The position that some writers in the area have taken, concerning whether legislation determines who is entitled to section 35 rights, illustrates that the fact that a person is excluded from exercising an existing right does not mean that their right is extinguished.

Pentney touches on this point when he suggests that the definition of "aboriginal peoples" in the Constitution could be determined "based on the current understanding of the meaning of the terms viewed in light of the purpose of the constitutional guarantee of rights."<sup>695</sup> If the purpose of the constitutional guarantee is to protect aboriginal rights, then all those who are entitled to aboriginal rights should be included within it. Pentney concludes that the position that legislative definitions are controlling was not correct regarding s.91(24) and need not be adopted under section 35.<sup>696</sup> Pentney notes

that "courts would seem to be required (by section 52) to scrutinize any such statutory definition [as in the Indian Act] to determine whether it is consistent with the Constitution."<sup>697</sup> He concludes that "it should be clear that a statute cannot deprive any person of rights that are recognized in the Constitution, without adequate justification."<sup>698</sup>

Lysyk argues that the definition of who is included within the terms of section 35 "is a subject appropriately dealt with in the Constitution itself, as opposed to statutory enactment since neither Parliament alone nor a provincial legislature alone can determine the scope of a constitutional classification."<sup>699</sup> McNeil notes the inclusion of "Indian", "Inuit" and "Metis" implies that all of these groups have aboriginal rights.<sup>700</sup> That is to say that who has aboriginal rights under section 35 now depends on the interpretation of this section not who the government chooses to recognize.

Hogg has suggested that the courts may accept government definitions of "Indian", "Inuit" and "Metis" provided "reasonable" criteria were employed.<sup>701</sup> This does not necessarily mean, however, that the courts would be deferring to Parliament's right to decide. The courts could simply be adopting the Parliamentary definitions as their own. Even if the court did defer to the Parliament's right to decide under certain circumstances, the fundamental question of what is "reasonable" or indeed any criteria for determining who is entitled to aboriginal rights remains.

The fact that it was not suggested by any of these authors that a person who could not exercise section 35 rights, because he or she was excluded from the Indian Act, had no rights makes it clear that this exclusion was not regarded as extinguishing section 35 rights. If this were the case then anyone excluded, at least before section 35 was enacted, would not have "existing" rights.

## 2. Case Law

The question of when an aboriginal right is extinguished was considered in the Sparrow case by the British Columbia Court of Appeal.<sup>702</sup> The court first

determined that there was an aboriginal right to fish based on the fact that the aboriginal group in question occupied the land before the coming of the white man as an organized society and that the "taking of salmon from the Fraser River was an integral part of their life and has continued to be so to this day."<sup>703</sup> Then, before considering the effect of section 35, the court considered whether this aboriginal right to fish was extinguished. The court noted that the only argument that the right was not existing was "the doctrine, apparently propounded in this case for the first time, of 'extinguishment by regulation'."<sup>704</sup> The court went on to describe the "major premise" of the argument as being "that the aboriginal right to fish was unrestricted" and the "minor premise" as being that, since restrictions have been imposed, the right can no longer be an aboriginal right.<sup>705</sup> The court first noted that "[n]o logical basis is suggested for the proposition that a right which is restricted ceases to be a right."<sup>706</sup> Then they concluded that "the 'extinguishment by regulation' proposition has no merit....[t]he short answer to it is that regulation of the exercise of a right presupposes the existence of a right."<sup>707</sup>

The court went on to consider the effect of section 35 on a right that was unextinguished when section 35 was enacted. Since this deals with the question of the protection afforded by section 35, not who is entitled to aboriginal rights, it is less relevant for our purposes. On this point the court concluded that "[t]here continues to be a power to regulate the exercise of fishing by Indians even where that fishing is pursuant to an aboriginal right but there are now limitations on that power."<sup>708</sup> The court further concluded that "where the Indian food fishery is in exercise of an aboriginal right, it is constitutionally entitled to such priority....[f]urthermore, by reason of s.35(1) it is a constitutionally protected right and can not be extinguished."<sup>709</sup>

In this case, then, it was held that rights which were not extinguished before section 35 was enacted are protected by section 35, after its enactment, from being extinguished and the power to alter them continues but is more limited. This may be relevant to whether a person is entitled to rights covered by section 35 only because, if their section 35 rights were not extinguished

before this section was passed, they cannot now be extinguished. The Supreme Court of Canada judgment in this case will be considered at a later point.

The questions of what rights are protected by section 35 and whether regulations can extinguish a right was again considered in R. v. Arcand, decided by the Alberta Court of Queen's Bench.<sup>710</sup> Conrad, J. began by noting that there is "general agreement that s.35(1) does not have the effect of reviving treaty rights which had been extinguished prior to April 17th, 1982."<sup>711</sup> In support of this conclusion she noted the writings of Hogg, McNeil and Slaterry.<sup>712</sup> However, Conrad, J. identifies the "real dispute" as being between the interpretation that section 35 entrenches the rights subject to the regulations existing when the Constitution was enacted and the interpretation that section 35 entrenches the rights in their original form.<sup>713</sup> She concludes that:

prior regulations passed are not equivalent to extinguishment. Regulation and extinguishment are fundamentally different concepts. A right that has been extinguished ceases to exist. On the other hand, a right that is regulated even to the point of unenforceability does not necessarily cease to exist, it is merely rendered dormant until the restricting regulation is repealed or altered.<sup>714</sup>

In support of this conclusion Conrad, J. noted the Court of Appeal judgment in the Sparrow case, as well as the test proposed by McNeil that unextinguished rights are rights which would be restored if the legislation was changed.<sup>715</sup> Conrad, J. also found support for her conclusions by considering the purpose behind the presence of the word "existing" and the fact that it would not be "reasonable" to constitutionalize the regulations in existence at a certain point in time.<sup>716</sup> Finally, Conrad, J. considered the Sikyca case and noted that the judgment of Johnson, J.A. in this case "itself implicitly recognizes that the right is still in existence though not enforceable."<sup>717</sup> She then concluded that although "Parliament could pass legislation that has the effect of suspending or interfering with the exercise of the right and in doing so may have breached the treaty....[i]t did not in my opinion extinguish the right."<sup>718</sup> The judgment of Conrad, J., concerning when a right is existing and when it is extinguished was adopted, by the Manitoba Queen's Bench in the Flett case.<sup>719</sup>

In principle it is easy to agree with the conclusion of Conrad, J. that a

breach of a right would not affect its existence. It could be argued that the breach of a right, like the regulation of a right, presupposes the existence of the right. If any right which was breached was said to not exist, there could never be such a thing as a violation of a right. Rights by their nature speak to entitlement in principle. A person who is entitled, based on the principles which called the right into existence, should not be regarded as any less entitled because their right has been denied. In the context of who is entitled to the rights of aboriginal people, this could mean that a person who has a claim to special treatment based on original occupation should not be regarded as not entitled to these rights because his or her claim has not been recognized or has been denied.

A similar issue was considered by the Ontario Court of Appeal in the case of R. v. Agawa.<sup>720</sup> As in the other cases, the court considered the effect of section 35. Blair, J.A. noted that "existing" could mean "established by a treaty at the time the treaty was executed" or "rights which could be exercised after restriction or limitation by federal law on April 17, 1982...".<sup>721</sup> Blair, J.A. noted that in the Saskatchewan Court of Appeal case of R. v. Eninew<sup>722</sup> the court did not decide between these two views because they found that the right as it originally existed was subject to regulation.<sup>723</sup> Blair, J.A. then noted that a different approach was taken in the Sparrow case, in the Court of Appeal, and noted cases which had followed this decision.<sup>724</sup> He also noted the approach taken by his court in R. v. Hare And Debassige, which will be considered, but did not find he was bound by the decision in this latter case on section 35 since this part of the decision was obiter.<sup>725</sup>

In the end Blair, J.A. apparently accepted that section 35 can only protect rights which are unextinguished. He found it necessary to state that "it seems to me that it is impossible to say that this right does not exist....[a]t most, it has been restricted by the requirement that Indians be licensed before exercising it."<sup>726</sup> Blair, J.A. then concluded that the unextinguished right could be regulated but the regulation must be reasonable for the purpose of conservation.<sup>727</sup>

The position that section 35 protects unextinguished rights and that rights are not extinguished by regulation was also accepted by the Appeal Division of the Nova Scotia Supreme Court in the Denny case.<sup>728</sup> In this case the defendants were charged with fishing for salmon with a net contrary to the federal legislation. Clarke, C.J.N.S. began by noting that aboriginal rights, such as the right to fish, can be extinguished through federal legislation or by voluntary agreement.<sup>729</sup> Clarke, C.J.N.S. went on to find that there was no agreement extinguishing the rights in question.<sup>730</sup> Clarke, C.J.N.S. then considered the proposition that these rights had been extinguished by regulation passed pursuant to the legislation in question. The Crown argued that "[i]f regulations manifest a sovereign intent 'necessarily inconsistent' with the continued existence of the aboriginal right, as opposed to merely regulating its exercise, then extinguishment will result."<sup>731</sup> Clarke, C.J.N.S. noted that the regulations themselves made provision for giving Indians or members of bands licences to fish for food and that the concept of extinguishment by regulation was rejected by the British Columbia Court of Appeal in the Sparrow case.<sup>732</sup> Clarke, C.J.N.S. then concluded that this right had not "been extinguished through treaty, other agreement or competent legislation."<sup>733</sup>

It seems clear that Clarke, C.J.N.S. accepted the distinction between the question of paramountcy and extinguishment. Clearly, before section 35 was enacted there was not an unfettered right to fish, as this was limited by the legislation in question. However, Clarke, C.J.N.S. did not regard these rights as being extinguished to the extent that they could not be exercised when section 35 was enacted. This is clear from the fact that he accepted that section 35 could only protect "unextinguished" rights and then went on to consider what protection this section offered to the unextinguished aboriginal right to fish in question.<sup>734</sup> Clarke, C.J.N.S. found that the right which was protected was the right as it existed on April 17, 1982, that is the right subject to the ability of the Federal Government to regulate its exercise.<sup>735</sup> However, as in the Court of Appeal judgment in the Sparrow case, he found that there was not an unlimited right to regulate. Before section 35 was enacted the ability to

regulate was unlimited, but this did not extinguish the right to the point that it only existed subject to that complete ability to regulate. Clarke, C.J.N.S. adopted the test, used by the Court of Appeal in the Sparrow case, that the regulations must give priority to the Indian food fishery over other uses.<sup>736</sup>

In Hare the Ontario Court of Appeal in an earlier case also took the view that section 35 only protected unextinguished rights, but took a different view concerning what this meant.<sup>737</sup> This case concerned treaty fishing rights in conflict with federal legislation which prevented gill-net fishing. The treaty in question ~~could~~ be seen as contemplating regulations since it gave the signatories the same rights and privileges regarding fishing as may be lawfully enjoyed and exercised by "white settlers". The court concluded that this right had been extinguished before section 35 was enacted and could not be revived by section 35.<sup>738</sup> However, what was said about section 35 in this case is obiter because the court held that section 35 did not apply when, as in this case, the offence took place before it was proclaimed.<sup>739</sup>

Courts have taken the position in other cases that extinguishment could take place by breach or regulation of a right. However, it is not entirely clear in all these cases whether the federal law was held to continue to apply because it had extinguished the right or simply because the paramountcy rule continued to apply, at least to legislation enacted before section 35 was in force.

R. v. Googoo is a case where the court clearly accepted that legislation which restricted the exercise of rights resulted in those rights being extinguished.<sup>740</sup> O'Connell, P.C.J., of the Nova Scotia Provincial Court, found that section 35 protected only unextinguished rights.<sup>741</sup> He then found that a federal law preventing possession of certain types of fishing nets had extinguished the accused's rights to fish in this way. O'Connell, P.C.J. stated that "[w]hatever treaty rights the accused's ancestors may have enjoyed...had become lost by operation of law well before the charges were laid" and "[s]ection 35(1) does not have the effect of reviving treaty rights that had been extinguished."<sup>742</sup> O'Connell, P.C.J. interpreted the Simon case as simply affirming the subordination of provincial law to treaty rights.<sup>743</sup> It has

already been seen that an argument can be made that Dickson, C.J.C. in this case was considering extinguishment of treaty rights generally, not just by provincial law. O'Connell, P.C.J. went on to find that if there was an aboriginal right it was subject to the same constraints as a treaty right.<sup>744</sup>

Other courts have not been as clear about the basis on which they find that section 35(1) does not protect aboriginal or treaty rights from federal legislation, enacted before section 35 was proclaimed. The New Brunswick Court of Queen's Bench in the Martin case simply held that "[a]lterations or extinguishment of those [aboriginal or treaty] rights which came into effect prior to the Constitution Act of 1982 were not affected by that Act and continue to be legally effective."<sup>745</sup> This court took essentially the same position in the more recent Nicholas case where it was held that "'existing aboriginal and treaty rights'...can only be taken to mean those rights as they existed on April, 17, 1982, i.e. as modified by the earlier enacted" legislation.<sup>746</sup> The judgement of the Ontario Provincial Court in the Sutherland case makes it clear that Cloutier, P.C.J. regarded the paramountcy rule as continuing to apply to legislation passed before section 35 was enacted.<sup>747</sup> Cloutier, P.C.J. simply held that "[w]hether the Migratory Birds Convention Act merely abrogates, extinguishes, renders unexercisable or merely restricts the exercise of treaty rights is purely academic because the Supreme Court of Canada judgments that I have referred to are still in existence and binding on this court and this court is not prepared to rule differently."<sup>748</sup> The decisions that Cloutier, P.C.J. considered included the Sikyea and the Derriksan cases dealing with the paramountcy of federal law.<sup>749</sup>

All of the cases considered so far have in common the fact that it is accepted that a right which is extinguished cannot be protected by section 35. There is some difference of opinion in these cases concerning what is meant, however, by unextinguished. In the Courts of Appeal judgments in the Sparrow, Agawa and Denny cases it was concluded that regulation of a right does not mean that it is extinguished. However, this still left open the question of whether a right that is breached or denied is extinguished. In the Arcand case the Court

of Appeal judgment in the Sparrow case and other sources were used to draw the conclusion that a breached right is not extinguished. On the other hand, case law from before section 35 was enacted was used to conclude, in the Hare case that a right which could not be exercised due to legislation was extinguished. However, the conclusion in this case was, as noted, only in obiter. Other cases have either followed the Courts of Appeal judgments in the Sparrow or Hare cases, or else have not clearly addressed the question of whether the right in question was extinguished.

Based on the distinction, already considered, between extinguishment cases and paramountcy cases developed before section 35 was enacted, it could be argued that it is not correct to equate the paramountcy rule with extinguishment. It is submitted that if the courts are going to take the position that section 35 protects all unextinguished rights, the question of how rights can be extinguished must be addressed and that paramountcy cases, decided before section 35 was enacted, are not helpful in this regard.

An approach similar to that taken in the Calder or the Simon cases, where extinguishment was specifically considered, should be followed. This would require a resolution of the unresolved issues in the area of extinguishment, including whether specific legislation is required, what evidence can be used to show a clear and plain intention, how rules regarding extinguishment of common law rights to occupancy apply to other common law rights, how and even if treaty rights can be extinguished, and, finally, whether the rules are different concerning extinguishment of individual entitlement as opposed to extinguishment of the right itself.

When the Supreme Court of Canada considered the interpretation of the word "existing" in section 35 of the Constitution in the appeal of the Sparrow case many of these issues were resolved.<sup>750</sup> The court determined conclusively the distinction between regulating or breaching a right and extinguishing the right as well as determining how a common law aboriginal right can be extinguished. Dickson, C.J.C. and La Forest, J., in jointly delivering the judgment of the court in this case, began by noting that "'existing' makes it clear that the

rights to which s.35(1) applies are those that were in existence when the Constitution Act, 1982 came into effect.<sup>751</sup> They went on to conclude that "extinguished rights are not revived by the Constitution Act, 1982."<sup>752</sup>

The Supreme Court, then, is in agreement with the view, expressed in most other cases and in academic opinions, that section 35 only protects unextinguished rights. What must be determined, however, as has been seen, is when a right is extinguished.

The Supreme Court, like the Court of Appeal, rejected the idea that regulation of a right extinguishes the right. Dickson, C.J.C. and La Forest, J. held that "an existing right cannot be read so as to incorporate the specific manner in which it was regulated before 1982."<sup>753</sup> In support of this, they note that this would have the effect of incorporating "into the Constitution a crazy patchwork of regulations."<sup>754</sup> The Supreme Court, however, went further than the Court of Appeal had in emphasizing that the manner in which a right is treated by legislation does not determine the scope of an existing right. Dickson, C.J.C. and La Forest, J. pointed out that academic commentary, as noted by Blair, J.A. in the Agawa case, supports the conclusion that "'existing' means 'unextinguished' rather than exercisable at a certain point in history."<sup>755</sup> Whether a right is extinguished, then, is not, in the opinion of the Supreme Court, determined by whether the right can be exercised or by the extent to which the right can be exercised.

The conclusion that a right is not extinguished simply because it can not be exercised is in keeping with the distinction between the doctrine of paramountcy and the extinguishment of rights. Since they were considering the extinguishment of a common law right to fish, not the relationship between that right and legislation prior to 1982, the court considered cases which dealt with extinguishment such as Calder, Baker Lake and Bear Island.<sup>756</sup>

The court noted the confusion in some cases between extinguishment and regulation. Dickson, C.J.C. and La Forest, J. quote from the Baker Lake case where Mahoney, J. stated that a validly enacted statute will be effective even if the result is to "abridge or entirely abrogate a common law right."<sup>757</sup> They

also noted a similar approach in the Bear Island case.<sup>758</sup> They considered the view of Judson, J. in Calder that extinguishment can take place through legislation that is inconsistent with the continuation of the right, but they adopted the test proposed by Hall, J. in the same case that "the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."<sup>759</sup> The court went on to conclude that the "Crown has failed to discharge its burden of proving extinguishment" in this case.<sup>760</sup> Neither the fact that provisions were made allowing Indians generally to fish for food nor the fact that at times the permits were discretionary and were given to individuals not communities amounted to a clear and plain intention to extinguish the right.<sup>761</sup>

Since the decision of the Supreme Court in Sparrow, it is possible to conclude that a right is not extinguished simply because legislation, that prior to section 35 would be paramount over the right, prevented or restricted the exercise of that right. Although this case dealt with a common law aboriginal right, not a treaty right, it seems likely a treaty right also would not be extinguished simply because it could not be exercised. In fact, it could be argued that the case was stronger for finding that a common law right was extinguished because it could not be exercised, since the idea of extinguishment through non-user had been specifically rejected in the context of treaty rights but not in the context of common law aboriginal rights.<sup>762</sup> It is also possible to conclude that the opinion of Hall, J. in the Calder case, concerning how a common law aboriginal right can be extinguished, has been accepted in preference to that of Judson, J. As the Sparrow case dealt with a common law aboriginal right to fish, it can be assumed that the Supreme Court considers the test set out by Hall, J. to be applicable to all common law aboriginal rights whether they concern possession of land or not. However, as this case did not concern treaty rights, the questions raised by the Simon and the Sioui cases concerning how these rights can be extinguished remain.

E. Conclusion

The question of whether the right of a person, who cannot because of legislation exercise that right, is extinguished has now been considered. It has been seen that before section 35 was enacted federal legislation was paramount over both aboriginal and treaty rights. However, it has also been argued that paramouncy over rights is not the same question as extinguishment of these rights.

Even before section 35 was enacted, the Supreme Court of Canada appeared to deal with the question of extinguishment on a different basis than the question of the paramouncy of federal legislation over the rights of aboriginal people. In the paramouncy cases the question of extinguishment was not even directly raised so it is difficult to see how these cases could be authoritative on this point. For this reason, it is not appropriate to apply the rules in paramouncy cases to the question of extinguishment. This is made particularly clear by the Simon and Sioui cases where the Supreme Court considered the question of extinguishment of treaty rights as a distinct issue from whether legislation could override that right.<sup>763</sup>

When section 35 was enacted the distinction between legislation which extinguished a right and legislation which simply regulated the right or prevented its exercise arose for the first time. There is now conclusive authority for the position that a right is not extinguished because it cannot be exercised. This position, that a right which is denied does not cease to exist, can be supported by reference to the nature of rights. A right does not cease to exist because it is violated any more than it ceases to exist because it is regulated.

Once it is accepted that a right is not extinguished because it cannot be exercised, the question of how rights can be extinguished must be addressed. Cases that dealt with extinguishment of common law rights to land, before section 35 of the Constitution was enacted, left many questions open. It has been seen that the Supreme Court of Canada divided evenly on the question of whether a

common law aboriginal right to land could be extinguished through general legislation inconsistent with the exercise of the right.<sup>764</sup> As well, it was not clear how the principles of extinguishment would apply to other common law rights, to treaty rights and to the extinguishment of an individual's entitlement to an existing right.

The Supreme Court decision in the Sparrow case provided the answer to some of these questions. The court adopted the test proposed by Hall, J. in Calder for how a common law aboriginal right can be extinguished. The Supreme Court would require a clear and plain intention and would place the burden of proof on the party attempting to establish extinguishment. However, while the court's conclusions regarding the effect of legislation preventing the exercise of a right would likely apply to both treaty and common law rights, since both were subject to the same paramountcy rule, different considerations may apply to extinguishing a common law, as opposed to a treaty right. In so far as treaty rights are concerned, the Supreme Court has indicated certain factors which must be considered, such as consent and the burden of proof, but has not specifically adopted a method by which treaty rights can be extinguished.

In any case, the rules concerning how rights can be extinguished may not apply to the extinguishment of entitlement to an existing right. Rights themselves determine who is entitled to them by their very nature. In other words, the principles that created the rights determine who is entitled to them. In the case of aboriginal people the principles that created aboriginal and treaty rights was not legislative enactment but the fact of original occupation, customary law or agreement. For this reason it can be argued that a person's right to aboriginal rights is not extinguished unless the legislation changes his or her entitlement in principle, not in fact.

The conclusion that a person who can not exercise any rights as an aboriginal person because of legislation may still be entitled to these rights is also supported by academic opinion. Both the proposition that rights are not extinguished unless repeal of the legislation would not restore them and the proposition that rights are not extinguished without consent, are based on the

idea that rights can only be extinguished if entitlement in principle to these rights is removed. If these rights will only be extinguished when the basis for their existence is nullified, then the question becomes simply whether the person is entitled to aboriginal rights in principle.

## Chapter VI

CONCLUSION

From the analysis in this work, certain conclusions concerning who is entitled to the rights of aboriginal people and how this is affected by legislation can be made. How these conclusions could be applied in a number of different situations will also be briefly discussed.

The source of the rights of aboriginal people has been considered. From this it has been seen that aboriginal common law rights are based on occupation or the existence of customary laws at a certain point in time. The exact time which is relevant for establishing these rights is not entirely clear as it may have been as early as when England first showed an unambiguous intention to acquire sovereignty or as late as when control of the area was gained in fact. However, it is clear that these rights are not established because of circumstances which exist today but because of circumstances that have existed historically.

It was also seen that many of the other rights of aboriginal people are based on these common law rights. These rights, such as the treaty rights, were initially established when the agreement was made. Therefore these rights, like common law rights, are not based on current circumstances. The rights are based on these agreements, many of which were entered into in the past.

The rights of aboriginal people then can be regarded as historical rights in the sense that their establishment does not depend on the current situation but on the situation when the rights were created. For this reason, it can be concluded that entitlement to these rights today can only be established through association with the group which existed when the rights were first created.

The nature of the rights of aboriginal people has also been considered. It has been seen that these rights were originally vested in organized societies, but that groups other than organized societies may be able to exercise these rights today. This is the result of the fact that occupation as an organized

society is necessary to establish these rights but not to continue them once established. This, however, does not mean that these rights are not collective rights.

It seems clear that the rights of aboriginal people are collective rights, and that, as a result, they can be exercised only by a group or through membership in a group. Whether the rights can be exercised by an individual, due to his or her membership in a group, or only by the group as a whole will depend on the type of right. It is submitted that some rights, such as the right exclusively to occupy an area or the right to self-government, can only be exercised by a group as a whole, but that other rights, such as hunting and fishing rights on land not exclusively occupied by an aboriginal group as well as monetary and some other treaty benefits, could be exercised by an individual provided he or she was entitled to do so by group membership.

As a result of this analysis of the source and nature of the rights of aboriginal people, it was determined that any group entitled to the rights of aboriginal people must be both a collectivity and associated in some way with the originally entitled group.

What makes a group a collectivity has been considered. It has been seen that such things as being distinct on the basis of race and culture are important. However, it has also been seen that the fundamental characteristics of a collectivity are that the group regards itself as distinct and that it is regarded as distinct by others. In this way a group that is distinguishable on the basis of race and culture could meet the definition of a collectivity even if it was not completely distinct on these bases and even if it had changed and evolved over time. On the other hand, a group created by legal definition, even if distinct on the basis of race and culture, could not be a collectivity unless the group and the rest of society came to regard it as a distinct entity.

The degree to which a collectivity must exist as a cohesive entity and the degree to which it must be distinct from the rest of society would likely depend on which type of collective rights were asserted. If the group as a whole must exercise the rights, then it would likely have to be a group that was similar to

a community. On the other hand, if individual group members could exercise the rights, then the group would simply have to exist as a discernable segment of society.

What makes a collectivity entitled to the aboriginal rights of the group in which the rights were initially vested was then considered. From this it was concluded that descent from the originally entitled groups is important as perhaps the only way to show association with these historical groups. The degree of descent required was discussed. A consideration of government policy and legislation, as well as section 35 of the Constitution, led to the conclusion that full aboriginal blood was not required to entitle a person to aboriginal rights. However, the point at which aboriginal descent no longer entitles a person to the rights of aboriginal people is not clear from a consideration of this requirement. For this reason it was determined that this method would perhaps have to be combined with another method of determining entitlement.

The cultural attributes of the individual or the group was considered, as another method of connecting existing groups or individuals with the originally entitled groups. It was seen that it would be difficult to identify the cultural inheritors of an original group's culture and that this would require stagnation of aboriginal cultures. The development and subsequent rejection of the assimilation policy was reviewed to show both that cultural change was forced on aboriginal people and that the government eventually rejected both this policy and the idea that cultural change resulted in the loss of rights as aboriginal people.

In conclusion, it was found that descent could be used to determine entitlement to the rights of aboriginal people today, but that the collective nature of aboriginal rights and the fact that there is no logic to any particular degree of descent meant that this requirement had to be combined with a requirement to be a member of a collectivity. The difficulty that remained was the relationship between the idea that entitlement was based on descent and the idea that these rights are dependant on being a member of a collectivity. This presents a problem because a single aboriginal collectivity may not consist

solely of members who are descended from one original aboriginal group.

To solve this problem by finding that only aboriginal collectivities consisting entirely of members descended from a single original group are entitled to rights was rejected. This was rejected because it is not consistent with the idea that aboriginal groups can and do change over time without losing their rights and the idea that changes by outsiders should not be regarded as eliminating entitlement.

It was suggested that this matter could be resolved by basing entitlement on membership in a collectivity but not requiring that the collectivity consist of the descendants from one particular group of aboriginal people. It was argued that a collectivity to be entitled to the rights of aboriginal people could be descended from aboriginal groups generally.

The problems associated with this approach, in particular vesting the rights in an artificially created group made up of all the descendants of those originally entitled, could be addressed through the method of recognizing these rights, not by denying entitlement. It was suggested that if this artificially created group was then given the right to define itself, it would no longer be an artificial group once this power was exercised. It was also suggested that, as an alternative, the new collectivities that consist of aboriginal people from many different original groups could have their entitlement recognized in a way that did not involve their members joining particular aboriginal groups. Recognizing that the new collectivities had rights could be achieved through agreements with these groups or through some other form of recognition, based on the fact that the original rights were taken away.

The effect of legislation on entitlement to aboriginal rights has also been considered. It can be concluded from this analysis that, since the rights of aboriginal people are not created by legislation, legislation does not determine entitlement. However, these rights, at least before section 35 was enacted, could be extinguished by legislation, and federal legislation was paramount over these rights. A distinction was made between these two situations, and it was concluded that extinguishment of the rights of aboriginal people is different than simply

applying federal legislation notwithstanding these rights.

The requirements for extinguishing a right, as opposed to breaching or regulating it were considered. The Supreme Court of Canada has indicated that there must be a clear and plain intention to extinguish common law aboriginal rights and that the burden of proving extinguishment is on the party alleging it. The same rule concerning burden of proof has been adopted by the Supreme Court in relation to treaty rights, but it is still not clear whether these rights can be extinguished without consent and, if so, whether there must be a clear and plain intention to do so.

The question of extinguishment of individual entitlement to existing rights has not been considered in any detail by the courts. It has been seen, however, that a strong argument can be made that preventing certain persons from exercising a right, which still exists, does not mean that their rights are extinguished.

Having considered the principles concerning who is entitled to aboriginal rights and how this is affected by legislation, it will be useful briefly to consider some of the circumstances in which these conclusions could be applied. The question of who is entitled to the rights of aboriginal people will be relevant whenever these rights are recognized or enforced. Before section 35 of the Constitution was enacted, protecting certain aboriginal and treaty rights, these circumstances were somewhat limited.

One way that the rights of aboriginal peoples could be recognized, that still exists after the enactment of section 35, is through an application to a court for a declaration that aboriginal common law rights exist in certain lands. When such rights are found to exist, the question of who is entitled to these rights and how this would be affected by the Indian Act arises. As has been seen, this question was an issue in the trial judgement in the Bear Island case which involved a claim for common law aboriginal rights.<sup>765</sup>

The same question arises if common law rights are recognized by agreement between the government and an aboriginal group. In this case, who is entitled to aboriginal rights could become an issue if a settlement is based on the number

of persons who are entitled to the aboriginal rights. It could also arise if more than one group claims rights to a particular area.

Before section 35 was enacted treaty rights could only be enforced through a provision of the Indian Act that preserved these rights against provincial legislation.<sup>766</sup> In such a situation, who is entitled to the treaty rights in question could become an issue as in the Supreme Court of Canada decision in the Simon case.<sup>767</sup>

The enactment of section 35 of the Constitution, which protects the "existing" aboriginal and treaty rights of aboriginal peoples<sup>768</sup>, likely expands the circumstances under which these rights can be enforced. This would correspondingly expand the situations in which determining who is entitled to these rights could become an issue.

The Twinn case, decided by the Federal Court, Trial Division and upheld by the Federal Court of Appeal, involved some preliminary motions on an action to claim certain rights under section 35.<sup>769</sup> In this case the six bands, as they existed before certain changes were made to membership by the Indian Act in 1985, claimed that those changes to membership denied their section 35 right to decide their own membership. This was based on the fact that the 1985 amendments, as has been seen, gave status and band membership to certain persons previously excluded. When this case goes to trial, one of the major issues may be whether the right to decide membership, assuming it exists, resides in the groups which made up the "bands" in 1985. One could as easily see an action being taken by those excluded prior to 1985 claiming that their rights to participate in band membership decisions were denied by the same legislation. Clearly, the only way to resolve these competing claims would be to determine who is entitled to the rights in question and the effect that the Indian Act has on this entitlement.

The issue of who is entitled to rights controlled by the Indian Act is clearly a contentious one. Some aboriginal groups, as illustrated by the Twinn case, claim the changes to the Indian Act in 1985 violate their right to determine their own membership, while other groups claim the Indian Act, before and after the changes in 1985, violates their rights as aboriginal people. The

positions of groups representing both sides of this issue were presented to the House of Commons Standing Committee on Indian Affairs and Northern Development when it held hearings on changes to the Indian Act.

The position of most groups representing those included in the Indian Act is that those who were included prior to 1985 have the exclusive claim to the rights controlled by the Act. This would include the right to determine band membership under the Act as well as certain treaty rights access to which is controlled by the Indian Act. This position is based on the idea that these rights are collective rights that can only be exercised by a group and the assumption that Indian Act bands are the only groups that can exercise these rights. Based on this argument, the inclusion of others without the existing band's consent is seen as a violation of aboriginal collective rights in favour of the individual right to equality.

The Assembly of First Nations (A.F.N.) represents bands, as defined under the Indian Act, although it calls these bands "First Nations". In presentations to the Committee, the A.F.N. emphasized its right to determine who is included in the Indian Act. For example, an A.F.N. representative stated that "First Nations have a basic, inherent right of self-government, which includes the right to define citizenship in each First Nation."<sup>770</sup> The fact that they regard this right as including the definition of membership in the Indian Act, and as belonging to the current membership of the Indian Act, is evident from their position. An A.F.N. spokesman stated that the A.F.N. wants full reinstatement to band membership under the Indian Act of all "citizens" in all generations, but that bands must have absolute control over exercise of active membership rights.<sup>771</sup>

The Coalition of First Nations is also a group which represents those covered by the Indian Act.<sup>772</sup> Their position on the changes was essentially the same as that of the A.F.N. The co-ordinator for the Brotherhood of Indian Nations, Manitoba, a provincial counterpart to the Coalition, expressed their opinion to the Committee in these terms:

We are the ones through the direction of our people and the actions of our First Nations governments, who decide

who is an Indian and who is not...who can reside and have benefits and privileges and participate in institutions and governments.<sup>771</sup>

The Treaty Eight group, representing Indian bands in British Columbia, Alberta and Saskatchewan, also supported the position of the A.F.N.<sup>774</sup> A representative for the Treaty Eight Group concluded that existing bands cannot be compelled to share their entrenched rights with other people unless they consent to these inclusions.<sup>775</sup> He argued that if any unilateral reinstatement by the government was going to take place, then "high impact bands" must be protected. He proposed that bands, which would be affected with increases in reserve population or electors of more than 20%, should be allowed to decide when and if persons reinstated can have benefits of membership.<sup>776</sup>

The Brotherhood of Indian Nations, Manitoba (B.I.N.), representing some First Nations in Manitoba, argued that "individual rights" and "majority rule" collide "with our unwritten supreme law...of sovereignty of our people, collective rights and the law of consensus".<sup>777</sup> A member of the Committee, responded to this statement by inquiring as to who should be involved in coming to this consensus, since different native groups had presented different opinions before the Committee.<sup>778</sup> Another spokesperson for the B.I.N. stated that those represented by First Nations groups, such as the B.I.N., because of their position as treaty and as status Indians, are the only people who should decide on changes to the Indian Act.<sup>779</sup>

The A.F.N., in addition to arguing that existing bands should control additions to membership, argued that only band members have treaty rights and that the extent to which status non-members have rights is to be determined by the A.F.N.<sup>780</sup> Other groups also argued that treaty rights belong exclusively to those covered by the Act. A spokesperson for the Federation of Saskatchewan Indians (F.S.I.) argued that once an Indian's connection with the Indian Act and his or her treaty was dissolved it was final.<sup>781</sup> She questioned whether it is possible for an individual to reclaim these rights without renegotiating themselves back into the treaty.<sup>782</sup> This would presumably be with the consent of those still recognized. A representative of the Saskatchewan Indian Women's

Association also concluded that "Indian lands will be trampled on by non-resident people who have no legal right as treaty Indian people to live on crown land, known as Indian reserves and held in trust by the crown."<sup>783</sup>

Similarly, Chief Harry Delorme, of the F.S.I., argued that the changes to the Indian Act violated treaty rights as well as the right to sovereignty. He argued that additions to a reserve population should be done by adhesions to a treaty and then the treaty formula regarding land and other benefits should be applied.<sup>784</sup> Delorme noted that "it is important to our Indian treaty nations that the new population undertake the commitments embodied in the treaties."<sup>785</sup> He also stated that those reinstated may have little appreciation of what is involved in being a treaty Indian.<sup>786</sup> He concluded that "reinstatement of 22,000 individuals is an affront to the principle of treaty Indian Nations self-determination of citizenship."<sup>787</sup> Inherent in this is the assumption that those who are included in the Indian Act are the only ones who were entitled to treaty rights.

In summary, it could be said that the A.F.N., and certain other groups representing status persons, object to the inclusion of any persons in the Indian Act without the consent of those already included. This would presumably apply to the government or the courts recognizing persons as having any rights distributed by the Indian Act, including the right to participate in decisions concerning who should be a member of the band under the Indian Act or treaty rights controlled by the Act.

The position of the groups, representing those already covered by the Indian Act, can be contrasted with the position of those excluded. The Native Council Of Canada (N.C.C.), the largest group representing non-status persons, takes the position that membership in the Indian Act should not determine whether a person is entitled to the rights controlled by the Indian Act. They see these rights as belonging to aboriginal people generally and do not accept that only band members under the Act are aboriginal people. In this way the N.C.C., and other groups representing non-status persons, do not view including others in the Indian Act, without the permission of those included, as a case of individual

rights overriding collective aboriginal rights. Instead, they regard it as a recognition of the rights of aboriginal people.

The fact that the N.C.C. does not regard those covered by the Indian Act as being the only ones entitled to the rights controlled by the Indian Act is clear. The spokesperson for the N.C.C. disagreed with the use of the Indian Act structure as the basis for Indian self-government.<sup>788</sup> Presumably this was because they felt this right was not limited to those covered by the Act. A representative of the United Native Nations of British Columbia (U.N.N.), representing non-status and status persons living off of reserves, made the same point stating that the U.N.N. "categorically...agree[s] with band councils defining membership provided this is done by people of the blood and not by the Indian Act [people]."<sup>789</sup> The spokesperson for the N.C.C. also criticized the "dubious" practice of associating treaty rights with status because the "Indian Act does not and can not in any way diminish treaty rights."<sup>790</sup>

Similarly, those groups engaged in land claims settlements argued that all aboriginal persons, not just Indian Act persons, have rights as aboriginal people. The representative of the Dene Nation noted that the position that the Dene Nation represents "all descendants of the Dene" is "not reflected in the present legislation" because some, although recognized in land claims, are not included in the Indian Act.<sup>791</sup> A similar position was taken by the Council for Yukon Indians who noted that their "desire in adopting eligibility criteria as part of land claims negotiations was to ensure full reinstatement of all our members and equal treatment amongst our members" but that the Bill did not go far enough in reinstating these people to status.<sup>792</sup>

The N.C.C. argued that treaty rights and the aboriginal right of self-government do not depend on status and also noted that the right to be a member of a community in international law is not dependent on being included in the Indian Act. Referring to the Lovelace case, the representative stated that "[t]he violation of Sandra Lovelace's international rights, and by implication those of all non-status Indians, was the denial of her right to be recognized as part of her community and the denial of her right to live with other members of that

community and share the identity and benefits of that community."<sup>793</sup> The N.C.C. considers "identity" a "fundamental human right".<sup>794</sup>

The position, that rights of aboriginal peoples do not belong exclusively to those covered by the Indian Act, extends to the question of who is entitled to rights of aboriginal people in the Constitution. A representative of Indian Rights For Indian Women made the point that the protections in section 25 and section 35 of the Constitution extend to aboriginal rights and aboriginal people not just the rights and people included under the Indian Act.<sup>795</sup>

The foundation of these arguments is that the Indian Act controls access to rights, based on the common law, the Constitution, the treaties, international law and other principles, that belong to all aboriginal peoples not just those included in the Act. The position of the N.C.C. is that "all Indian people must be recognized as Indian people."<sup>796</sup>

The Native Alliance of Quebec, representing non-status Indians in Quebec notes that the "A.F.N. claim they do not want a bunch of people who are arbitrarily made Indians flooding the reserve."<sup>797</sup> They go on to comment that the A.F.N. has quickly forgotten that "they themselves were arbitrarily made Indians by the same Act."<sup>798</sup>

It can be seen then that the issue of who is entitled to rights controlled by the Indian Act is regarded as fundamental by many native groups. The conflicting views of various aboriginal groups may have to be resolved, by the courts, if an application is made to enforce section 35 rights, as in the Twinn case.

These conflicting views concerning who is entitled to the rights controlled by the Indian Act could arise in another situation, other than when section 35 was being applied. If an application was made by those excluded, on the basis that their exclusion denied them equality under section 15(1) of the Charter,<sup>799</sup> section 25 would be an issue.

This section prevents the Charter from derogating or abrogating from the rights of aboriginal peoples.<sup>800</sup> Clearly the effect of this section on the application of equality to the Indian Act is beyond the scope of this work. It

is interesting to note, however, that Bruce Wildsmith, in his work on section 25 argues that "while non-aboriginal peoples may not be able to assert a right to be raised to a position of equality...it may be feasible for aboriginal people to argue for equality in relation to section 25 rights..."<sup>101</sup>

This means that only aboriginal people could claim a right to be treated equally with other aboriginal people. The question of whether someone is aboriginal could be seen as equivalent to asking whether they are entitled to the rights of aboriginal people. Section 25 may not be able to prevent an equality claim, to rights controlled by the Indian Act, if that claim is by those entitled to the rights in principle, since the inclusion of entitled persons could not derogate from the rights of those already included. For this reason who is entitled to the rights of aboriginal people may be crucial in the application of equality to the Indian Act, as well as in the application of section 35.

Who is entitled to the rights of aboriginal people and how this is affected by legislation is therefore relevant in a number of circumstances. In these situations it would be possible to apply the principles, developed in this work, as a means of resolving these questions.

## NOTES

1. Indian Act, R.S.C. 1970, c.149.
2. Ibid. s.88.
3. Constitution Act, 1930, (U.K.), 20 & 21 Geo. 5., c.26 (formerly British North America Act, 1930).
4. Constitution Act, 1982, s.35, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11 [hereinafter Constitution Act].
5. Supra, note 1.
6. Canadian Charter of Rights and Freedoms, s.15, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11 [hereinafter Canadian Charter of Rights and Freedoms].
7. Ibid. s.25.
8. B. Slattery, "The Hidden Constitution: Aboriginal Rights In Canada" (1984) 32 Am. J. Comparative L. 361 at 366.
9. W.F. Pentney, The Aboriginal Rights Provisions in the Constitution (Saskatoon: University of Saskatchewan Native Law Centre, 1988) at 38.
10. D. Sanders, "Aboriginal Peoples and the Constitution" (1981) 19 Alta. L. Rev. 410 at 412 quoted in supra, note 9 at 39.
11. Supra, note 9 at 40.
12. K. McNeil, Common Law Aboriginal Title (Oxford: Clarendon Press, 1989) at 110.
13. Ibid.
14. Ibid.
15. Ibid. at 112.
16. Ibid. at 112.
17. Ibid. at 112-113.
18. B. Bilson, "Aboriginal Hunting Rights: Some Issues Raised by the Case of R. v. Frank" (1976-77) 41 Sask. L. Rev. 101 at 102.
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20. Common Law Aboriginal Title, supra, note 12 at 131.
21. Common Law Aboriginal Title, supra, note 12 at 131.
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24. St. George Tucker, ed., Blackstone's Commentaries on the Laws of England, Vol.1 (South Hackensack, New Jersey: Rothman, 1969) at 108.
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26. Common Law Aboriginal Title, supra, note 12 at 118-119.
27. Common Law Aboriginal Title, supra, note 12 at 119-126.
28. Common Law Aboriginal Title, supra, note 12 at 126.
29. (1774), 1 Cowp. 204, 98 E.R. 1045 (K.B.) [hereinafter cited to E.R.].
30. Ibid. at 1047-1048.
31. Ibid.
32. Common Law Aboriginal Title, supra, note 12 at 113.
33. Blackstone's Commentaries on the Laws of England, supra, note 24 at 107.
34. Common Law Aboriginal Title, supra, note 12 at 193.
35. Common Law Aboriginal Title, supra, note 12 at 179.
36. Common Law Aboriginal Title, supra, note 12 at 180.
37. Common Law Aboriginal Title, supra, note 12 at 114.
38. Common Law Aboriginal Title, supra, note 12 at 181.
39. Common Law Aboriginal Title, supra, note 12 at 182.
40. D. Elliot, "Aboriginal Title" in B.W. Morse, ed., Aboriginal People and the Law: Indian, Metis and Inuit Rights in Canada (Ottawa: Carleton University Press, 1985) 48 at 59-60.
41. Ibid. at 60.
42. (1869), 17 R.J.R.Q. 266, 1 R.L.O.S. 253, 1 C.N.L.C. 151 (Q.Q.B.) [hereinafter Connolly cited to R.J.R.Q.].
43. Ibid. at 334.
44. Ibid. at 334.
45. Ancestral Lands, supra, note 23 at 3.
46. Ancestral Lands, supra, note 23 at 3.
47. Ancestral Lands, supra, note 23 at 3.
48. Ancestral Lands, supra, note 23 at 3.

49. Johnson and Graham's Lessee v. M'Intosh (1823), 8 Wheaton 543 (U.S.S.C.) [hereinafter Johnson v. M'Intosh].
50. Ancestral Lands, supra, note 23 at 17-38.
51. Ancestral Lands, supra, note 23 at 31.
52. Ancestral Lands, supra, note 23 at 31 quoting from Worcester v. Georgia (State of) (1832), 6 Peters 515 at 542, 31 U.S. Rep. 515 (U.S.S.C.) [hereinafter Worcester].
53. Ancestral Lands, supra, note 23 at 26 quoting from Worcester, supra, note 52 at 542-43.
54. Ancestral Lands, supra, note 23 at 31.
55. Ancestral Lands, supra, note 23 at 31-32.
56. Ancestral Lands, supra, note 23 at 33.
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64. Common Law Aboriginal Title, supra, note 12 at 195.
65. P.A. Cumming & N.H. Mickenberg Native Rights in Canada 2d ed. (Toronto: General Publishing, 1972 ) at 3.
66. Common law Aboriginal Title, supra, note 12 at 196.
67. Common Law Aboriginal Title, supra, note 12 at 108.
68. Common Law Aboriginal Title, supra, note 12 at 108 n.3.
69. Common Law Aboriginal Title, supra, note 12 at 109.
70. Common Law Aboriginal Title, supra, note 12 at 203-204.
71. Common Law Aboriginal Title, supra, note 12 at 205-208.
72. Common Law Aboriginal Title, supra, note 12 at 241-243.
73. Common Law Aboriginal Title, supra, note 12 at 216.
74. Common Law Aboriginal Title, supra, note 12 at ~~261~~.

75. Common Law Aboriginal Title, supra, note 12 at 216.
76. The Royal Proclamation October 7, 1763 by King George reprinted in R.S.C. 1970, app. No.1 [hereinafter Royal Proclamation, 1763].
77. St. Catherine's Milling and Lumber Co. v. R. (1889), 14 App. Cas. 46 at 53, 4 Cart. 107 (P.C.) [hereinafter St. Catherine's cited to App. Cas.].
78. Elliot, supra, note 40 at 58.
79. Common Law Aboriginal Title, supra, note 12 at 273.
80. See Common Law Aboriginal Title, supra, note 12 at 273-274 including 273 n.114 where McNeil discusses how land rights that an Indian group held under the French regime would presumably be continued by the terms of the Proclamation and how Indian land rights can exist outside of the geographical areas where the proclamation applies.
81. Common Law Aboriginal Title, supra, note 12 at 275, citing supra, note 42.
82. Common Law Aboriginal Title, supra, note 12 at 276.
83. Common Law Aboriginal Title, supra, note 12 at 276.
84. Common Law Aboriginal Title, supra, note 12 at 276.
85. Calder v. A.G.B.C., [1973] S.C.R. 313, 34 D.L.R. (3d) 145 [hereinafter Calder cited to the S.C.R.].
86. Ibid. at 328.
87. Common Law Aboriginal Title, supra, note 12 at 276.
88. Calder, supra, note 85 at 328-345.
89. Calder, supra, note 85 at 344.
90. Calder, supra, note 85 at 345-375.
91. Calder, supra, note 85 at 376-390 considering supra, note 49.
92. Calder, supra, note 85 at 383.
93. Calder, supra, note 85 at 390.
94. Common Law Aboriginal Title, supra, note 12 at 277-279.
95. Common Law Aboriginal Title, supra, note 12 at 277 considering the judgment of Hall, J. in Calder, supra, note 85 at 354-55, 368-75, 401-14.
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97. Common Law Aboriginal Title, supra, note 12 at 278-279.
98. Elliot, supra, note 40, at 74.

99. D. Elliot, supra, note 40 at 75.
100. D. Elliot, supra, note 40 at 75.
101. D. Elliot, supra, note 40 at 74-75.
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112. Ibid. at 260.
113. Sparrow v. R. (1986), 36 D.L.R. (2d) 246 at 261-264, [1987] 2 W.W.R. 577 (B.C.C.A.) [hereinafter Sparrow cited to D.L.R.] aff'd (1990), 46 B.C.L.R. (2d) 1 (S.C.C) [unpublished].
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115. Ibid. at 15.
116. Ibid. at 15-16.
117. Common Law Aboriginal Title, supra, note 12 at 282.
118. Common Law Aboriginal Title, supra, note 12 at 289.
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120. Common Law Aboriginal Title, supra, note 12 at 193.
121. B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982) 8 Queen's L. J. 232 at 268.
122. Ibid.
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128. Baker Lake, supra, note 103 at 557-558.
129. Baker Lake, supra, note 103 at 557-558.
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132. Baker Lake, supra, note 103 at 563.
133. Baker Lake, supra, note 103 at 563-576.
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138. Supra, note 85 at 204 quoting from R. v. White (1964), 50 D.L.R. (2d) 613 at 638, 52 W.W.R. 193 (B.C.C.A.), aff'd [1965] S.C.R. vi, 52 D.L.R. (2d) 481n.
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142. "Aboriginal Peoples and the Constitution", supra, at 414.
143. P. Cumming, "Native Rights and Law in an Age of Protest" (1973) 11 Alta. L. Rev. 238 at 240.
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153. "Native Rights and Law in an Age of Protest", supra, note 143 at 240.
154. Calder, supra, note 85 at 394.
155. R. v. Sikyea (1964), 43 D.L.R. (2d) 150, [1964] 2 C.C.C. 325 (N.W.T.C.A.), [hereinafter Sikyea cited to D.L.R.] aff'd [1964] S.C.R. 642, 50 D.L.R. (2d) 80 [hereinafter Sikyea cited to S.C.R.].
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166. R. v. Horseman (1990), 108 N.R. 1 (S.C.C.) [hereinafter Horseman].
167. Supra, note 4.
168. Ancestral Lands, supra, note 23 at 34-35.
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171. Sioui, supra, note 140 at 68.
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174. [1919] A.C. 210 at 233 (P.C.).
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180. See Treaty No. 3 reprinted in Treaty No.3 Between Her Majesty The Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions (Ottawa: Queen's Printer, 1957) at 6 [hereinafter Treaty No. 3]. Also see the similar provisions in Treaty No.6 reprinted in Copy of Treaty No.6 Between Her Majesty The Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions (Ottawa: Queen's Printer, 1957) at 4-5, Treaty No.7 reprinted in Copy of Treaty and Supplementary Treaty No.7, Made 22nd Sept. and 4th Dec. 1877 Between Her Majesty The Queen and the Blackfeet and Other Indian Tribes, at the Blackfoot Crossing of Bow River and Fort Macleod (Ottawa: Queen's Printer, 1966) at 5-6, Treaty No.8 reprinted in Treaty No.8 Made June 21 1899 and Adhesions, Reports, etc. (Ottawa: Queen's Printer, 1966) at 14, Treaty No.10 reprinted in Treaty No. 10 and Reports of Commissioners (Ottawa: Queen's Printer, 1957) at 10 and Treaty No.11 reprinted in Treaty No.11 (June 27 1921) and Adhesion (July 17 1921 with Reports, etc. (Ottawa: Queen's Printer, 1966) at 9.
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359. Gradual Enfranchisement Act, supra, note 347 s.4.
360. Supra, note 330.
361. The Indian Act, 1876, supra, note 330, determined who was entitled to "...settle, reside or hunt upon, occupy or use..." reserve land [see supra, ss.11-17]. "Reserve" land was defined as land "...set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered." [see supra, s.3(6)]. The result was that the Act determined who could exercise aboriginal rights in lands which, as reserve lands, may have been lands to which a band had aboriginal or treaty rights.
362. The Indian Act, 1876, supra, note 330 s.3(3).

- 363. The Indian Act, 1876, supra, note 330 s.3(3).
- 364. R v. Howson (1894), 1 Terr. L.R. 492, 1 N.W.T.R. 44 (S.C.) [hereinafter Howson cited to Terr. L.R.].
- 365. Ibid. at 492-493.
- 366. Ibid. at 493.
- 367. Ibid. at 494.
- 368. Ibid. at 494.
- 369. Native Rights in Canada, supra, note 65 at 200.
- 370. Supra, note 76.
- 371. S. Carter, Métis Aboriginal Title (College of Law, University of Saskatchewan, 1978) [unpublished] at 17.
- 372. Ibid.
- 373. Supra, note 146 preamble.
- 374. An Act Respecting the Appropriation of Certain Dominion Lands in Manitoba, S.C. 1874, c.20, s.1.
- 375. Supra, note 147 s.43.
- 376. Native Rights in Canada, supra, note 65 at 202.
- 377. Native Rights in Canada, supra, note 65 at 202.
- 378. Published in Canada Gazette Vol.XL, No.9 (1 September 1906) 477.
- 379. A. Morris, The Treaties of Canada with the Indians (Toronto: Coles, 1971) at 16.
- 380. Ibid.
- 381. Treaty No. 3, supra, note 180 at 9.
- 382. The Treaties of Canada with the Indians, supra, note 379 at 69.
- 383. Supra, note 247 at 130.
- 384. Supra, note 330 s.3(3)(e).
- 385. Supra, note 364 at 495.
- 386. The Indian Act, 1876, supra, note 330 s.3(3)(e)
- 387. The Indian Act, 1876, supra, note 330 s.3(3)(e).

388. See S.C. 1879, c.34, s.1, amending The Indian Act, 1876, supra, note 330 s.3(3)(e), to allow "half-breeds" already admitted to treaty to withdraw and receive scrip. See The Indian Act, 1880, S.C. 1880, c.28, s.14. See S.C. 1884, c.27, s.4, amending The Indian Act, 1880, supra, regarding the procedure to withdraw from treaty [hereinafter 1884 Amendment Act]. See The Indian Act, R.S.C. 1886, c.43, s.13 [hereinafter The Indian Act, 1886]. See S.C. 1888, c.22, s.1, amending The Indian Act, 1886, supra, regarding the consent necessary to withdraw from treaty and the inclusion of any children of the person in the withdrawal. See the Indian Act, R.S.C. 1906, c.81, s.16 [hereinafter Indian Act, 1906]. See S.C. 1914, c.35, ss.3-4, amending the Indian Act, 1906, supra, regarding the consent necessary to withdraw from treaty and the providing for the inclusion of the person's wife in any withdrawal. See the Indian Act, R.S.C. 1927, c.98, s.16 [hereinafter Indian Act, 1927].
389. See Indian Act, 1876, supra, note 330 s.3(3)(b), Indian Act, 1927, supra, note 388 s.14.
390. The Indian Act, S.C. 1951, c.29 [hereinafter The Indian Act, 1951].
391. See Ibid. s.18, which provides that "reserves" are for the use and benefit of "bands" and s.20 which concerns when an "Indian" is lawfully in possession of reserve land. "Reserve" is defined by s.2(1)(o) as "...a tract of land the legal title to which is vested in His Majesty, that has been set apart by His Majesty for the use and benefit of a band." Since a "reserve" could be land in which an aboriginal group had common law or treaty rights the Act could be seen as controlling access to certain aboriginal or treaty rights.
392. Ibid. s.2(1)(g).
393. Ibid. s.11(1)(a).
394. Management of Indian and Ordnance Lands Act, supra, note 345, s.15.
395. Gradual Enfranchisement Act, supra, note 347 s.4, s.6, An Act to Amend Certain Laws Respecting Indians, and to Extend Certain Laws Relating to Matters Connected with Indians to the Provinces of Manitoba and British Columbia, supra, note 354 s.8, amending Management of Indian and Ordnance Lands Act, supra, note 345 s.12 and Gradual Enfranchisement Act, supra, note 347 s.3.
396. The Indian Act, 1951, supra, note 390 s.11(1)(b).
397. The Indian Act, 1951, supra, note 390 s.11(c).
398. The Indian Act, 1951, supra, note 390 s.11(d).
399. The Indian Act, 1951, supra, note 390 s.11(e).
400. The Indian Act, 1951, supra, note 390 s.12.
401. The Indian Act, 1876, supra, note 330 s.3(3)(e).
402. The Indian Act, 1951, supra, note 390 s.12(1)(a)(i)-(ii).
403. The Indian Act, 1951, supra, note 390 s.12(1)(a)(iv).
404. The Indian Act, 1951, supra, note 390 s.12(1)(b).

405. S.C. 1958, c.19, s.1, amending Indian Act, R.S.C. 1952, c.149, s.12(1)(a)(i)-(ii) [hereinafter Indian Act, 1952].
406. See the Indian Act, 1952, supra, note 405 ss.11-12. See S.C. 1956, c.40, s.3-4 amending the Indian Act, 1952, supra, ss.11-12 by changing the procedure for registration of illegitimate children of women who were entitled to be registered and by allowing women excluded through marriage to a person not entitled to be registered to be included if they subsequently married a man who was entitled to be registered. See the Indian Act, R.S.C. 1970, c. 1-6, ss.11-12.
407. Supra, note 1 s.2(1), para. 8.
408. Indian Act, supra, note 1 s.6, as am. S.C. 1985, c.27.
409. Indian Act, supra, note 1 s.6(1)(a), as am. S.C. 1985, c.27.
410. Indian Act, supra, note 1 s.6(1)(b), as am. S.C. 1985, c.27.
411. Indian Act, supra, note 1 s.6(1)(c), as am. S.C. 1985, c.27.
412. Indian Act, supra, note 1 s.6(1)(c), as am. S.C. 1985, c.27.
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414. Indian Act, supra, note 1 s.6(1)(f), as am. S.C. 1985, c.27.
415. Indian Act, supra, note 1 s.6(2), as am. S.C. 1985, c.27.
416. Indian Act, supra, note 1 s.7, as am. S.C. 1985, c.27.
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418. Indian Act, supra, note 1 s.11(b), as am. S.C. 1985, c.27.
419. Indian Act, supra, note 1 s.11, as am. S.C. 1985, c.27.
420. Indian Act, supra, note 1 s.11(1)(c), as am. S.C. 1985, c.27.
421. Indian Act, supra, note 1 s.11(2)(b), as am. S.C. 1985, c.27.
422. Indian Act, supra, note 1 s. 11(1)(d), as am. S.C. 1985, c.27.
423. Supra, note 113 at 20.
424. Constitution Act, 1867 (U.K.), 30 & 31 Vict., c.3, s.91(24) (formerly British North America Act, 1867).
425. Constitution Act, supra, note 4.
426. Supra, note 247.
427. Chevrier, supra, note 247 at 130.
428. Chevrier, supra, note 247 at 130.
429. Constitution Act, supra, note 4.

430. Constitution Act, supra, note 4.
431. Supra, note 194.
432. Dumont, supra, note 194 at 202-210, Twaddle, J.A., Hubard, Philp and Lyon, JJ.A concurring.
433. Dumont, supra, note 194 at 197.
434. Supra, note 9 at 95.
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446. Supra, note 58 at 319.
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588. Supra, note 139.
589. Bear Island, supra, note 139 at 436.
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592. Bear Island, supra, note 139 at 410 noting the Quebec Act, 1774, R.S.C. 1970, App. II, No.2.
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598. See Calder, supra, note 85 and Baker Lake, supra, note 103.
599. Supra, note 1 s.4(1).
600. Supra, note 194.
601. Dumont, supra, note 194 at 209.
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603. Supra, note 139.
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606. Bear Island, supra, note 139 at 363.
607. Bear Island, supra, note 139 at 364.
608. See Indian Act, supra, note 1 s.18 where it is stated that "...reserves are held for the use and benefit of the respective bands for which they were set apart." Member of a band is defined by the Indian Act, supra s.2(1) as "...a person whose name appears on a Band List or who is entitled to have his name appear on a Band List". The Indian Act, supra, s.11 details the circumstances under which a person is "...entitled to have his name entered on a Band List...maintained in the Department..." From this it can be concluded that it would be illegal for a person who was not entitled to have his or her name on a band list to make use of or benefit from a reserve.
609. Bear Island, supra, note 139.
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612. Derriksan, supra; note 610 at 160.
613. Supra, note 103 at 568.
614. Kruger v. R., [1978] 1 S.C.R. 104, 75 D.L.R. (3d) 434 [hereinafter Kruger cited to S.C.R.].
615. Ibid. at 108.
616. Ibid. at 108.
617. Ibid. at 108.

- 618. Ibid. at 108.
- 619. Supra, note 76.
- 620. See R. v. White, [1965] S.C.R. vi, 52 D.L.R. 481n, aff'g (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193. See Simon, supra, note 179. See s.88 of the Indian Act, supra, note 1.
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- 624. Ibid. at 631.
- 625. See Calder, supra, note 85 at 328 & 390. See Baker Lake, supra, note 103 at 557. See Guerin v. R., supra, note 106 at 376 and 379. See Sparrow, supra, note 113. See Denny, supra, note 111 at 11.
- 626. Supra, note 155.
- 627. Sikyea, supra, note 155 at 646.
- 628. Sikyea, supra, note 155 at 154.
- 629. Sikyea, supra, note 155 at 158.
- 630. Sikyea, supra, note 155 at 158.
- 631. Sikyea, supra, note 155 at 158.
- 632. Sikyea, supra, note 155 at 159.
- 633. Supra, note 85 at 404.
- 634. (1969), 2 N.B.R. (2d) 14, 10 D.L.R. (3d) 189 (S.C.A.D.) [hereinafter cited to N.B.R.].
- 635. Ibid. at 23.
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- 637. Supra, note 179.
- 638. Supra, note 1 s.88.
- 639. Simon, supra, note 179 at 397.
- 640. Simon, supra, note 179 at 405.
- 641. Supra, note 49.
- 642. Supra, note 52.
- 643. Simon, supra, note 179 at 405.

- 644. Simon, supra, note 179 at 405.
- 645. Simon, supra, note 179 at 405.
- 646. Simon, supra, note 179 at 405-406.
- 647. Simon, supra, note 179 at 405-406.
- 648. Simon, supra, note 179 at 406.
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- 650. Supra, note 140.
- 651. Sioui, supra, note 140 at 63.
- 652. Sioui, supra, note 140 at 65.
- 653. Sioui, supra, note 140 at 65.
- 654. Sioui, supra, note 140 at 67.
- 655. Sioui, supra, note 140 at 68.
- 656. Sioui, supra, note 140 at 68 considering Indian Act, supra, note 1 s.88.
- 657. Supra, note 166 considering supra, note 3.
- 658. Horseman, supra, note 166 at 10.
- 659. Horseman, supra, note 166 at 11 citing the relevant provision with the words "for food" underlined.
- 660. Horseman, supra, note 166 at 11.
- 661. Horseman, supra, note 166 at 12-13 referring to R. v. Strongguill (1953), 8 W.W.R. 247 (Sask. C.A.), Cardinal v. A.G. of Alberta, [1974] S.C.R. 695, R. v. Frank, supra, note 242, R. v. Moosehunter, supra, note 243.
- 662. Cardinal v. A.G. of Alberta, supra, note 661, R. v. Frank, supra, note 242, R. v. Moosehunter, supra, note 243.
- 663. Horseman, supra, note 166 at 14-16.
- 664. Horseman, supra, note 166 at 15-16.
- 665. Horseman, supra, note 166 at 16.
- 666. Horseman, supra, note 166 at 17.
- 667. Horseman, supra, note 166 at 18.
- 668. Supra, note 247 at 130.

669. Chevrier, supra, note 247 at 128 n.2. The accused was hunting on land ceded by treaty. Lands ceded would not be "reserves" since this is defined by the Indian Act, supra, note 1 as "...a tract of land the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band".
670. Reference Re Term "Indians", [1939] S.C.R. 104, [1939] 2 D.L.R. 417.
671. A.G. Can. v. Lavell, [1977] 2 S.C.R. 897, 77 D.L.R. (3d) 481.
672. Supra, note 9 at 91.
673. B.W. Morse, Aboriginal Self-Government in Australia and Canada (Kingston, Ontario: Institute of Intergovernmental Relations, 1984) at 13.
674. Ibid. at 13.
675. N. Lyon, "Constitutional Issues In Native law" in B. W. Morse, ed., supra, note 78, 408 at 429.
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677. Supra, note 3.
678. R. v. Laprise, [1978] 6 W.W.R. 85 at 87, [1978] 4 C.N.L.R. 118 (Sask. C.A.) [hereinafter cited to W.W.R.].
679. Ibid. at 88.
680. Constitution Act, s.35 supra, note 4.
681. R. v. Agawa (1988), 65 O.R. (2d) 505 at 519, 53 D.L.R. (4th) 101 (C.A.) [hereinafter Agawa cited to O.R.].
682. Agawa, supra, note 681 at 520 quoting Pentney, supra, note 9 at iv.
683. Supra, note 9 at 183 quoting from D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 Can. Bar Rev. 315 at 331.
684. Agawa, supra, note 681 at 520 quoting from K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada." 4 (1982) Sup. Ct. L. Rev. 255 at 258.
685. Supra, note 684 at 258.
686. Agawa, supra, note 681 at 519 noting N. Zlotkin, Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference (Kingston, Ontario: Institute of Intergovernmental Relations, Queen's University, 1983) at 43.
687. Supra, note 9 at 186.
688. Pentney, supra, note 9 at 186 quoting McNeil, supra, note 684 at 258.
689. Supra, note 9 at 186.
690. Supra, note 9 at 187.

691. Pentney, supra, note 9 at 187.
692. Pentney, supra, note 9 at 187.
693. Agawa, supra, note 681 at 520 quoting from D. Sanders, "The Rights of the Aboriginal Peoples of Canada" in Beck & Bernier eds., Canada and the New Constitution, the Unfinished Agenda, Vol. 1 (Montreal: Institute for Research on Public Policy, 1983) 255 at 331.
694. Agawa, supra, note 681 at 520 quoting from "The Constitutional Guarantee of Aboriginal and Treaty Rights", supra, note 121 at 264.
695. Supra, note 9 at 88.
696. Supra, note 9 at 91.
697. Supra, note 9 at 91.
698. Pentney, supra, note 9 at 91.
699. K.M. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada (ss.25, 35 and 37)" in G.A. Beaudoin & W.S. Tarnopolsky, eds., The Canadian Charter of Rights and Freedoms - Commentary (Toronto: Carswell, 1982) 467 at 470.
700. Supra, note 684 at 261.
701. P.W. Hogg, Canada Act 1982 Annotated (Toronto: Carswell, 1982) at 82.
702. Sparrow, supra, note 113.
703. Sparrow, supra, note 54 at 113.
704. Sparrow, supra, note 113 at 265.
705. Sparrow, supra, note 113 at 265.
706. Sparrow, supra, note 113 at 265.
707. Sparrow, supra, note 113 at 266.
708. Sparrow, supra, note 113 at 276.
709. Sparrow, supra, note 113 at 277.
710. R. v. Arcand (1989), 95 A.R. 173, [1989] 3 W.W.R. 635 (Q.B.) [hereinafter Arcand cited to A.R.].
711. Ibid. at 175.
712. Ibid. at 175-176 noting "The Constitutional Rights of the Aboriginal Peoples of Canada", supra, note 684 at 257-258 and "The Constitutional Guarantee of Aboriginal and Treaty Rights", supra, note 121 at 252.
713. Ibid. at 176.
714. Ibid. at 177.

715. Ibid. at 177-178.
716. Ibid. at 178.
717. Ibid. at 179 noting R. v. Sikvea, supra, note 155.
718. Ibid. at 179.
719. R v. Flett, [1989] 6 W.W.R. 166 at 171, [1989] 4 C.N.L.R. 128 (Man.Q.B.).
720. Supra, note 681.
721. Agawa, supra, note 681 at 512.
722. R. v. Eninew (1984), 10 D.L.R. (4th) 137, 12 C.C.C. (3d) 365 (Sask. C.A.) [hereinafter Eninew cited to D.L.R.].
723. Agawa, supra, note 681 at 516 quoting from Eninew, supra, note 722 at 140. Blair, J.A. also noted that Eninew, supra, was followed in R. v. Steinhauer (1985), 63 A.R. 381, 15 C.R. 175 (Q.B.).
724. Agawa, supra, note 681 at 518-519 noting Sparrow, supra, note 113. Blair, J.A. also noted that Sparrow, supra, was followed in Flett, supra, note 719, R. v. Stevenson (27 January 1988) (Man. Prov. Ct.) [unreported] and Arcand, supra, note 710.
725. Agawa, supra, note 681 at 514-515 & 523 noting (1985), 9 O.A.C. 161, 20 C.C.C. (3d) 1 (C.A.) [hereinafter Hare cited to O.A.C.].
726. Agawa, supra, note 681 at 524.
727. Agawa, supra, note 681 at 524-526.
728. Denny, supra, note 111.
729. Denny, supra, note 111 at 260.
730. Denny, supra, note 111 at 260-261.
731. Denny, supra, note 111 at 261-262.
732. Denny, supra, note 111 at 262 noting Sparrow, supra, note 113.
733. Denny, supra, note 111 at 263.
734. Denny, supra, note 111 at 263-268.
735. Denny, supra, note 111 at 264-265.
736. Denny, supra, note 111 at 265 adopting the test from Sparrow, supra, note 113 at 276.
737. Supra, note 725.
738. Hare, supra, note 725 at 171.
739. Hare, supra, note 725 at 171.

740. Supra, note 314.
741. Googoo, supra, note 314 at 141.
742. Googoo, supra, note 314 at 142.
743. Googoo, supra, note 314 at 141 interpreting Simon, supra, note 244.
744. Googoo, supra, note 314 at 143.
745. R. v. Martin (1985), 65 N.B.R. (2d) 21 at 26-17, 167 A.P.R. 21 (Q.B.).
746. R. v. Nicholas (1988), 91 N.B.R. (2d) 248 at 254, 232 A.P.R. 248 (Q.B.).
747. R. v. Sutherland, [1984] 4 C.N.L.R. 133 (Ont. Prov. Ct.).
748. Ibid. at 138.
749. Ibid. at 134 relying on Sikyea, supra, note 155 and Derrikson, supra, note 610.
750. Sparrow, supra, note 113.
751. Sparrow, supra, note 113 at 12.
752. Sparrow, supra, note 113 at 12.
753. Sparrow, supra, note 113 at 13.
754. Sparrow, supra, note 113 at 13.
755. Sparrow, supra, note 113 at 13 noting that Blair, J.A., in Agawa, supra, note 681, found that academic commentary supported this position.
756. Sparrow, supra, note 113 at 17-18 considering Calder, supra, note 85, Baker Lake, supra, note 103 and Bear Island, supra, note 139.
757. Sparrow, supra, note 113 at 18 quoting from Baker Lake, supra, note 103 at 568.
758. Sparrow, supra, note 113 at 18 noting Bear Island, supra, note 139.
759. Sparrow, supra, note 113 at 18 noting Calder, supra, note 85 at 404.
760. Sparrow, supra, note 113 at 18.
761. Sparrow, supra, note 113 at 18.
762. see Sioui, supra, note 140 at 68 where it was found that the fact that a treaty right had not been used did not result in its extinguishment. This position can be contrasted with the opinion of Steele, J., in Bear Island, supra, note 139 at 436, that common law aboriginal rights could be extinguished simply by virtue of not being exercised. As well in Quapaw Tribe of Indians v. United States, supra, note 597 at 286, the court noted that in the absence of a treaty reservation aboriginal rights could be extinguished if the rights were not exercised.

- 763. Supra, note 244, supra, note 140.
- 764. Calder, supra, note 85 at 156 & 401-403.
- 765. Supra, note 78.
- 766. Supra, note 1 s.88, first enacted in The Indian Act, 1951, supra, note 390 s.87.
- 767. Supra, note 168.
- 768. Constitution Act, s.35, supra, note 4.
- 769. Supra, note 233.
- 770. Canada, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development Respecting Bill C-31, An Act to Amend the Indian Act, No. 16 at 16-6 (14 March 1985) [hereinafter Minutes Respecting Bill C-31].
- 771. Ibid. at 16-8.
- 772. Minutes Respecting Bill C-31, supra, note 648, No.17 at 17-5 (18 March 1985).
- 773. Ibid. at 17-7.
- 774. Minutes Respecting Bill C-31, supra, note 648, No.25 at 25-5 (26 March 1985).
- 775. Ibid. at 25-16.
- 776. Ibid. at 25-17.
- 777. Minutes Respecting Bill C-31, supra, note 648, No.13 at 13-33 ( 12 March 1985).
- 778. Ibid. at 13-38.
- 779. Ibid. at 13-38 to 13 -39.
- 780. Minutes Respecting Bill C-31, supra, note 648. No. 16 at 16-15 ( 14 March 1985).
- 781. Minutes Respecting Bill C-31, supra, note 648, No. 28 at 28-37 ( 28 March 1985).
- 782. Ibid. at 28-37.
- 783. Ibid. at 28-30 to 28-31.
- 784. Ibid. at 28-26.
- 785. Ibid. at 28-26.
- 786. Ibid. at 28-26.

787. Ibid. at 28-27.
788. Minutes Respecting Bill C-31, supra, note 648, No.18 at 18-10 (19 March 1985).
789. Minutes Respecting Bill C-31, supra, note 648, No.19 at 19-20 (19 March 1985).
790. Minutes Respecting Bill C-31, supra, note 648, No.18 at 18-11 (19 March 1985).
791. Minutes Respecting Bill C-31, supra, note 648, No.29 at 29-22 to 29-23 (28 March 1985).
792. Ibid. at 29-5 to 29-6.
793. Minutes Respecting Bill C-31, supra, note 648 at 18-22 ( 19 March 1985).
794. Ibid. at 18-7 to 18-8.
795. Minutes Respecting Bill C-31, supra, note 648, No.24 at 24-40 (26 March 1985).
796. Minutes Respecting Bill C-31, supra, note 648 No.18 at 18-8 (19 March 1985).
797. Ibid. at 18-47.
798. Ibid. at 18-47.
799. Canadian Charter of Rights and Freedoms, supra, note 6.
800. Canadian Charter of Rights and Freedoms, s.25, supra, note 6.
801. Supra, note 141 at 210.

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