INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps. Each original is also photographed in one exposure and is included in reduced form at the back of the book.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

UMI

A Bell & Howell Information Company
300 North Zeeb Road, Ann Arbor MI 48106-1346 USA
313/761-4700 800/521-0600

Université d'Ottawa · University of Ottawa

Transfer of Jurisdiction for Education: A Paradox in Regard to the Constitutional Entrenchment of Indian Rights to Education and the Existing Treaty No. 3 Rights to Education

© Dennis H. McPherson
530330

Thesis submitted to
the School of Graduate Studies and Research
in partial fulfilment of the requirements
for the LL.M. degrée in Law

University of Ottawa

April, 1997

Abstract

Education, to date, has failed Indian people. Shortfalls in education provided to Indian people, brought about by constitutionally sanctioned discrimination under s. 91(24) of the Constitution Act, 1867 and made operant by the Indian Act, 1876 and a boarding school system, is well documented in the report of the Royal Commission on Aboriginal People and elsewhere.

From this archaic beginning the government has recently taken the initiative to transfer jurisdiction for education to Treaty No. 3 area Indian bands. This initiative is examined in this thesis. The examination begins with cultural differences and progresses through a variety of legal instruments and case law pertaining to Indians within the education system and their rights to education. A position of entrenched aboriginal rights to education under s. 93 of the Constitution Act, 1867 is arrived at. It is argued that these constitutionally entrenched rights, dormant for almost 100 years, came alive in 1960 when the government granted the rights of citizenship to status Indian people.

To Mary

Table of Contents

Table of Cases

Table of Statutes

Thesis Statement

A new phenomena is occurring in the ongoing development of relationships between First Nations and the Government of Canada. In particular, as part of the policy of devolution of programs to First Nations from the Department of Indian Affairs and Northern Development over the past thirty years, a new phase in the process has begun; it is the "Transfer of Jurisdiction for Education".

The importance of First Nations control of Native education has been addressed by Dr. George E. Burns of the Ontario Institute for Studies in Education at the University of Toronto. Dr. Burns writes

> First Nations control of Native education is a plausible goal for the Native peoples. As plausible as this may be, the various ideals and aspirations underpinning First Nations control of Native education have been unsustainable within the context of tuition agreement negotiations and tuition agreement schooling resulting from such negotiations with provincial school boards. [This]... has been counterproductive to the self-determination of the First Nations people, as a distinct people. It is not inclusive of the Native Peoples. It is not an effective instrument of socialization for Native children. It does not provide First Nations children, youth, and adults with school based learning experiences required for exploring, examining, discussing, critiquing, understanding, or appreciating various concepts, ideas, methods, affects, skills, and language underpinning a world of possible alternative approaches for regaining control over their political, educational, economic, cultural, kinship, and spirituality systems. [It]... is devoid of experiences which prepare Native students for working proactively within existing systems to bring about needed changes in both the Constitution Act and in federal and provincial legislation. [It is]... devoid of relevant experience in the preparation of Native students to intervene in

> institutional, organizational and agency policies, structures, processes, and practices which hinder or constrain the Native peoples in their attempts to achieve their manifest destiny in Canadian society and throughout Turtle Island.[1]

Dr. Burns' paper clearly shows that the most crucial aspect lacking in the present education system for Aboriginal communities is relevant curriculum content. Dr. Burns paper also emphasizes the utter and complete failure on the part of both the federal and all provincial governments to address this crucial issue.

This thesis argues first that jurisdiction for the education of Indians, in the case of Treaty No. 3, is a right of treaty requiring the Crown under the terms of the treaty to provide schools when requested to do so. Second, this thesis argues that outside of the jurisdiction over Aboriginal people, conferred on Parliament under s. 91(24), the rights to education for Aboriginal people, and status Indians in particular, were entrenched in the Constitution Act, 1867 under s.93 at the time of Confederation. It is argued that in the case of status Indians these entrenched rights to education, dormant for almost 100 years, came alive in 1960 when government conferred the rights of citizenship upon status Indians. Therefore, in order

---

[1]. Burns, Dr. George E., "A Critical Pedagogy of Native Control of Native Education: Toward a Praxis of First Nation/Provincial boards Tuition Negotiations and Tuition Schooling", paper prepared for presentation at the Aboriginal Peoples' Conference, Lakehead University, Thunder Bay, October, 1996.

for a "Transfer of Jurisdiction for Education" to take place, it must be decided whether jurisdiction for education has always been in the hands of Aboriginal people under treaty, or else how the federal government will address a longstanding violation of the constitution.

This thesis argues that the contemplated transfer for education is in fact an attempt by government to save money. In so doing, government will not only avoid responsibility and political embarrassment but government will also be protected against violations of s.93 of the Constitution Act, 1867 and violations of Treaty No. 3. Under closer scrutiny of this transfer it becomes clear that Canada is looking to establish one central agency, controlled by Indians, to which Canada could send a cheque for the education of Indians. What happens to Indians after that in the field of education is up to the Indians!

Introduction

This thesis is written for two particular purposes. Firstly, this thesis is a submission in partial fulfilment of the requirements for the LL.M. degree in law. Secondly, this thesis is to be used as a teaching tool in assisting Treaty No. 3 First Nations communities in the negotiating process for the transfer of jurisdiction for education from the Department of Indian Affairs and Northern Development to the local bands in the Treaty No. 3 Tribal Area.

In order to do this, this thesis will show that Indians not only have rights to educate their children in the same fashion as all other citizens, in addition, Indians have always retained jurisdiction for the education of their children. The differences between Indians and all other citizens are that Indian rights to education have been constitutionally protected under s. 35 of the Constitution Act, 1982, as aboriginal rights, under s. 91(24) of the Constitution Act, 1867, as Indian Act rights, under s. 93 of the Constitution Act, 1867, and in the case of Indians in the Treaty No. 3 Tribal Area, jurisdiction for education was retained by Indian people as a condition of Treaty No. 3. Furthermore, this thesis will show some of the difficulties faced by Canada in resolving the "Indian problem" and how complicated giving Indians control of education can be given the federal/provincial jurisdictional nightmare in regard

to Indians and rights to property.

The first chapter of this thesis is entitled "Distinct Cultures: Aboriginal and European, A Contemporary Dilemma." It looks at the "cultural gap" between Aboriginal peoples and non-Aboriginal peoples in Canada, presented through the lens of a Lockian perspective of 'civility'. According to John Locke, in order to receive the benefit of civil society man must give up equality, liberty and executive power. The influence of John Locke, through his treatise "Of Civil Government", on British rule and descendent governments of British rule is quite evident. Remnants of his philosophy still linger as policy drivers in the development of modern bureaucratic strategies. When viewing the impact that Locke has had on the relationships between Aboriginal people and the government it is easy to see why the Royal Commission on Aboriginal Peoples would conclude "[t]he main policy direction, pursued for more than 150 years, first by colonial then by Canadian governments, has been wrong." In the view of the Royal Commission

> Successive governments have tried - sometimes intentionally, sometimes in ignorance - to absorb Aboriginal people into Canadian society, thus eliminating them as distinct peoples. Policies pursued over the decades have undermined - and almost erased - Aboriginal peoples cultures and identities.
>
> This is assimilation. It is a denial of the principles of peace, harmony and justice for which this country stands - and it has failed. Aboriginal peoples

remain proudly different.[2]

Chapter Two of this thesis, "Treaties and Statutes: Creation of the Legal Nightmare, or Do Indians Really Know Who They Are?", builds on this theme and looks at the legal relationships that have developed between Aboriginal people and government over time. In doing so, this chapter provides a cursory view of the attempts by the British and successive governments to absorb Aboriginal people into the Canadian state through use of various legal instruments. But instead of assimilating Aboriginal people, these attempts have left some Aboriginal people segregated as "Indians", mostly in a state of confusion and certainly in a state of dependency. This confusion is highlighted in the opening question of the chapter: do Indians really know who they are? Of equal importance is the converse question: do others know who Indians are?

Treaty No. 3, discussed in Chapter Three, was finalized on October 3, 1873 at the Northwest Angle of the Lake of the Woods. From the record of events we learn about the Aboriginal people of the day and their understanding of the world around them. It is their words on the practices of the day, along with their wishes for the future, which were written into Treaty No. 3. It is these words which form the basis for present day discussions.

---

[2]. People to People, Nation to Nation, Highlights from the Report of the Royal Commission on Aboriginal People, (Ottawa: Minister of Supply and Services, 1996), p. x.

Chapter Four, "Treaty No. 3: Transfer of Jurisdiction" for Education, explores the position presented by government supporting a transfer of jurisdiction for education in the Treaty No. 3 Tribal Area. Analysis of the government's position provides insight on the advantages of establishing an Indian controlled cheque deposit depot. This proposed streamlining of the education system would allow the federal government, in particular the Department of Indian Affairs and Northern Development, to divest itself of all responsibilities to Indians for all time in the field of education except for the settlement of a negotiated price based upon current costs to the Department.

Finally, Chapter Five looks at the paradox of the fiduciary obligation of the federal government to Indians versus the First Nations' treaty and constitutional rights in the field of education. This chapter asks whether meaningful discussions should focus on who has jurisdiction for education or on who has the responsibility to educate? This chapter shows that ultimately, a final decision to a point of law in answer to any question of entrenched jurisdiction or responsibility for the education of Indians within the constitutional framework of Canada rests squarely with the Supreme Court of Canada.

Chapter One

Distinct Cultures: Aboriginal and European, a Contemporary Dilemma.

The primary purpose of the Royal Commission on Aboriginal People was to examine how a "new partnership" could be brought about between Aboriginal and non-Aboriginal peoples within the constitutional framework of Canada. In review of the historical relationships between these two groups, Aboriginal and non-Aboriginal peoples, thus far, the record clearly indicates an important component of this "new partnership" will have to be an appreciative understanding of each others' culture. Each group must be respectful of how, as a people, although their respective ways of behaving are quite different from one another, yet their ways of behaving may be acceptable to each other.

In September, 1992, the Royal Commission on Aboriginal Peoples held an Aboriginal Researchers Workshop at Nakoda Lodge in Alberta. One of the discussion groups addressed the question: "What working definition of "culture" should the Royal Commission on Aboriginal People Research Program be guided by?"

The workshop adopted a talking circle format and discussion began slowly and awkwardly. Most participants prefaced their comments by qualifying them as inadequate, and then hesitantly

offered lists of values, concepts, traits, and activities to describe their meaning of culture. The atmosphere in the room was tense and uncomfortable. It was clear that there was a fundamental flaw in the question itself: the workshop group could not come up with a definition that satisfied anyone or, more importantly, that grasped the breadth, depth and complexity of what Aboriginal peoples wanted to say about their "cultures".

This type of exercise demonstrates the difficulty in defining what is meant by the term "culture". Few words possess so many different meanings for so many different people. Culture is in everything. Culture is nothing specific. Culture is a way of life. Culture is history and tradition. Culture is in the here and now. Culture is found in objects. Culture is found in the soul. Culture is inherited. Culture is learned. Culture is lived by everyone in every day life. Culture is created by specialists in hallowed halls of learning.

If a specific definition which gives meaning to the term "culture" is beyond our grasp then what are people talking about when they talk about culture? Aboriginal presenters to the Royal Commission on Aboriginal People in public hearings talked about culture as "what makes us who we are as Aboriginal people", "the core of our identity", "the heart of our people", "the hope for our future", "the strength of our past", "the pain of our loss", the "locus of our power". They talked about

culture as "spirituality", as "health", as "politics". In this vein, an Aboriginal view of culture begins to unfold. It is not captured as an abstract definition but offered as the lived experiences of real people. It is a seat of power that creates and sustains identities, both individual and communal. This view of culture as lived experience emerged as a constant theme throughout the process of public hearings conducted by the Royal Commission on Aboriginal People.

For the Aboriginal presenters to the Royal Commission on Aboriginal People, the meaning of culture comes to life through the telling of it. When Aboriginal people talk about "culture", they may speak <u>of</u> specific topics and offer analyses but perhaps more importantly, they speak <u>with</u> a passion, with a pain, with an anger, with a compassion, with a hope, with a resolve and with a commitment to themselves, to their community, to past generations and to future generations yet unborn.

The definitional and communicative task in understanding what is meant by culture is further complicated by the fact that there is not one single, agreed upon meaning of "culture" in the English or French languages either. Anthropologists, whose work it is to study "culture", themselves employ the term in a variety of ways. However, as Micheal Asch has pointed out, based on a review of anthropological texts: "certain aspects of its definition. . . are held by all", and these aspects are

reflected in dictionary definitions of "culture". Among these are:

- Culture is an attribute of all human societies.

- Culture includes rules and/or behaviour regarding virtually all aspects of human social life.

- Culture is passed from one generation to another by learning rather than by instinct.

- Virtually all human social behaviour is based on patterns that are cultural and learned rather than inherited genetically through biological processes.[3]

Definitions of culture can be context specific and functional. For example, various institutions have their own working definitions and usages of "culture". Likewise, political parties and governments at various levels define "culture" for the purposes of "cultural policy" to be developed in a particular fashion.

To the extent that in the English and French languages the word "culture" is understood as an abstract category, an object of study, a policy field, a bounded topic distinguishable from other topics that are "not culture", in other words, as an historically, politically and geographically specific phenomena, then discussion of culture will prove one of the most difficult areas of cross-cultural communication between Aboriginal and non-Aboriginal peoples.

---

[3]. Asch, Michael, "Errors in Delgamuukw: An Anthropological Perspective", in Cassidy, F., (ed), Aboriginal Title in British Columbia: Delgamuukw v. The Queen, (Vancouver, B.C.: Oolichan Books, 1991), pp. 224-225.

For the purposes of discussion, we might begin with two competing and compelling conceptions of culture: one "the webs of significance that man himself has spun and that give meaning to his relationship to the world", the other "the webs of mystification and legitimation spun by the few to capture the many".[4] Both conceptions are needed to understand the role of culture in Canadian Aboriginal, French, English and other cultures.

In the variety of Aboriginal cultural traditions in Canada today commonalities can be found even though these commonalities are most often expressed in varying words or are manifest in varying environmental or behaviourial contexts. This does not mean there is only one Aboriginal culture that is generally applicable to all of Canada's Aboriginal people or that Aboriginal culture can be understood as a form of "pan-Indianism" making all Aboriginal people in Canada behave in the same fashion. It is actually quite the opposite. The cultural traditions of the various Aboriginal peoples in Canada are very different one from the other. In order to understand and appreciate the various cultural traditions practised by the Aboriginal peoples in Canada today a brief look must be taken at the path these cultures have had to follow since coming into contact with the many influences presented to them by Europeans

---

[4]. These quotations are paraphrases of a debate between Clifford Geertz and Roger Keesing, anthropologists.

as European migration progressed across the lands of the Aboriginal peoples of Canada. Aboriginal people are often told by the Elders that we cannot know where we are today or where we are going unless we know where we have come from.

Earlier cultural traditions of Aboriginal people can be seen by looking at what the first meetings between Aboriginal people and Europeans were like. This can be done by reading the descriptions left to us by European people who experienced these interactions first hand.

For example, in his Letter to the Sovereigns (in 1492), which was promptly printed at Barcelona and widely distributed throughout Europe in a Latin translation, [Christopher] Columbus stresses the gentleness and generosity of the natives:

> They are so ingenuous and free with all they have, that no one would believe it who has not seen it; of anything that they possess, if it be asked of them, they never say no; on the contrary, they invite you to share it and show as much love as if their hearts went with it, and they are content with whatever trifle be given them, whether it be a thing of value or of petty worth. I forbade that they be given things so worthless of broken crockery and of green glass and lace-points, although when they could get them, they thought they had the best jewel in the world.[5]

Almost one hundred and fifty years after Columbus first encountered the native people of America, and about three thousand miles distance to the north from where Columbus first

---

[5]. Morison, Samuel Eliot, Admiral of the Ocean Sea, A Life of Christopher Columbus, (Boston, Mass.: Little, Brown and Company, 1942), p. 231.

made contact, Father Paul Le Jeune, of the Society of Jesus, writes in his reports back to the Provincial of the Society of Jesus, in the Province of France, of his experiences when he first encountered native people. The following is Father Paul Le Jeune's description of his experience on the 18th of June, 1632, at Tadoussac (now Quebec):

> It was here that I saw Savages for the first time. As soon as they saw our vessel they lighted fires, and two of them came on board in a little canoe very neatly made of bark. The next day a Sagamore, with ten or twelve Savages, came to see us. When I saw them enter our Captain's room, where I happened to be, it seemed to me that I was looking at those maskers who run about in France in Carnival time. There were some whose noses were painted blue, the eyes, eyebrows, and cheeks painted black, and the rest of the face red; and these colors are bright and shining like those of our masks; others had black, red and blue stripes drawn from the ears to the mouth.

Later, when reporting further to the Society on the Hurons he had encountered, Father Le Jeune writes:

> . . . . We see shining among them some rather noble moral virtues. You note, in the first place, a great love and union, which they are careful to cultivate by means of their marriages, of their presents, of their feasts, and of their frequent visits. On returning from their fishing, their hunting, and their trading, they exchange many gifts; even if they have thus obtained something unusually good, even if they have bought it, or if it has been given to them, they make a feast to the whole village with it. Their hospitality towards all sorts of strangers is remarkable; they present to them, in their feasts, the best of what they have prepared, and, as I have already said, I do not know if anything similar, in this regard, is to be found anywhere. They never close the door upon a Stranger, and, once having received him into their houses, they share with him the best they have; they never send him away, and when he goes away of his own accord, he repays them by a simple "thank you."[6]

---

[6]. Mealing, S.R., ed., The Jesuit Relations and Allied Documents, A Selection, (Ottawa, Ont.: Carleton University Press, 1990), pp. 17 & 45.

In their respective reports of their first encounters with the native people of America by both Christopher Columbus and Father Le Jeune, they speak about the similar values displayed in the cultural behaviours of the native people they came into contact with. Values very different from those of the European reporters. In their reports they describe natives who are caring, loving, and sharing amongst themselves and with others. Over two hundred years later, and about three thousand miles west of where Father Le Jeune had his first experiences, these same values are displayed again on the far distant prairies of what is now Canada.

> An early Ukrainian settler on the Canadian prairies told the story of working in the field clearing land by hand when an elderly Indian came by. 'He got off his horse and walked over to a clump of bush. He was talking in some kind of language but I couldn't understand anything. He waved to me to come over. I was kind of scared and didn't go at first. Finally I went and as I got nearer I saw that he was eating these berries. Slowly, he picked off a berry and dropped it into his mouth. He was showing me I should do the same. I finally did and tasted the juiciest berry I had ever had. I smiled and tried to thank the man. Food was not exactly plentiful and I was more than happy to learn about some edible berries. I will always remember that incident and wonder why today [1957] we always think of the Indian in such a bad way.'[7]

The "early Ukrainian settler" presents an interesting question for the time - why do "we always think of the Indian in such a bad way?" Perhaps it is because "we" do not understand the Indian's culture.

---

7. Purich, Donald, Our Land, (Toronto, Ont.,: James Lorimer & Company, 1986), p. 31.

As stated at the beginning, the task of exploring the apparent cultural differences between European and Aboriginal peoples has the appearance of being impossible. For example, it was recognized early in the nineteenth century by the Aboriginal interpreter and Ojibway historian, William Warren, that to gain an understanding of the Aboriginal

> It requires a most intimate acquaintance with them as a people, and individually with their old story tellers, also with their language, beliefs, and customs, to procure their real beliefs and to analyze the tales they seldom refuse to tell, and separate the Indian or original from those portions which they have borrowed or imbibed from the whites. Their innate courtesy and politeness often carry them so far that they seldom, if ever, refuse to tell a story when asked by a white man, respecting their ideas of the creation and the origin of mankind.
>
> These tales, though made up for the occasion by the Indian saga, are taken by his white hearers as their bona fide belief, and, as such, many have been made public, and accepted by the civilized world.[8]

There are some who believe that it is not possible to know what Aboriginal culture is because for them "Indian" culture is identified with or equivalent to the pre-dawn experiences of Aboriginal people in contact with Europeans. To some degree this concern is valid as illustrated by Warren's description of the Aboriginal world which he knew existed in prior times. In his description, he says

> There was consequently less theft and lying, more devotion to the Great Spirit, more obedience to their parents, and more chastity in man and women, than exist at the present day since their baneful intercourse with the white race. Even in the twenty years' experience of the writer, he has

---

[8]. Warren, William W., History of the Ojibway People, (St. Paul: Minnesota Historical Society Press, 1984), p. 58.

> vividly noticed these changes, spoken of by the old men, as rapidly taking place. In former times there was certainly more good-will, charity, and hospitality practised toward one another; and the widow and orphan never were allowed to live in want and poverty. The old traditionalists of the Ojibways, tell of many customs which have become nearly or altogether extinct.[9]

Given the experiences of William Warren and accepting that it is difficult to separate what is "Indian" or original from what has been borrowed from the Europeans, and that many Aboriginal customs have become nearly or altogether extinct, one could expect the task of exploring and understanding Aboriginal culture to be even more challenging in the modern era. But perhaps legitimate Aboriginal culture is not to be found in "Indian saga", whatever the origin, or even in Aboriginal customs, extinct or otherwise. Instead, it may perhaps be found in Aboriginal cultural practises which have withstood the test of time. Contrary to the conclusion Warren draws from his depiction of the Aboriginal world of the early 1800s, the values inherent in Aboriginal culture are still here today and understanding of these values can be achieved by extrapolating from the cultural interaction within Aboriginal society.

Earlier style policies of European governments governing the relations between Europeans and Aboriginal peoples have seriously affected the cultures of Aboriginal peoples. These policies are well described by the Reverend George M. Grant of

---

[9]. Warren, William W., supra, note 8, p. 101.

Halifax, Nova Scotia, who, as secretary to Sir Sanford Fleming, Engineer-in-Chief of the Dominion Government, travelled with Fleming's expedition across Canada in 1872 to survey a route to unite British Columbia with Eastern Canada by the Canadian Pacific Railway. In Grant's words

> As the mode of settling with the Indians, adopted in Manitoba, is based on the system that has been long tested in the older provinces, and that will probably be extended to the whole of the North-West, a few words on the general question may not be out of place. There are three ways of dealing with the less than half-million of red men still to be found on the continent of America, each of which has been tried on a smaller or larger scale. The first cannot be put more clearly or baldly that it was in a letter dated San Francisco, Sept. 1859, which went the round of the American press, and received very general approval. The writer, in the same spirit in which Roebuck condemned the British Government's shilly-shally policy towards the Maories, condemned the Federal Government for not having ordered a large military force to California when they got possession of it, "with orders to hunt and shoot down all the Indians from the Colorado to the Klamath." Of course the writer adds that such a method of dealing with the Indians would have been the cheapest, "and perhaps the most humane." With regard to this policy of "no nonsense" thorough-going as selfishness itself, it is enough to say that no Christian nation would now tolerate it for an instant.
>
> The second way is to insist that there is no Indian question. Assume that the Indian must submit to our ways of living and our laws because they are better than his; and that, as he has made no improvement in the land, and has no legal title-deeds, he can have no right to it that a civilized being is bound to recognize. Let the emigrants, as they pour into the country, shove the old lords of the soil back; hire them if they choose to work; punish them if they break the laws, and treat them as poor whites have to be treated. Leave the struggle between the two races entirely to the principle of natural selection, and let the weaker go to the wall. This course has been practically followed in many parts of America. It has led to frightful atrocities on both sides, in which the superior vigour of the civilized man has outmatched the native ferocity of the savage. The Indian in such competition for existence, soon realizing his comparative weakness, had recourse to the cunning that the inferior

naturally opposes to the strength of the superior. This irritated even the well-disposed white, who got along honestly, and believed that honesty was the best policy. It was no wonder that, after a few exchanges of punishment and vengeance, the conviction would become general that the presence of the Indian was inconsistent with public security; that he was a nuisance to be abated; and that it was not wise to scrutinize too closely, what was done by miners who had to look out for themselves, or by troops who had been called in to protect settlers. The Indians had no newspapers to tell how miners tried their rifles on an unoffending Indian at a distance, for the pleasure of seeing the poor wretch jump when the bullet struck him; or how, if a band had fine horses, a charge was trumped up against them, that the band might be broken up and the horses stolen; or how the innocent were indiscriminately slaughtered with the guilty; or how they were poisoned by traders with bad rum, and cheated till left without gun, horse or blanket. This policy of giving to the simple children of the forest and prairie, the blessings of unlimited free-trade, and bidding them look after their own interests, has not been a success. The frightful cruelties connected with it and the expense it has entailed, have forced many to question whether the fire and sword' plan would not have been 'cheaper and, perhaps, more humane.'

The third way, called, sometimes, the paternal, is to go down to the Indian level when dealing with them; go at least half-way down; explain that, whether they wish it or not, immigrants will come into the country, and that the Government is bound to seek the good of all races under its sway, and do justly by the white as well as by the red man; offer to make a treaty with them on the principles of allotting to them reserves of land that no one can invade, and that they themselves cannot alienate, giving them an annual sum per family in the shape of useful articles, establishing schools among them and encouraging missionary effort, and prohibiting the sale of intoxicating liquors to them. When thus approached, they are generally reasonable in their demands; and it is the testimony of all competent authorities that, when a treaty is solemnly made with them, that is, according to Indian ideas of solemnity, they keep it sacredly. They only break it when they believe that the other side has broken faith first. . . . It may be said that, do what we like, the Indians as a race, must eventually die out.[10]

---

[10]. Grant, The Reverend George M., Ocean to Ocean, Sandford Flemings's Expedition through Canada in 1872, (Toronto, Ont.: The Radisson Society of Canada Limited, 1925), pp. 108-110.

But "Indians as a race" in Canada have managed to resist "dying out"; they have resisted the policies of extermination, paternalism and assimilation of the "Indians as a race" instituted by European, British and post-confederation Canadian governments. In contemporary debates Aboriginal people demand recognition of their right to self-determination and their right to self-government - in essence Aboriginal people are boldly making the statement - "We are who we are and we refuse to change."

Aboriginal people have long questioned why they must change their culture and traditions in order to receive the benefits of the Canadian state in the same fashion as other citizens of the country. In order to understand the perceived need for Aboriginal people to change their cultural traditions, we again have to look backwards into the not too distant past.

Cultures, whether they are manifestations of Aboriginal ways of behaving or otherwise, do not evolve purely in a vacuum. In fact it is quite the opposite. Cultures, as ways of behaving, may derive from the experiences of people within a particular environment or they may be influenced and changed as the result of particular expressed thoughts of certain individuals. Replication of certain ways of behaving, derived from either experience or thought, become the customary practices of the community. It is the process of upholding

certain practices, which are different from their own, that has drastically affected Aboriginal cultures in Canada today.

> . . . See, that's why I say, we get carried away sometimes from The Book. I was in a Catholic school. I was brainwashed. I didn't know who I was. I started to drink and I had a lot of problems until I realized I had to go out there and learn from the spirit.[11]

Testimonies such as this speak to the influence of European thought in creating discontinuity in the cultural evolution of Aboriginal people in North America.

In the Canadian context, a prime influence in the cultural discontinuity of Aboriginal people was the British philosopher John Locke.

> Locke had extensive knowledge of and interest in European contact with aboriginal peoples. A large number of books in his library are accounts of European exploration, colonization and of aboriginal peoples, especially Amerindians and their ways. As secretary to Lord Shaftesbury, secretary of the Lord Proprietors of Carolina (1668-71), secretary to the Council of Trade and Plantations (1673-4), and member of the Board of Trade (1696-1700), Locke was one of the six or eight men who closely invigilated and helped to shape the old colonial system during the Restoration. He invested in the slave-trading Royal Africa Company (1671) and the Company of Merchant Adventurers to trade with the Bahamas (1672), and he was a Landgrave of the proprietary government of Carolina.[12]

Locke's theory of political society and property was widely disseminated in the eighteenth century and was woven into theories of progress, development, and statehood throughout

---

[11]. Alex Skead, Elder, Kenora, Ontario.

[12]. Tulley, James, An Approach to Political Philosophy: Locke in Contexts, (Cambridge: Cambridge University Press, 1993), p. 141.

subsequent intellectual history. Debates - between jurists and humanists, free traders and merchantilists, and capitalists and socialists - over the great questions of political and economic justice have tended [] to work within [Locke's] basic conceptual framework.[13] It is debates carried on within this conceptual framework which have influenced the Aboriginal world of North America. For instance, Locke's idea "to assert the basic human rights 'of life, liberty and the pursuit of happiness'" were adopted by Thomas Jefferson in the American Declaration of Independence of July 4, 1776.[14]

Locke starts his argument on civility by claiming that the reason why man should join civil society is to protect his property. For Locke the right to rule and to have dominion over others began with God:

> God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience. The earth, and all that is therein, is given to men for the support and comfort of their being. And though all the fruits it naturally produces, and beasts it feeds, belong to mankind in common, as they are produced by the spontaneous hand of nature; and nobody has originally a private dominion, exclusive of the rest of mankind, in any of them, as they are thus in their natural state: yet being given for the use of men, there must of necessity be a means to appropriate them some way or other before they can be of any use, or at all

---

[13]. Tulley, James, supra, note 12, p. 139.

[14]. Dukes, Paul, A History of Europe 1648-1948: The Arrival, The Rise, The Fall, (London: McMillan Publishers Ltd., 1985), p. 122.

beneficial to any particular man.[15]

This starting position is vastly different from the starting position which is held by Aboriginal people. By way of contrast, Aboriginal people do not recognize a separation between themselves and the spirits and instead speak of their oneness with creation and their spiritual ties to Mother Earth.

Although Locke mentions God and speaks of creation, he is not talking about spirituality or religion. He is presenting an argument to substantiate his belief in property, progress, development and the need for civil society. In his view, God has given everything on earth to all men equally. God has also given all men the means to better themselves and their individual circumstances. Therefore, there must be a way for each man to use all things in the world in order to better his own position.

Locke extends his argument to include reasons why men should labour and improve upon the world in which they find themselves. In doing so he sets out man's reasons for being in the world, what is required of man and what it is that man is to gain for his efforts. Locke says:

> God, when he gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him. God and his reason commanded

---

[15]. Yolton, John W., The Locke Reader, (New York: Cambridge University Press, 1977), p. 289.

> him to subdue the earth, i.e. improve it for the benefit of life, and therein lay out something upon it that was his own, his labour. . . And thus, . . . supposing the world given, as it was, to the children of men in common, we see how labour could make men distinct titles to several parcels of it, for their private uses; wherein there could be no doubt of right, no room for quarrel.[16]

According to Locke, creation exists initially as the "state of nature" where all things given to man by God are held in common. But this "state of nature", where no man has more privilege or right above the other, is a useless world unless man can find some "means to appropriate" the things found in the "state of nature" and in so doing, remove parts of those things held in common in the "state of nature" for his own particular purpose. Through this appropriation man improves upon the "state of nature" by contributing his labour. In separating the part from the "state of nature" man makes the part more than it once was by contributing his labour and it is the contribution of his labour which justifies the part as his private property.

At first glance this argument for the right of man to own property outside of himself certainly seems plausible and none would argue with Locke's statement that,

> He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his.[17]

---

[16]. Yolton, John W., supra, note 15, p. 291.

[17]. Yolton, John W., supra, note 15, p. 290.

But the question that must also be asked is where does man get the right to remove a part from the "state of nature" which by contribution of his labour becomes his private property? Again, John Locke must turn to the workings of God, who has constructed man in his likeness, and in so doing, has conferred on man the two duties of "self-preservation" and the "preservation of mankind". Thus, following the words of Locke, we can see that man, because of his inherent nature, is forced to behave in the manner in which he does. Man's culture is determined by God.

Locke's argument is certainly not free of contradiction. For example, if man were to behave in a manner which respects the "state of nature" in which all things are held in common by "compact" or "common consent", man's respect would lead to his own demise and not only his existence, but the existence of the entire world would be useless. In the dilemma presented to man by holding a duty to "self-preservation" and a duty to the "preservation of mankind", man has little choice. If, for example, man were to respect the state of nature and its inherent law that all things are held in common by "compact", as described by Locke, then man, in providing for his "self-preservation", would also have to consider on an equal footing to his "self-preservation" the "preservation of mankind". This would require man to seek the consent of all mankind in order to take a single part from the state of nature for his own nourishment. It is easy to see in present

experience that to fulfil the Lockian requirement of consensus of mankind is an impossible task. For Locke

> [t]he earth, and all that is therein, is given to men for the support and comfort of their being.[18]

In following the reasoning of Locke's argument it must be concluded that man has no option but to behave in the manner in which he does; for it is only in the securing of property by which man (a) prevents the world from being useless, (b) provides for his own "self-preservation", and (c) follows the will of God. It is these values which are apparent as the value base upon which Canadian society has been constructed.

But the argument doesn't end here. Accepting Locke's premises that: (1) man does have an obligatory duty of "self-preservation", stipulated by God, and (2) it is this obligatory duty of "self-preservation" which in turn drives man to separate parts from the "state of nature", then, according to Locke, (3) it follows that in the separation of the part from the "state of nature", it is man's labour which gives him the right to determine the part as his private property. If this argument is true and is the law of nature, then the question of how much man can separate from the "state of nature" to call his own property must be asked. John Locke would answer this question simply by saying that

---

[18]. Yolton, John W., supra, note 15, p. 289.

> The same law of nature, that does by this means give us property, does also bound that property too. "God has given us all things richly," 1 Tim. vi. 17, is the voice of reason confirmed by inspiration. But how far has he given it us? To enjoy.[19]

Therefore, through the law of nature, man has a right to separate parts from the "state of nature" to the extent that man can "enjoy" and what man separates though his labour, and improves upon by his labour from that which existed in the "state of nature" and that which he now calls his private property, is not allowed to be wasted. For it is in the making of waste that man begins to infringe upon the right of others to fulfil their inherent duty of "self-preservation".

Locke's argument establishing man's right to property stems from the will of God and included in man's right to property is the right, by the application of man's labour, to improve upon the "state of nature".

Contrary to the belief of Europeans, that the "state of nature" can and should be improved through the labour of man, "Aboriginals view the natural world as perfect."[20] To an Aboriginal person, the natural world as it exists in the "state of nature" does not need improvement and instead, for the Aboriginal person, man is not meant to "subdue the earth", but

---

[19]. Yolton, John W., supra, note 15, p. 291.

[20]. Highwater, Jamake, Ritual of the Wind, (New York: The Viking Press, 1977), p. 36.

to live life in harmony with it. Therefore, Aboriginal people do not see themselves as entities separate from the "state of nature"; instead they see themselves as part and parcel of the same package.

Comparatively speaking, these two worldviews do differ greatly and result in different cultural practices. Aboriginals do not see the world as something outside of themselves. Rather Aboriginals project their view to the extent that things apart from themselves take on their own personalities and ultimately, in this projection, all things eventually become as one. This leads to a profoundly different sense of relationship to earth as is expressed in the following quotation, Aboriginals do not seek to remove or appropriate a part of the "state of Nature" in order to preserve themselves or one another.

> The capitalistic principle is, simply stated, private property and all that accrues to private property. We native people did not have the concept of private property in our lexicon, and the principle of private property was pretty much in conflict with our value system. For example, you wouldn't see 'No Hunting,' 'No Fishing,' or 'No Trespassing' signs in our territories. If you said to the people, 'The Ontario government owns all the air in Ontario, and if you want some, you are going to have to go and see the Bureau of Air,' we would all laugh. Well, it made the Indians laugh too when Europeans said, 'We are going to own the land.' How could anyone own the land?[21]

Let us get away from the question of a right to property and instead look at the purpose of property. This change in

---

[21]. Lyons, Oren, "Spirituality, Equality, and Natural Law", Pathways to Self-Determination: Canadian Indians and The Canadian State, (Toronto: University of Toronto Press, 1984), p. 9.

perspective, addressing the purpose of property rather than the right to property, allows for an escape from two unresolvable problems which are central to the two world views and their cultural practices under discussion. These problems are on the one hand, whether or not God in fact does exist and all power is derived from God, while on the other, whether or not the natural world is perfect or needs to be improved upon.

Again, when looking at the Lockian view the purpose of property is to accumulate. This purpose is made very clear, for as John Locke says,

> We see in commons, which remain so by compact, that it is the taking any part of what is common, and removing it out of the state nature leaves it in, which begins the property; without which the common is of no use.[22]

Following the logical reasoning of this argument it becomes clear that the paramount motivating force behind Locke's approach to property is the principle of "accumulation". Rights to property are gained by the labour of one man. This labour is applied to (a) improve upon those things he found in the "state of nature", and (b) to "subdue" the earth to benefit his life. It is in this way that he makes his wealth. This "accumulated" wealth can be passed on to his sons as their rights to property. To do otherwise, such as leave things as they are found in the "state of nature" and held in "common" by all mankind, according to Locke, makes all things in the "state of nature" useless to

---

[22]. Yolton, John W., supra, note 15, p. 285.

anybody. For Aboriginal culture, on the other hand, the purpose of property is not to accumulate but to establish relationships with others. As Mauss writes:

> Property for the Aboriginal is a gift to be given and as such it is the same time property and a possession, a pledge and a loan, an object sold and an object bought, a deposit, a mandate, a trust; for it is given only on condition that it will be used on behalf of, or transmitted to, a third person, the remote partner.[23]

Here again, when looking at the purpose of "property", we come across a discrepancy between the values central to the two cultures. If a European's motivation for having "property" is based upon the principle of "accumulation" for the purpose of enjoyment, and the motivation for the Aboriginal having property is based upon the principle of "distribution" for the purpose of giving "property" away, then with certainty, cultural practices or ways of behaving stemming from these values will not be the same.

The Aboriginal view of "property" is explored in the works of Marcel Mauss who, in his studies, focused on the social function of the "potlatch" practised by aboriginal cultures. In translation "potlatch" means "to nourish" or "to consume".[24] As a ceremony, Mauss found the "potlatch" was a time when the clan, group or tribe gathered together to distribute "property". In

---

[23]. Mauss, Marcel, The Gift, (London, England:Cohen and West Ltd., 1966), p.23.

[24]. Ibid, p. 4.

this forum value was placed on the act of giving the gift, not on the gift given. He found that in this transaction, respect accrued to the person performing the act of giving.

By European standards, a cultural system based on gift giving may seem simplistic and incomprehensible. But upon analysis, such a system is found to be driven by complex principles and mechanisms binding upon the participants. Mauss says

> Many ideas and principles are to be noted in systems of this type. The most important of these spiritual mechanisms is clearly the one which obliges us to make a return gift for a gift received.[25]

The implications stemming from the perception of property in each of these two cultural perspectives certainly has strong impacts on the organizational structure of their respective societies. As Locke says

> The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property.[26]

In Locke's view, man enters civil society to protect his property against the wrongful actions of "degenerates" who hide amongst his fellowmen. "Degenerates", for Locke, are those persons in mankind who are not willing to apply their labour to improve upon the things found in the "state of nature" and

---

[25]. Ibid, p. 5.

[26]. Yolton, John W., supra, note 15, p. 285.

instead prefer to take the rightful property of others. By comparison, social interaction or society for Aboriginal people provides them with the opportunity to exercise their privilege to give property away to others, rather than providing them with a protective measure ensuring against the loss of property to "degenerates".

If one is to accept Locke's argument that the "great and chief end" why man enters "civil society" is to protect his "property"; one needs to ask what it is that man must give up in order to enter "civil society" and receive this protection. For it seems improbable that man would be allowed to receive a benefit from "civil society" without first providing something else in exchange for the benefit which is to be received.

Looking at the words used by John Locke, it appears that man is quite capable of protecting his "property" while in the "state of nature", for he says

> Man being born, . . . , with a title to perfect freedom, and uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or number of men in the world, hath by nature a power, not only to preserve his property, that is, his life, liberty, and estate, against the injuries and attempts of other men; but to judge of and punish the breaches of that law in others, as he is persuaded the offence deserves, even with death itself, in crimes where the heinousness of the fact, in his opinion, requires it.[27]

It appears that in Locke's view, instilled in every man's

---

[27]. Ibid, p. 243.

"title" to "perfect freedom and uncontrolled enjoyment" is an innate "power" to protect this "title." He says that "in the state of nature every one has the executive power of the law of nature. . . ."[28] Accordingly, in this view, executive power is the power of man to judge the wrongful actions of his fellowman. But, as Locke says,

> . . . it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends: and, on the other side, that ill-nature, passion, and revenge will carry them too far in punishing others; and that therefore nothing but confusion and disorder will follow: and that therefore God hath certainly appointed government to restrain the partiality and violence of men.[29]

And so Locke concludes from this that even

> . . . though men, when they enter into society, give up the equality, liberty, and executive power they had in the state of nature, into the hands of the society, to be so far disposed of by the legislative as the good of the society shall require; yet it being only with an intention in every one the better to preserve himself, his liberty and property (for no rational creature can be supposed to change his condition with an intention to be worse); the power of the society, or legislative constituted by them, can never be supposed to extend farther than the common good; but is obliged to secure every one's property, by providing against those three defects above-mentioned, that made the state of nature so unsafe and uneasy.[30]

Locke's own words confirm the suspicion; man must first give up something in order to receive the benefit derived from joining "civil society." Man must give up his "equality, liberty, and executive power" in order to receive the benefit of

---

[28]. Ibid, p. 282.

[29]. Ibid, p. 282.

[30]. Ibid, p. 287.

protection of his "property". If giving up "equality, liberty and executive power" is the trade-off, then one must ask, what does this mean for man?

In further analysis of Locke's view we find that "God hath certainly appointed government to restrain the partiality and violence of men." If this view is correct then it conversely follows that God never at any time meant for man to enjoy the power or right of self-government which Locke admits man was born with and held in the "state of nature." It would then be fair to say that, according to Locke's view, God meant only for man to join "civil society" and receive protection for "accumulated property." In the process God meant for man to give up his individual rights to "equality, liberty and executive power." In other words, God meant for man to give up his autonomy.

This point represents the fundamental difference in the perspectives and cultural practises of a European influenced by a Lockian philosophy and that of Aboriginals. In ordinary contexts the word "autonomy" means the power and right to be self-governing. A nation is autonomous if it has political independence and therefore enjoys the right and power of self-government.[31] Self-governing in turn means the power and

---

[31]. Black's Law Dictionary. . . . The negation of a state of political influence from without or from foreign powers. Green v. Obergfell, 73 App. D.C. 298, 121 F. 2d 46, 57.

right of man to direct and control his own destiny.

Within Aboriginal society, each member exercises their individual right to give to the group, each member exercises their "equality, liberty, and executive power", each member exercises their autonomy. Each member exercises their right to be self-governing. But one must be careful not to confuse the concept of the individual with the concept of autonomy or vice-versa, nor should one even consider the two terms "individual" and "autonomy" to be in any way synonymous terms within these two systems. In the words of Jamake Highwater

> . . . there is nothing in Indian tribal life that even begins to approximate the Western concept of individuality and free will. It follows that Indian societies do not provide a place for individuals and therefore do not provide the regulations that govern the limits of individuality. Whites are extremely devoted to limiting the rights of individuals and preventing anarchy, which is greatly feared by individualized cultures. By contrast the Indian, generally speaking, does not recognize the individual and therefore has not formulated strict regulations for his control. The thrust of the ego in the individual is so slight a threat to Indian tribes that common gossip and ceremonialized ridicule is generally sufficient to keep people living harmoniously.[32]

When looking at cultural practices as ways of behaving that are influenced by Locke, we find that man must remove himself from the "state of nature." With the contribution of his labour man improves on the things found in the "state of nature" and subdues the earth within the context of a rightful duty conferred upon him by God. His actions directed towards the

---

[32]. Highwater, Jamake, supra, note 20, p. 51.

accumulation of "property" are sanctioned by government.

On the other hand, when looking at cultural practices as ways of behaving demonstrated by Aboriginal people, we find they view themselves as a part of nature and see as their duty their manner of working in harmony within their environment. In their view of the world they see themselves as having an integral part to play and their part is only dependent upon their interactions within their environment. Actions are achieved as a result of their own self-determination.

In the European view the world is a hierarchal structure to be controlled; the prime authority for which rests in the hands of God. Everything is separate and may be used for the "self-preservation" of man and for the "preservation of all of mankind". For the Aboriginal person, the world is a dynamic everchanging process within a natural structure. For the Aboriginal, inclusion in the world is for purpose, not for right, and the struggles are with use, not with ownership or control.

The wisdom of the Aboriginal view is in its' acceptance of the world as it is, found in what John Locke describes as the "state of nature". For example, as an Aboriginal Elder has said

To us the apple is a very complicated and mysterious thing.

But for the apple tree it is easy.[33]

Like all cultures, Aboriginal cultures have their distinctive features and as a result, they are not all the same. The culture of one group varies to some degree from that of another in either their stories, their myths, their legends, their narratives or their ceremonies. But in all of these cultures, similar aspects, irrespective of their geographical location, come clear. The oneness, the integration and the spiritual ties to Mother Earth within these cultures is apparent. It is these spiritual ties Aboriginal people have with the land and with all of creation that binds them to their culture. For Aboriginal people there is no distinctive "other"; therefore, there is no reality in a concept of "a separation from others." Aboriginal people hold a strong belief and understanding that the "I" as a being in both physical and spiritual realms means having a presence in everything and everything having a presence is in me.

Retention of this belief, that I am in everything, and everything is in me, is of primary importance in Aboriginal cultures for it is this strong belief that opens the cultural door to all creation. This belief allows Aboriginal people to communicate with all creation whether physical or spiritual. In this sense, for Aboriginal people, their culture is their

---

[33]. Ibid, p. 29.

religion, and the world is their church.

In order for Aboriginal people to retain this gift rules must be followed which are deeply imbedded within their languages, as are the cultural rules of any other group. The major difference is that Aboriginal languages are not object oriented as are the European languages. For an Aboriginal person there is no "other" out there somewhere, therefore, there is no "thing" out there somewhere either. Instead, Aboriginal languages are process oriented and as such these languages speak to what we do, rather than what we are. The impact on Aboriginal culture of this inability to define a distinctive "other" or a "thing" out there somewhere prevents persons from using language as a tool to pass judgement on others. As a result, Aboriginal culture is non-judgemental - there is no ability in Aboriginal languages to discriminate on purely moral grounds. There is no ability within the language to see "other" or "thing" as either good or bad. In a similar fashion, Aboriginal languages prevent the use of gender differentiation. In using an Aboriginal language to refer to persons as either man or woman they are described by what they do, rather than by what they are. It is not unlikely to hear gender clash in conversations with Aboriginal people unfamiliar with the use of English. For example, an Aboriginal person may say "That man she . . . ."

Paramount to all the Aboriginal cultural values is the value of respect. Respect must be given and shown to all that is in creation. Without respect for all that is in creation, Aboriginal people are unable to live their lives to the fullest and will be unable to fulfil their purpose for being.[34]

In the next chapter we will begin to see how a Lockian influence of "civility" has in fact confused the Aboriginal world in the formalization of the concept of "Indian" as a legal fiction.

---

[34]. Morey, S.M., and O.L. Gilliam, Respect for Life, (New York: Waldorf Press, 1972), p. 11. It has already been said . . . it's the Indian who is going to understand the white man before the white man understands the Indian. This is so because the Indian can think with his whole heart, whereas the white man thinks with his head, and thinking only with the head really doesn't help to understand the other person.

Chapter Two

Treaties and Statutes: Creation of the Legal Nightmare, or Do Indians Really Know Who They Are?

What is an Indian? Whether or not the use of the predicate "Indian" to describe the aboriginal peoples of North America was due to Christopher Columbus thinking that he had reached India in 1492 when he had in fact reached America, there can be no doubt that the term "Indian" was at that time, and sometimes still is, an outside view predicate. It is certainly a description brought to North America from the outside.

According to the Oxford English Dictionary (O E D), the first recorded English use of the word "Indian" to mean American aboriginal occurred in 1553 with the publication of a Treatise of the New India. The O E D indicates that America was frequently called "New India," and that by 1613 the name "India" was applied indiscriminately to "all far-distant countries." The term "Indian" not only denoted the aboriginal inhabitants of America (1553), but also the Philippines (1697), and of Australia and New Zealand (1769). In fact, the term "Indian" became a very general one designating aboriginals, those in far away lands, those other than Europeans, other than civilized.

Unfortunately, a Columbus discovery story is not consistent with the fact that for almost half a century after Columbus' landing the original people in the "New World" were not treated as the Europeans had been treating the people of India. The "Indians" in the new world were not trading partners; they were either slaughtered or enslaved.[35] Throughout this period, legal arguments were presented in Europe in an attempt to substantiate the rights of the newly discovered people in the Americas.[36] It was not until 1535 that a Papal Bull was issued recognizing the original people in the Americas as men, as persons.

> We, who, though unworthy, exercise on earth the power of our Lord and seek with all our might to bring those sheep of His flock who are outside into the fold committed to our charge, consider, however, that the Indians are truly men and that they are not only capable of understanding the catholic faith, but, according to our information, they desire exceedingly to receive it. Desiring to provide

---

[35]. Morse, Bradford W., Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada, (Ottawa: Carleton University Press, 1985), p. 20.

[36]. Franciscus De Victoria, The First Relectio on the Indians Lately Discovered, in Ernest Nys ed., De Indis Et De Jure Belli Relectiones, Classics of International Law, #7, Bk.1, (Washington, D.C.: Carnegie Institution of Washington, D.C., 1917).

De Victoria's first question about the Indians focused on whether the Indians "were true owners in both private and public law before the arrival of the Spaniards" while also asking "whether there were among them any who were the true princes and overlords of others." In presenting arguments to answer these questions, De Victoria compares Indians to slaves for "the aborigines in question are preëminently such, for they really seem little different from brute animals and are utterly incapable of governing, and it is unquestionably better for them to be ruled by others than to rule themselves." On the other hand, De Victoria finds that "the fact that the people in question were in peaceable possession of their goods, both publicly and privately" before the arrival of the Spaniards and therefore, "unless the contrary is shown, they must be treated as owners and not be disturbed in their possession unless cause be shown."

> ample remedy for these evils, We define and declare by these letters, or by any translation thereof assigned by any notary public and sealed with the seal of any ecclesiastical dignitary, to which the same credit shall be given as to the originals, that, notwithstanding whatever may have been or may be said to the contrary, the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ, and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they in any way be enslaved; should the contrary happen it shall be null and of no effect.[37]

The church, of course, faced a dilemma. If the Indians of America were not humans, were mere animals, then it made no sense to convert them to Christianity. On the other hand, to recognize them as humans is to admit that they have certain human rights and cannot be indiscriminately exploited. Yet exploited they were.[38] Over the past five-hundred years various strategies have been used by Europeans to separate the original inhabitants of the Americas from the land on which they lived. Some were exterminated, some were used as slaves, some were relocated to other parts of the country, but very few were

---

[37]. Morse, Bradford W., supra, note 35, p. 44.

[38]. Lewis, Norman, The Missionaries: God against the Indians, (London: Martin Secker & Warburg Ltd, 1988), p. 221. "12 December, 1987: Survival International mounted a vigil at the European Headquarters of the New Tribes Mission, at Matlock Bath, to commemorate the death of five Indians, killed one year ago in a Mission manhunt. A letter of protest signed by Bishop Trevor Huddleston, Lord Avebury, Chairman of the Parliamentary Human Rights Group, Rabbi Richard Rosen and Survival International President, Robin Hanbury-Tenison, called on the Mission to halt its controversial activities and respect tribal religion and culture."

"civilized."[39]

In his book, Indian Givers: How the Indians of the Americas Transformed the World, Jack Weatherford argues convincingly that it was gold which motivated Columbus' voyages:

> Every step in the discovery and conquest of America was spurred on by a greed that overshadowed the quest for silver, spices, or souls. Columbus gave evidence of this in his diaries with the oft-repeated statement "I was anxious to learn whether they had gold". . . In the end, Columbus brought back only a small amount of gold, but it

---

[39]. To reiterate on Grant, George M., Ocean to Ocean, (Toronto: The Radisson Society of Canada Limited, 1925), (original edition published 1873). The Reverend George M. Grant of Halifax, N.S., was secretary to Sir Sandford Fleming's expedition across Canada in 1872.

In Grant's estimate, less than half a million "red men" were still to be found in the America of his time and that there were three ways of dealing with them. In the first instance Grant felt that one policy was properly illustrated in a letter, dated San Francisco, September, 1859, which had received wide media attention. The writer of the letter condemned the Federal Government "for not having ordered a large military force to California when they got possession of it, 'with orders to hunt and shoot down all Indians from Colorado to the Klamath.' [T]he writer adds that such a method of dealing with the Indians would have been the cheapest, 'and perhaps the most humane'." Grant felt the second way was "to insist there is no Indian question." This notion was founded on the assumption that Indians must submit to European laws and ways of living because they are better than that of the Indian. This assumption was based on the grounds that the Indians had not improved the land, they had no legal title-deeds and therefore they had no right to the land that needed to be recognized by civilized men. The third way mentioned by Grant is the paternalistic model which had been "the policy of old Canadas and of the Dominion." In this model, Indians were seen as children needing care. Indians could be allotted reserve lands which they could not alienate and they could be given useful articles to be used in their daily lives. At the same time, Indians could be schooled in European ways and converted through missionary efforts.

was enough to whet the appetite of all Europe.[40]

Not only was Christopher Columbus' main interest in finding gold, but as Weatherford shows, others who followed him in this economic pursuit continued in even more barbaric ways.

> When Francisco Pizarro invaded the Andes and seized the Inca emperor Atahualpa in 1532, he demanded a room filled with gold as ransom, and the Incas paid it. Bearers from all over the empire gathered jewellery and stripped their temples to fill the room. The gold of Atahualpa formed the greatest ransom ever paid. Even though the Incas complied, Pizarro nevertheless killed Atahualpa and continued to loot the country in search of even more gold.[41]

Weatherford's main theory is that the industrial revolution in Europe was a consequence of the wealth provided by the Americas. For example, the introduction of the potato to European agriculture meant more people could be sustained per acre of land farmed without milling. This in turn left idle the mills formerly used for milling wheat. Cotton from America was transported to the European mills. Information provided by Weatherford and others well documents the tangible items that Europeans took from the Americas on their return voyages to Europe, but what has not been very well documented to date is: what was left behind?

---

[40]. Weatherford, Jack, Indian Givers: How the Indians of the Americas Transformed the World, (New York: Crown Publisher, Inc., 1988), p. 6.

[41]. Ibid, p. 8.

The Royal Proclamation

Following the resolution of war between the French and the English in Europe, which culminated in the Treaty of Paris of 1763, vast territories in the Americas formerly controlled by the French were turned over to British rule. These areas extended from present day Florida in the south to points as far north as Cape Breton Island. On October 7, 1763, King George III of Britain, by His Royal Prerogative, issued the Royal Proclamation with respect to the governing of what was then British North America.

The Royal Proclamation clarified and codified the policy and law of the British Crown with respect to aboriginal title in the North American colonies.[42] It has two main features. In the first place the proclamation sets out four new British colonies with their own governmental and judicial systems. These are the Government of Quebec, the Government of East Florida, the Government of West Florida and the Government of Grenada. Secondly, the Royal Proclamation recognizes aboriginal title to a large portion of North America. It says

> . . . We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the

---

[42]. Woodward, Jack, Native Law, (Toronto: Carswell, 1989), p. 198.

> Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.[43]

In this second element, the Royal Proclamation has three distinct functions. (A) Even to the present time, it is a foundation document in the debate over many Indian legal issues. This is so because, as set out in the Royal Proclamation, all lands west of the Canadian shield belonged to the Indians. Indians held aboriginal title to these lands through their use and occupation.[44] In this respect the Royal Proclamation says

> 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.[45]

(B) The Royal Proclamation recognizes that in all British possessions in North America, the Indian people own their lands

---

[43]. The Royal Proclamation, October 7, 1763.

[44]. Calder et al. v. Attorney General of British Columbia, [1973] SCR 313 (SCC); aff'g. (on technical grounds) (1971), 13 DLR (3d) 64 (BCCA); which aff'd (1969), 8 DLR (3d) 59 (BCSC).

[45]. The Royal Proclamation.

until they are ceded.[46] It says quite distinctly that the colonial governments of the time were not to possess or use land outside of their own territories. Lands outside the territories of colonial charters were reserved for the use and occupation of Indians.

> And, We do further declare it to be Our Royal Will and Pleasure for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.[47]

(C) The Royal Proclamation set out a procedure for ceding land and extinguishing aboriginal title through the treaty process. In this process, the proclamation forbade any private sale of land from Indians to non-Indians.[48] This meant that Indians could only sell land to the Crown at a public meeting called for that purpose. Indians must consent to the sale.

---

[46]. Woodward, Jack, supra, note 42, p. 198.

[47]. The Royal Proclamation.

[48]. Johnson and Graham's Lessee v. McIntosh (1823), 8 Wheaton 543; U.S. Rep. 240 (U.S.S.C.). In this case Johnson obtained title for land from settlers who had purchased it from Indians. The state of Virginia was ceded to the United States and the U.S. Federal government patented the land in question to McIntosh. The court decision was based on the principle of discovery and the right to possession came with discovery. In the view of the court, indigenous peoples' power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who make it, thus, the original sale by the Indians was void.

Apparently it was not an expectation of the time for Indians to sell land to other Indians. Moneys for land transfer were held then, and still are, by the Crown in trust for the use and benefit of the Indians. Because of this procedure of transfer of aboriginal title of land to the Crown, a special fiduciary relationship was established between Indians and the Crown.[49] In this respect the Royal Proclamation says

> And, whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only by Us, in our Name, at some public Meeting or Assembly of the said

---

[49]. Guerin v. R., [1984] 2 S.C.R. 335. The Counsel of the Musqueam Indian Reserve No. 2 in Vancouver surrendered 162 acres of the reserve to the Government of Canada for lease to a golf club in 1967. Proposed terms of the lease were discussed among the Band Council, government officials and the golf club before the surrender, but the terms of the lease were not settled between the government and the golf club until after the land was surrendered. The settled terms of the lease were much less favourable to the Band than those the Band understood would be obtained. The Band finally obtained a copy of the terms of the lease after great difficulty and brought an action for damages for breach of trust against the Government in failing to obtain reasonable terms in the lease.

Dickson, J., as he then was, with Beetz, Chouinard and Lamer, JJ., as they then were, concurring, held that because the land was inalienable except upon surrender to the Crown, which had a broad discretion in dealing with surrendered land, the surrender created an equitable or fiduciary duty in the Crown to deal with the land for the benefit of the Indians.

> Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, confirmable to such Directions and Instructions as We or they shall think proper to give for that Purpose;[50]

Summary of the Royal Proclamation

First of all, the Royal Proclamation followed from the Treaty of Paris as a result of the transfer of control of the French colonies in America to British authority. In this vein, four new colonial governments were established by the British and given authority to make their own laws based on the British model of government and judicial system. Through the Proclamation, the concept of common law real property was applied in the colonies and the colonial governments in America were given the power to collect tax on these properties. As a means to encourage settlement of these new lands, the Proclamation outlines a scheme of rewarding persons who had participated in the recent war between England and France. Parcels of land were provided upon application to persons who had served in the British army or navy, and these parcels were to be owned tax free for the first ten years. As far as Indians are concerned, the Royal Proclamation recognized use and possession of the unceded territories as their hunting grounds.

---

[50]. The Royal Proclamation.

Dominion over these unceded territories was held by the Crown while the territory was held in reserve for the use of the Indians. No private subject was allowed to buy these lands from the Indians. Indians could only sell to the Crown. In the event that anyone had purchased land from Indians in the past, the Proclamation voided any such purchase. Any future purchases of land by the Crown could only be done in public. Finally, all British subjects were encouraged to trade with the Indians upon obtaining a license to do so. A license to trade with the Indians was obtained free of charge but the license could be revoked should the person holding the license refuse to obey set regulations. Lastly, the Royal Proclamation directed that all "outlaws" residing in Indian territory be apprehended.

Treaties

As previously stated, the Royal Proclamation recognized that in all British possessions in North America, the Indian people own their lands until they are ceded. It is from this basis that the Indian reserves, in most cases, were created as a function of the treaty making process between the British Crown and the Aboriginal peoples. This is not to say that a treaty was in any manner a unique document pertaining only to Indian and European relations or that only Europeans made use of a treaty making process. Indians were also knowledgable of the treaty process. In fact, the Five Nations Iroquois Confederacy

demonstrated this knowledge when a number of Iroquois groupings joined together, under a form of treaty, for their mutual benefit.

It is also necessary to point out the fact that the first treaties made between Indians and Europeans were not treaties dealing with land in particular. Instead, they were treaties made to ensure enduring relationships over time and therefore resembled and are commonly referred to as treaties of friendship. An example of such a treaty is the Treaty of 1779.

The Treaty of 1779, between the Mickmack[51] Indians and Michael Franklin, the King's Superintendent of Indian Affairs in Nova Scotia was designed to restore "Peace and good Order in that Neighbourhood".[52] As recorded in the treaty, in the months of May and July previous to its signing, a number of Indians, operating at the instigation of British deviants, attacked the stores of a John Cort and several other residents at Mirimichy. In reprisal for this attack, Captain Augustus Hervey, Commander of the British sloop Niper, captured sixteen Indians on the Mirimichy River. One of the Indians was killed, three of them were released and twelve were transported to Quebec for trial. The Treaty was meant to restore the good relations that were disrupted by these events.

---

[51]. As spelled in the Treaty of 1779.

[52]. Treaty of 1779.

In the Treaty six specific expectations were laid out by the British. First, the British expected the Indians to "behave Quietly and Peaceably towards all his Majesty King George's good Subjects treating them upon every occasion in an honest friendly and Brotherly manner."[53] Secondly, the British expected the Indians "at the Hazard of [their] Lives [to] defend and Protect to the utmost of [their] power, the Traders and Inhabitants and their Merchandize and Effects who are or may be settled on the Rivers Bays and Sea Coasts within the forementioned Districts against all the Enemys of His Majesty King George whether French, Rebells or Indians."[54] Thirdly, the Indians were expected "whenever it shall be required [to] apprehend and deliver into the Hands of the said Mr. Franklin, to be dealt with according to his Deserts, any Indian or other person who shall attempt to Disturb the Peace and Tranquillity of the said District."[55] The British then restricted the Indians from speaking to "John Allen, or any other Rebell or Enemy to King George."[56] They also required the Indians to convince other Mickmack tribes in the province to enter into similar treaties and to "Renew, Ratify and Confirm all former Treatys, entered into by [the Indians] . . . . with the late Governor Lawrence, and others His Majesty King George's Governors, who have

---

53. Treaty of 1779.

54. Treaty of 1779.

55. Treaty of 1779.

56. Treaty of 1779.

succeeded him in the Command of this Province."[57]

In exchange for meeting the six requirements of the treaty, the Indians were allowed to remain in the districts mentioned in the treaty (where they were at the time) "Quiet and Free from any molestation of any of His Majesty's Troops or other his good Subjects in their Hunting and Fishing."[58] Secondly, immediate measures were to be taken by the British "to cause Traders to supply them [the Indians] with Ammunition, clothing and other necessary stores in exchange for their Furrs and other Commoditys."[59]

The real beneficiaries of the Treaty of 1779 have become very obvious. It was in the best interests of the British that the Indians behave; protect settlers; search out and deliver anyone, Indian or otherwise who would disturb the peace; talk other Indians into similar treaties; and renew and ratify former treaties. It was also in the best interests of the British that the Indians remain where they were. In exchange for the British providing them with ammunition, clothing and other necessary stores, items for which the Indians had little need, the Indians provided furs for the British to sell in the European market.[60]

---

57. Treaty of 1779.

58. Treaty of 1779.

59. Treaty of 1779.

60. Treaty of 1779.

Over time, the purpose of treaties began to change. By the mid-eighteen hundreds, signing a treaty with the Indians involved the expansion of settlements and the ceding of Indian land. Treaties no longer merely reacted to disruptions which might "Disturb the Peace and Tranquillity of the said District." The Robinson Superior Treaty is an example of this new interest by the colonial government.

On September 7, 1850, at Sault Ste. Marie, Ontario, the Robinson Superior Treaty was signed between William Benjamin Robinson, on behalf of Her Majesty the Queen, and "the Ojibwa Indians inhabiting the Northern Shore of Lake Superior, in the said Province of Canada, from Batchewananng Bay to Pigeon River, at the western extremity of said lake, and inland throughout the extent to the height of land which separates the territory covered by the charter of the Honourable the Hudson's Bay Company from the said tract, and also the islands in the said lake within the boundaries of the British possessions therein."[61]

Again, this treaty provided for consideration to be given to the Indians. However, unlike the consideration given to the Mickmack in the Treaty of 1779, which allowed the Mickmack to remain where they had always been and provided them with "ammunition, clothing and other necessary stores," the Robinson

---

[61]. The Robinson Superior Treaty.

Superior Treaty gave to the Ojibeway "the sum of two thousand pounds of good and lawful money of Upper Canada, to them in hand paid, and for the further perpetual annuity of five hundred pounds, the same to be paid and delivered to the said Chiefs and their tribes at a convenient season of each summer, not later than the first day of August at the Honourable the Hudson's Bay Company's Posts of Michipicoton and Fort William."[62]

At first glance, it appears that the Ojibeway were party to a good bargain. They received the sum of two thousand pounds and a perpetual annuity of five hundred pounds, now commonly referred to as "Treaty Money". However, the question must be asked, what did they give up in exchange for this treaty money. As spelled out in the treaty, the Ojibeway "freely, fully and voluntarily surrender, cede, grant and convey unto Her Majesty, Her heirs and successors forever, all their right, title and interest in the whole of the territory"[63] mentioned in the treaty. In other words, the Ojibeway extinguished their aboriginal title and relieved the Crown of any encumbrance on the underlying title to the land. In particular, the Ojibeway exchanged "the Northern Shore of Lake Superior, in the said Province of Canada, from Batchewananng Bay to Pigeon River, at the western extremity of said lake, and inland throughout the extent to the height of land which separates the territory

---

62. The Robinson Superior Treaty.

63. The Robinson Superior Treaty.

covered by the charter of the Honourable the Hudson's Bay Company from the said tract, and also the islands in the said lake within the boundaries of the British possessions therein",[64] an area of over six hundred kilometres in length, stretching approximately from present day Sault Ste. Marie, Ontario, in the east, past Thunder Bay, Ontario, in the west. They gave up all aboriginal rights to this land, except for the rights to hunt and fish on unoccupied Crown land, for a one time only payment of two thousand pounds and an annual payment of five hundred pounds per year to be shared equally on a per capita basis by all the Indians covered by the treaty area.

The areas of land the Ojibeway did not cede in the treaty were the reserved lands which were, under the treaty, held in common "for the purposes of residence and cultivation."[65] The treaty closely followed the wording of the Royal Proclamation of 1763 in stating that "should the said Chiefs and their respective tribes at any time desire to dispose of any mineral or other valuable productions upon the said reservations, the same will be at their request sold by order of the Superintendent-General of the Indian Department for the time being, for their sole use and benefit, and to the best advantage."[66]

---

64. The Robinson Superior Treaty.

65. The Robinson Superior Treaty.

66. The Robinson Superior Treaty.

Again, similar to the Treaty of 1779, the Robinson Superior Treaty sets out specific requirements. But in this case the Robinson Superior Treaty promises, first, that Her Majesty and the Government of the Province of Canada will make the payments of two thousand pounds and five hundred pounds annually; secondly, that the Ojibeway will have the privilege of hunting and fishing over the land except in areas that are leased or sold to individuals or companies; thirdly, that the Ojibeway will not sell any portion of their reserve without the consent of the Superintendent-General of Indian Affairs; fourthly, that the Indians would not hinder or prevent persons from exploring for minerals in any part of the ceded territory; and lastly, that if the government had previously sold any mining locations or other property on areas designated to be Indian reserve lands, then the money from the sale would be paid to the Indians.

The Robinson Superior Treaty also includes a clause which allows for an increase in the annuity should the ceded territory produce an amount of wealth which will allow the government to do so. But the annuity cannot be increased to more than one pound of provincial currency in any one year unless Her Majesty agrees to more. The annuity can also be decreased in proportion to the number of Indians alive at a given time who are entitled to receive the benefits of the treaty.

Confederation

In 1867 several of the British colonial governments in what is now Canada united to form "One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom."[67]

Federal jurisdictional responsibilities were enumerated under s. 91 of The Constitution Act, 1867, while provincial jurisdictional responsibilities were enumerated under s. 92. Responsibility for the provision of education was delegated to the provinces under s. 93. Indians and Lands Reserved for Indians were relegated to a position of federal responsibility under section 91, subsection 24.

An interesting question must be asked about the positioning of "Indians, and Lands reserved for Indians" as a part of federal responsibility under s. 91. Why were Indians assigned to this position? Regretfully, it can never be known with any degree of certainty because finding explicit information to clarify the rationale used for determining the inclusion of Indians as a federal responsibility in the Constitution is similar to finding answers to the question of why an amending clause was omitted from the British North America Act of 1867.

---

[67]. Preamble, The Constitution Act, 1867.

> . . . We do not have definite information as to the reason for this omission, because on this point (as on many others) there is no record of any discussion at the conferences in Charlottetown, Quebec and London which proceeded the passage of the Act (emphasis added).[68]

It is assumed that in the case of the Constitution the rationale is that the British Parliament would do the amending.

If a question about why Indians were made a federal responsibility cannot be answered because there is no record of certain discussions, perhaps an answer can be found by looking at section 91 itself. Section 91 delineates the priorities of the new Dominion as seen by the Fathers of Confederation. It appears that to them there were two major areas of responsibility which they felt must be retained in the hands of the federal government; economic enrichment and national concerns. After they had made all of their plans to look after economic enrichment such as borrowing money on the public credit, looking after their property and the public debt, raising money through taxation, regulating trade and commerce, operating a postal service, and a militia, military and naval defense, paying civil servants, installing beacons, buoys and lighthouse for navigation and shipping, maintaining maritime hospitals, regulating fisheries and ferries, and providing currency and coinage for the banking system, they then looked towards their national concerns.

---

[68]. Hogg, Peter W., Constitutional Law Of Canada, (Toronto: The Carswell Company Limited, 1985), 2nd. ed., p. 3.

> One of the gravest of the questions presented for solution by the Dominion of Canada, when the enormous region of country formerly know as the North-West Territories and Rupert's Land, was entrusted by the Empire of Great Britain and Ireland to her rule, was the securing the alliance of the Indian tribes, and maintaining friendly relations with them.[69]

Friendly relations were necessary because the Indians, who were the true owners of the land,[70] were an impediment to the further expansion of agricultural settlement in the west. An impediment overcome with the work of Alexander Morris in the treaty making process. He says that by 1880

> . . . no less than seven treaties [had] been concluded with the Indian tribes, so that there now remain[ed] no Indian nations in the North-West, inside the fertile belt, who [had] not been dealt with.[71]

The Indian Act

As previously stated, section 91(24) is the legislative power which gives the Parliament of Canada the legislative authority to make laws for "Indians, and Lands reserved for Indians"[72] the result of which is the Indian Act. This Act was first introduced into the House of Commons on Thursday, March 2, 1876, by the Honourable Mr. Laird. He said;

---

[69]. Morris, The Honourable Alexander, The Treaties of Canada with The Indians of Manitoba and the north-West Territories, (Toronto: Willing and Williamson, 1880), p. 2.

[70]. Morse, supra, note 35, p. 273.

[71]. Morris, supra, note 69, p. 10.

[72]. Originally s. 91(29), The Constitution Act, 1867.

> The principal object of this Bill is to consolidate the several laws relating to Indians now on the statute books of the Dominion and the old Provinces of Upper and Lower Canada.[73]

At that time there were three different statutes to be consolidated, along with portions of several other Acts. Laird asserted that it "is advisable to have these consolidated in the interests of the Indian population throughout the Dominion . . . ."[74]

An example of the colonial legislation referred to by Laird is the act of 1857 entitled An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians. As stated in the title, the object of this legislation was "to encourage the progress of Civilization among the Indian tribes . . . . and the gradual removal of all legal distinctions between them and Her Majesty's other Canadian Subjects, and to facilitate the acquisition of property and of the rights accompanying it, by such Individual Members of the said Tribes as shall be found to desire such encouragement and to have deserved it."[75] According to this Act, only male Indians were deemed capable of being civilized.

---

[73]. Debates of the House of Commons of the Dominion of Canada, (Ottawa: Maclean, Roger & Co., 1876), p. 342.

[74]. Ibid, p. 342.

[75]. Preamble, An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians, 20 Vict., CAP. XXVI.

Males became civilized when the Missionary to a tribe convinced the Governor in writing that a particular male Indian over the age of 21 years was able to speak, read and write English or French, had received elementary education, was of good moral character and was free of debt.[76] With the approval of the Governor the male Indian would be enfranchised. Upon enfranchisement he was to receive the civil liberties and legal rights enjoyed by other Canadian subjects of Her Majesty. For example, one of the rights the enfranchised male Indian could receive was the right to allotment of a parcel of land. The parcel of land allotted was carved out of the land previously reserved for the Indians. Enfranchisement was also applicable to female Indians except they did not receive the same benefit of civil liberties and legal rights as would males upon enfranchisement. This difference occurred not because the female Indians were Indians, but because they were women. By law, civil liberties and legal rights are benefits only enjoyable by persons. It must be kept in mind that women in Canada were not "qualified persons" for the purposes of section 24 of the Constitution Act, 1867 until well into the twentieth century.[77]

---

[76]. An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians, 20 Vict., CAP. XXVI, s. III.

[77]. Reference re: British North America Act 1867 (UK) Section 24 [1928] S.C.R. 276. Women are not "qualified persons" within the meaning of section 24 of the B.N.A. Act, 1867, and therefore are not eligible for appointment by the Governor General to the Senate of Canada.

In 1868 the government created The Department of the Secretary of State of Canada. In the same piece of legislation which provided for the organisation of the department, the Secretary of State was also named the Superintendent General of Indian affairs and was given responsibility for control and management of the lands and property of the Indians in Canada.[78] Section 15 of this Act delineated who were to be considered as Indians entitled to "hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada."[79]

> Firstly. All persons of Indian blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and their descendants;
>
> Secondly. All persons residing among such Indians, whose parents were or are, either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immovable property, and the descendants of all such persons; And
>
> Thirdly. All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.

In introducing his Bill in the House of Commons in 1876, the Honourable Mr. Laird stated that the goal to be achieved through application of the enfranchisement section of the Indian Act was that "in every respect an Indian would cease to be an

---

78. An Act for the organisation of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordinance Lands, 31 Vict., Cap. XLII.

79. Ibid, s. 15.

Indian according the acceptation of the laws of Canada relating to Indians."[80] He felt that this new Act would give the Indians "some motive to be industrious and sober, and educate their children."[81] Other members of the House felt that the Act could only be applied to the most advanced Indians. Therefore, as Mr. Fleming recognized, the House needed to make a choice in the policy to be followed in dealing with Indians; "either the Indians could be preserved as earlier legislation had attempted to do, or Indians could be absorbed and amalgamated into mainstream society."[82] But both of these policies presented difficult choices if they were to be applied to Indians who were semi-civilized.[83] In the final analysis, Indians must either be treated as minors or as white men. If they should be found intelligent enough to exercise the rights of white men they could become enfranchised.[84]

The Indian Act resulting from discussions in the House of Commons in 1876 has remained fairly consistent in most respects ever since that time. Some major revisions were made in 1951. For example, the government introduced what became known as the double mother clause, a section of the Act which was meant to

---

80. Debates of the House of Commons, supra, note 73, p. 343.

81. Ibid, p. 751.

82. Ibid, p. 753.

83. Ibid, p. 932.

84. Ibid, p. 933.

hasten the enfranchisement process. In effect this clause changed the line of Indian descent from blood line to male parent. Consequently, children whose mother and grandmother had gained status through marriage were automatically eligible to be enfranchised when they reached the age of twenty-one.

The latest major revisions to the Indian Act occurred in 1985 when the enfranchisement process was repealed from the Act. As of April 17, 1985, persons can only become Indians under the Indian Act if they are entitled to be registered.[85] Access to registration is prescribed under section 6 of the Act. Basic requirements are that either both,[86] or at least one,[87] of the biological parents of a person are or were registered or entitled to be registered, or "that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act."[88] Ironically, the language used in the Indian Act in 1985 is comparable in its wording and meaning to the language used in the House of Commons in 1876. At that time there was a concern that "they had the power to make an Indian a white man, [but] they had no power to make him an Indian again."[89] Today, the

---

85. The Indian Act, R.S., 1985, c. I-5, s. 5.

86. Ibid, s. 6(1)(f).

87. Ibid, s. 6(2).

88. Ibid, s. 6(1)(b).

89. Debates of the House of Commons, supra, note 73, p. 750.

reverse is true. As a result of changes to the Indian Act in 1985, the Department of Indian Affairs and Northern Development now have the power to make enfranchised Indians into Indians again, but they no longer have the power under the Act to turn Indians into white men.

Post Confederation Treaties

With the passage of the Constitution Act, 1867, formerly the British North America Act, 1867, the treaty making process in Canada was given new momentum and a new significance. No longer were treaties made just for peace and friendship as many of the earlier treaties had been. Instead, post-Confederation numbered treaties followed the intent of the pre-Confederation Robinson treaties[90] and the treaty making process became more pressing in the demand upon the Indians to cede their Aboriginal title. Treaty No. 9 is good example of the post-Confederation treaties.

Treaty No. 9 was signed, in 1905-1906, by Duncan Campbell Scott, Samuel Stewart and Daniel George MacMartin, commissioners of the government of Canada, on behalf of His Most Gracious

---

[90]. Morris, supra, note 69. The treaties are all based upon the models of that made at the stone fort in 1871 and the one made in 1873 at the north-west angle of the Lake of the Woods with the Chippewa tribes, and these again are based, in many material features, on those made by the Hon. W.B. Robinson with the Chippewas dwelling on the shores of Lakes Huron and Superior in 1860.

Majesty the King of Great Britain, Ireland and Canada, with the Ojibeway, Cree and other Indians, inhabiting "[t]hat portion or tract of land lying and being in the province of Ontario, bounded on the south by the height of land and the northern boundaries of the territory ceded by the Robinson-Superior Treaty of 1850, and the Robinson-Huron Treaty of 1850, and bounded on the east and north by the boundaries of the said province of Ontario as defined by law, and on the west by a part of the eastern boundary of the territory ceded by North-west Angle Treaty No. 3; the said land containing an area of ninety thousand square miles, more or less".[91]

It is interesting to compare the wording of Treaty No. 9 with the wording of the Royal Proclamation. The Royal Proclamation declared "if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only by Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie"[92] (emphasis added). Treaty No. 9 states "... whereas, the said Indians have been notified and informed by His Majesty's said commission that it is His desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to His Majesty may seem meet, a tract

---

91. The James Bay Treaty - Treaty No. 9.

92. The Royal Proclamation.

of country, bounded and described hereinafter mentioned, and to obtain the consent thereto of His Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good-will between them and His Majesty's other subjects, and that His Indian people may know and be assured of what allowances they are to count upon and receive from His Majesty's bounty and benevolence"[93] (emphasis added). From the wording of the treaty it would be safe to say that the agreement was entered into on the insistence of His Majesty, not in response to the wishes of the Indian people as stipulated in the Royal Proclamation.

A second factor is equally important in indicating the "Ojibeway, Cree and other Indians" inhabiting the said tract of land did not initiate the treaty. As the treaty says, the Indians were "requested by His Majesty's commissioners to name certain chiefs and headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be found thereon, and to become responsible to His Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them ....".[94] In other words, His Majesty not only initiated the treaty process, whether the Indians were inclined to dispose of the said lands or not, but he also dictated to the Indians that they should

---

[93]. The James Bay Treaty.

[94]. The James Bay Treaty.

appoint persons as chiefs and headmen to negotiate and sign the treaty on their behalf.

And what did the Indians get for signing the treaty? First, they each received "a present of eight dollars in cash"[95] from His Majesty, through His commissioners, in exchange for extinguishing all of their past claims. Secondly, each Indian and his/her descendants received an annuity of four dollars per year in perpetuity, again as in the Robinson Treaties, as "Treaty Money." Coincidentally, the commissioners did not want the Indians with whom they were negotiating Treaty No. 9 to talk to the Indians who had agreed to the Northwest Angle treaty, Treaty No. 3, because those Indians were receiving five dollars per year "Treaty Money." The government was not prepared to pay this amount to the Indians in the Treaty No. 9 area. Thirdly, each chief received a Canadian flag and a copy of the treaty. Lastly, His Majesty agreed to pay the salaries of teachers who would provide instruction for the Indian children (in English of course).[96]

---

[95]. The James Bay Treaty.

[96]. Celia Haig-Brown, Resistance and Renewal, Surviving the Indian Residential School, (Vancouver: Tillacum Library, 1988), pp. 23, 25. "Three things stand out in my mind from my years at school: hunger; speaking English; and being called a heathen because of my grandfather." George Manuel (1974:63). "The Province of Canada in 1874 published a report based on the ideas of Egerton Ryerson which formed the basis for future directions in policy for Indian education ... . The general recommendations of the report were that Indians remain under the control of the Crown rather than the provincial authority, that efforts to Christianize the Indians and settle them in communities be continued, and finally that

Again, as if as a carry over from the treaties of friendship of days long past, in Treaty No. 9 the Ojibeway, Cree and other Indians were required to swear allegiance to the King. In addition, they had to promise to obey the law, protect persons and property against "molestation", and assist officers of His Majesty in catching lawbreakers.

And what were the Ojibeway, Cree and the other Indians required to give up in order to receive the benefits promised in the treaty by the King? In particular, as in the pre-Confederation Robinson treaties, the Indians were required to "cede, release, surrender and yield up to the Government of the Dominion of Canada, for His Majesty the King and His successors for ever all their rights titles and privileges whatsoever, to the lands"[97] covered by the treaty, an area of approximately ninety thousand square miles. In addition, the Ojibeway, Cree and the other Indians of the Treaty No. 9 area were required to give up their rights, titles, and privileges to all other lands wherever they might be located anywhere in the Dominion of Canada. The Indians were allowed to retain the right to continue their traditional practices of hunting, fishing and trapping for food in the ceded territory, subject only to whatever regulations may be made by the Government and providing

---

schools, preferably manual labour ones, be established under the guidance of missionaries."

[97]. The James Bay Treaty.

they did not practice these vocations on any lands which were being used for settlement, mining, lumbering, trading or any other purposes. One would wonder if anyone negotiating on behalf of the Crown ever explained to the Indians the expectations of how much land would be required for settlement, mining, lumbering, trading or other purposes or what the regulations could be?

The Indians were also allowed to reserve land for themselves and their families to the extent of one square mile per family of five. Again, these lands, held in reserve for the Indians, are in fact legally held in fee simple by the Crown "for the benefit of the Indians free of all claims, liens, or trusts by Ontario".[98] The question could be asked, is the clause of the treaty "for the benefit of the Indians free of all claims, liens, or trusts by Ontario" actually meant to be a benefit for the Indians?[99]

His Majesty also reserved rights unto himself. These are first, the right to deal with trespassers on the lands reserved for Indians, second, the right to sell or dispose of the reserved land, with the consent of the Indians, for their use

---

[98]. The James Bay Treaty.

[99]. St. Catherine's Milling etc. Co. v. R. (1888), 14 App. Cas. 46, 4 Cart. B.N.A. 107, 2 C.N.L.C. 541, 58 L.J.P.C. 54, L.T. 197, 5 T.L.R. 125, affirming 13 S.C.R. 577 (P.C.) [Ont.]. Title to land ceded by Indians transfers to the province.

and benefit, and third, the right to expropriate any of the reserved lands that may be required for public works, buildings, railways or roads of whatsoever nature. Under the treaty, His Majesty also forbade any attempt by the Indians to sell or otherwise alienate reserved land in any manner.

In summation, under Treaty No. 9, the Ojibeway, Cree and other Indians, gave up, or extinguished, their "aboriginal title" to land extending from the Ontario/Quebec boundary in the east to the boundary of Treaty No. 3 in the west, and from the height of land in the south to Hudson Bay in the north, in all some ninety thousand square miles in northern Ontario. In exchange, they received a present of eight dollars each in cash and four dollars each per year forever and reserved land of one square mile of land per family of five. They also retained the right to hunt, fish and trap on lands not being used for other purposes or otherwise regulated. They gained schoolteachers to teach their children and each chief was given a Canadian flag and a copy of the treaty. This in 1906. It is interesting to note by way of comparison that in Tahiti of the early 1800s, almost 100 years before, local chieftains "would be baptized, crowned king, presented with a portrait of Queen Victoria, introduced to the bottle, and left to the work of conversion."[100]

---

[100]. Lewis, Norman, supra, note 38, p. 13.

Chapter Three

In Specific: Treaty No. 3

Simon J. Dawson, a civil engineer, had a long career in the Ojibway country. In 1858 he explored the route between Lake Superior and Red River for the Ontario Government. In 1868 and in 1870 he reported on the same route to the new Government of Canada, and his 1870 report was forwarded by the Governor General to the Colonial Office in Great Britain.

In his 1858 report, Dawson stated that "as they occupy the country through which any line of communication between Lake Superior and Red River must pass, it becomes of the utmost importance to ascertain every particular regarding them..." He met with "the Saulteaux Chiefs at Fort Frances, the result of which was that they accorded their full permission to examine the country, but requested that some person might be sent to meet them on their assembling the next spring, to explain the objects of the expedition, and whether it was intended to take up any of their lands for settlement, in which case they trusted nothing would be done until arrangements had been made with them."[101]

Dawson was evidently better able to communicate with the

---

[101]. Dawson, S.J., "Report of the Exploration of the Country between Lake Superior and the Red River Settlement", Legislative Assembly, Toronto, 1859.

Ojibway than Henry Youle Hind, who led the 1858 exploring expedition. Hind was stopped by a Lake of the Woods Chief, who refused passage through the country because Hind was proposing to travel by a route other than the established "highway". Hind's record states the Chief said

> Do you want to see the Indian's land? Remember, if the whiteman comes to the Indian's house, he must walk through the door, and not steal in by the window. That way, the old road, is the door, and by that way you must go.
>
> We see how the Indians are treated far away. The white man comes, looks at their flowers, their trees, and their rivers, others soon follow; the lands of the Indians pass from their hands, and they have nowhere a home. You must go by the way the whiteman has hitherto gone.
>
> We have hearts, and love our lives and our country. We do not want the white man; when the whiteman comes, he brings disease and sickness, and our people perish; we do not wish to die. Many people would pass away; we wish to live and to hold the land our fathers won, and the Great Spirit has given us.[102]

By 1868 Dawson had taken his own advice and learned a good deal about what he called the Saulteaux Ojibways. In his report of that year he advised the Government of Canada, then considering methods of opening direct communications with Red River, about "the Indian Element".

> In opening the communications to Red River, the country will be brought to some extent, into contact with the Indians, who have their hunting grounds on the line of route.
>
> Hitherto, Canada has been fortunate in dealing with the Indian element; and, in the present case, I see no reason for anticipating greater difficulty than has arisen in the past.

---

[102]. Ibid.

The only localities where the Indians are at all numerous, are at the Lake of the Woods and Rainy River, but the entire population does not greatly exceed three thousand. They can, however, collect in summer in larger numbers than Indians usually do, from the fact that they have abundance of food. This is afforded by the wild rice of the country which they collect, and by the fish which literally swarm in the Lakes and Rivers, some industry practiced on their own part, too, in raising Indian corn, serves to supply them to a small extent. I have seen as many as five or six hundred of them collected at one time, at the rapids on Rainy River, engaged in catching Sturgeon, the flesh of which they preserve by drying it like Pemmican and then pounding it up and putting it, with a due mixture of oil, into bags made of Sturgeons' skin.

They have a rude sort of Government, and the regulations made by their Chiefs are observed, it is said, better than laws usually are where there are no great means of enforcing them.

They are very intelligent and are extremely jealous as to their right of soil and authority over the country which they occupy.

When the Red River Expedition first came into contact with them, they manifested some displeasure, and were not slow to express it, at parties being sent through their country, to explore and examine it, without their consent being first asked and obtained.

In appearance, these Indians are tall and well formed and, in bearing, independent; sometimes, even a little saucy, but, in their intercourse with strangers they are hospitable and kind. Their morality is said to be of a high order, as compared to that of the Indians of the Plains.

Any one who, in negotiating with these Indians, should suppose he had mere children to deal with, would find himself mistaken. In their manner of expressing themselves, indeed they make use of a great deal of allegory, and their illustrations may at times appear childish enough, but, in their actual dealings, they are shrewd and sufficiently awake to their own interests, and, if the matter should be one of importance, affecting the general interests of the tribe, they neither reply to a proposition, nor make one themselves, until it is fully discussed and deliberated upon in Council of all the Chiefs.

> The Chiefs are fond of asking any travellers, whom they believe to be of importance, to attend a Grand Council.
>
> At these gatherings it is necessary to observe extreme caution in what is said, as, although they have no means of writing, there are always those present, who are charged to keep every word in mind.
>
> All this goes to show a certain stability of character, and a degree of importance attached to what they say, on such occasions, themselves, as well as to what they hear from others. The word of the Chiefs once passed, too, seems to be quite reliable, and this argues well for the observance of any treaty that may be made with them.
>
> For my own part, I would have the fullest reliance as to these Indians observing a treaty and adhering most strictly to all its provisions, if, in the first place, its provisions were thoroughly understood by the Indians, and if, in the next, it were never infringed upon by the Whites, who are generally the first to break through Indian treaties.[103]

On October 3, 1873 at the northwest angle of the Lake of the Woods, an agreement usually referred to as the Northwest Angle Treaty or Treaty No. 3 was reached between the Saulteaux tribe of Ojibway Indians and the Dominion of Canada in which the Indians ceded any and all claims to a 55,000 square mile tract of land from the water shed of Lake Superior to the northwest angle of the Lake of the Woods and from the U.S./Canada border to the height of land from which the streams flow into Hudson's Bay. Although aware that the Province of Ontario claimed a good part of this territory as lying within its boundaries,[104] the

---

[103]. Dawson, S.J., "Report of the Line of Route between Lake Superior and the Red River Settlement", 1868, (Toronto: Ontario Archives, Pamphlet 1868, #14).

[104]. See St. Catherine's Milling etc. Co. v. R., supra, note 99.

federal government, at the time of the treaty, believed the land to be part of that transferred to it by the Hudson's Bay Company in 1870. In addition to its responsibility for Indians and Lands Reserved for Indians under s. 91(24) of the British North America Act, and its obligation under the Royal Proclamation of 1763 to respect aboriginal land rights, the federal government further pledged itself, by the terms of the transfer, to deal with any Indian claims in Rupert's Land and the North West Territories.

The Dominion had elected to adopt the treaty system initiated by the British Colonial government in Upper Canada. From the time of the Royal Proclamation, the principle had been well established that a formal territorial surrender by the Aboriginal population exclusively to the Crown was to precede any white settlement of Indian lands. The 1850 Robinson Treaties at Lakes Huron and Superior set the form generally followed in the west for treating with the Indians, namely, aboriginal land rights could be surrendered only to the Crown at a public meeting called for that purpose. In compensation for land surrender, the Indians received certain gifts, reserves of land, annuity payments and guarantees of hunting and fishing rights. Though their precise legal nature may defy classification, the treaties are considered to constitute

continuing obligations[105] enforceable at law and to be special agreements[106] entered into by both Government and Aboriginal people with the intention of creating mutually binding obligations.[107]

Besides negotiating for the usual hunting and fishing rights, that had been claimed in earlier treaties, one chief who entered into Treaty No. 3 with Canada was insightful enough to forsee a need for schools. Chief Sakatcheway said

> I understand the matter that he asks; if he puts a question to me as well as to others, I say so as well as the rest. We are the first that were planted here, we would ask you to assist us with every kind of implement to use for our benefit, to enable us to perform our work; a little of everything and money. We would borrow your cattle; we ask this for our support; I will find whereon to feed them. The waters out of which you sometimes take food for yourselves, we will lend to you in return. If I should try to stop you - it is not in my power to do so; even the Hudson's Bay Company - that is a small power - I cannot gain my point with it. If you give what I ask, the time may come when I will ask you to lend me one of your daughters and one of your sons to live with us; and in return I will lend you one of my daughters and one of my sons for you to teach what is good, and after they have learned, to teach us. If you grant us what I ask, although

---

[105]. Hay River v. R. (1979), 101 D.L.R. (3d) 184 at 186 (Fed. T.D.).

[106]. R. v. Simon (1985), 24 D.L.R. (4th) 390 at 404, reversing 65 C.C.C. (2d) 323 (S.C.C.)[N.S.].
An Indian treaty is unique, it is an agreement sui generis which is neither created nor terminated according to the rules of international law.

[107]. Woodward, Jack, supra, note 42, p. 403. Treaties (and Land claims settlements) entrench a legal relationship between an Indian nation and the Crown. Both the federal and provincial Crown have an enduring interest in the rights and obligations found in treaties. Treaties generally lift the burden of Indian title from provincial Crown lands.

> I do not know you, I will shake hands with you. This is all I have to say.[108]

Likewise, promises for the construction of schools were made by the Government Treaty Commissioners at Northwest Angle negotiations. As recorded by Dawson, Governor Morris said

> I told you I wanted to make a treaty with you on account of my mistress the Queen and on your account. That is the reason I am here . . . We are all children of the same Great Spirit and I want to settle all matters so that the white and red men will always be friends. I want to have lands for farms reserved for your own use so that the white man cannot interfere with them . . . I am glad to learn that some of you wish your children to learn the cunning of the white man and on application of a Band, a school will be established . . .[109]

The wishes of Chief Sakatcheway were graciously written into the North-West Angle Treaty, Treaty No. 3,[110] but unfortunately, the school experiences by many members of the Treaty No. 3 Tribal area were quite different than experiences which had been envisioned by Chief Sakatcheway or Governor Morris at the time of treaty negotiations in 1873.

Schools for Treaty No. 3 tribal members, operated by Catholics and Anglicans, were in fact established at Fort

---

108. Morris, supra, note 69, p. 63.

109. Ibid.

110. Specifically, Treaty Number Three says
. . .
And further, Her Majesty agree[s] to maintain schools for instruction in such reserves hereby made as to her Government of her Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it (emphasis added).
. . . .

Frances and Kenora and, under law,[111] Indian children were required to attend from the age of 6. In many cases for these children, learning the "cunning of the white man" proved to be a very harsh lesson.

---

[111]. Indian Act, 1876.

Chapter Four

Treaty No. 3: Transfer of Jurisdiction for Education

Under the Constitution Act, 1867, powers for education were conferred on the provinces under s. 93. The only powers implicitly relating to the education of Indians are the sections on schooling in the Indian Act and are administered by the Department of Indian Affairs. Transfer of these and other Indian Act powers from the Department to individual First Nations bands has been an ongoing process, the extent of which was recently presented by the Honourable Ron Irwin, Minister of Indian Affairs. He says

> In response to the request by First Nations for governance control over all community services, including education, DIAND has developed and is currently piloting, Financial Transfer Arrangements (FTA) with some 32 First Nations across the country. Discussions are underway with another 26 First Nations to sign FTA (emphasis added).[112]

The request by First Nations in Treaty No. 3 for "governance control over all community services", being addressed by DIAND initiatives meant to correct errors of the past, is rooted in promises like that made by The Honourable Alexander Morris, P.C., Lieutenant-Governor of Manitoba, The North-West Territories and Kee-wa-tin, as he then was, to

---

[112]. R. Irwin, letter circulated to delegates at the Assembly of First Nations, National Education Conference, Winnipeg Convention Centre, November 6, 1996.

establish a school when the Indians requested one.[113] Following from Morris' promise boarding schools were built in the Treaty No. 3 area and the effects of the Indian boarding school system on people of Treaty No. 3, as well as the people in other areas across the country, are well documented by the Royal Commission on Aboriginal People.[114] In its report the Royal Commission speaks to the essence of Morris' promise.

> In the first few decades of the life of the new Canadian nation, when the government turned to address the constitutional responsibility for Indians and their lands assigned by the Constitution Act, 1867, it adopted a policy of assimilation. . . . It was a policy designed to move communities, and eventually all Aboriginal peoples, from their helpless 'savage' state to one of self-reliant 'civilization' and thus to make in Canada but one community - a non-Aboriginal, Christian one.
>
> Of all the steps taken to achieve that goal, none was more obviously a creature of Canada's paternalism toward Aboriginal people, its civilizing strategy and its stern assimilative determination than education. In the mind of Duncan Campbell Scott, the most influential senior official in the department of Indian affairs in the first three decades of the twentieth century, education was "by far the most important of the many subdivisions of the most complicated Indian problem". As a potential solution to that 'problem', education held the greatest promise. It would, the minister of Indian affairs, Frank Oliver, predicted in 1908, "elevate the Indian from his condition of savagery" and "make him a self-supporting member of the state, and eventually a citizen in good standing(emphasis added).[115]

---

[113]. Morris, supra, note 69, "... a school will be established ...."

[114]. See Canada, Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, (Ottawa: Ministry of Supply and Services, 1996), Volume 1, Residential Schools, p. 333.

[115]. "Looking Forward, Looking Back", Report of the Royal Commission on Aboriginal Peoples, (supra), Vol. 1, p. 333.

Since 1908, not quite half of Oliver's prediction has come true,[116] "most Canadian Indians are citizens [of the state] by operation of the Citizenship Act,[117] however, on the other hand, as "self-supporting member[s] of the state" the education system has completely failed Indians and Indians living on Indian reserves enjoy the highest levels of illiteracy, poverty and unemployment in the country.[118]

The problems of illiteracy, poverty and unemployment faced by Indians of Treaty No. 3 are not isolated to the Treaty No. 3 Tribal Area or even to Canada. They are in fact more wide spread. For example, in Australia the 6,000 black students currently enrolled in Australian universities are double the number who attended these universities just five years ago. It is out of this milieu that a critical question emerges for the members of Treaty No. 3. Colin J. Bourke, one of a handful of blacks in the country who hold full professorships, is Chairman

---

116. Royal Commission on Aboriginal People, Vol. I, supra. Initially, the schools were seen as a bridge from the Aboriginal world into non-Aboriginal communities. That passage was marked out in clear stages: separation, socialization and, finally, assimilation through enfranchisement. By this last step, the male graduate could avail himself of the enfranchisement provisions of the Indian Act, leaving behind his Indian status and taking the privileges and responsibilities of citizenship.

117. Woodward, Jack, supra, note 42, p. 145. The qualifier "most" is necessary, however, because it is apparent that some non-citizens (Americans, mostly) have status as Indians under the Indian Act.

118. See Basic Departmental Data, 1995, Department Of Indian Affairs and Northern Development.

of the Indigenous Australian Higher Education Association, a group formed in 1994 to try to give aborigines control of their own education. He asks

> How can you expect your culture and identity to survive if you give all the responsibility for education to another group of people? It is absolutely essential, if we are to know what it is to be aboriginal, to take charge of the education system . . .[119]

Taking charge of the education system by Aboriginal people is not a new phenomena in Canada; efforts in this direction have been ongoing for many years. For example the case was well stated by the Manitoba Indian Brotherhood's response in 1971 to the then Liberal Government's white paper of 1969. The Brotherhood's approach to development drew on major institutions of public life in Canada. In their statement they said

> In developing new methods of response and community involvement it is imperative that we, both Indian and Government, recognize that economic, social and educational development are synonymous, and thus must be dealt with as a "total" approach rather than in parts. The practice of program development in segments, in isolation between its parts, inhibits if not precludes, effective utilization of all resources in the concentrated effort required to support economic, social and educational advancement.
>
> In order that we can effect change in our own right, it will be necessary to develop a whole new process of community orientation and development. The single dependency factor of Indian people upon the state cannot continue, nor do we want to develop a community structure that narrows the opportunities of the individual through the transferal of dependencies under another single agency approach.
>
> It is generally recognized that the strength of society rests with the inter-dependency of people, one upon

---

[119]. The Chronicle of Higher Education, October 6, 1995, p. A47.

the other, and the development of the community of interest that exists between all people to pursue progress and a better way of life. For the Indians this will mean a conscious effort to develop inter-relationships that have for a century been inhibited by continuing state control.

The transition from paternalism to community self sufficiency may be long and will require significant support from the state. However, we would emphasize that state support should not be such that the government continues to do for us, that which we want to do for ourselves.

We would emphasize for the purpose of clarity and to avoid any misunderstanding that the Indian tribes of Manitoba are committed to the belief that our rights, both aboriginal and treaty, emanate from our sovereignty as a nation of people. Our relationships with the state have their roots in negotiation between two sovereign peoples.

There can be no delegation of authority or responsibility by the federal state to the province without our consent. There can be no deviation or alteration in this relationship without our consent. The Indian people enjoy "special status" conferred by recognition of our holistic title that cannot be impaired, altered or compromised by federal-provincial collusion or consent.

We regard this relationship as sacred and inviolate.[120]

Sovereignty in Canada was divided between the federal government and the provinces through the Constitution Act, 1867. Jurisdiction over education, a political compromise, was given to the provinces under s. 93. The rationale for the compromise was summarized by Wilson J. in the Reference Re Bill 30. She says

---

[120]. Elias, Peter Douglas, Development of Aboriginal Peoples's Communities, (Toronto: Captus Press, 1991), p. 11.
See also National Indian Brotherhood, Indian control of Indian education: policy paper presented to the Minister of Indian Affairs and Northern Development, (Ottawa: National Indian Brotherhood, 1972).

> The protection of minority religious rights was a major preoccupation during the negotiations leading to Confederation because of the perceived danger of leaving the religious minorities in both Canada East and Canada West at the mercy of overwhelming majorities.[121]

Madam Justice Wilson's words echo those of Sir Charles Tupper quoted in the Debates of the House of Commons dated March 3, 1896. Tupper says:

> . . . I say it within the knowledge of all these gentlemen . . . that but for the consent to the proposal of the Hon. Sir Alexander Galt, who represented especially the Protestants of the great province of Quebec on that occasion, but for the assent of that conference to the proposal of Sir Alexander Galt, that in the Confederation Act should be embodied a clause which would protect the rights of minorities, whether Catholic or Protestant, in this country, there would be no Confederation . . . I say therefore, it is important, it is significant that without this clause, without this guarantee for the rights of minorities being embodied in that new constitution, we should have been unable to obtain any confederation whatever. That is my reason for drawing attention to it at present.[122]

The political compromise providing "protection of minority religious rights" as stated by Tupper were for Catholics and Protestants, but not for Indians. Jurisdiction over Indians was placed in the hands of the federal government under s. 91(24) and the courts have said that section 91(24) can be perceived as a counterpart to s. 93.

> Once section 93 is examined as a grant of power to the province, similar to the heads of power found in s. 92, it is apparent that the purpose of this grant of power is to provide the province with the jurisdiction to legislate in a prima facie selective and distinguishing manner with

---

[121]. Reference Re Bill 30, an Act to amend the Education Act (Ont.), [1987] 1 S.C.R. 1173.

[122] Debates of the House of Commons, supra, note 73.

> respect to education whether or not some segments of the community might consider the result to be discriminatory. In this sense, s. 93 is a provincial counterpart of s. 91(24) (Indians, and lands reserved for Indians) which authorizes the Parliament of Canada to legislate for the benefit of the Indian population in a preferential, discriminatory, or distinctive fashion vis-a-vis others.[123]

There are those who argue that Canada, meaning the federal crown, "has assumed responsibility for the education of Indians, a matter which normally would fall within provincial jurisdiction".[124] And although Canada has not created specific legislation for the education of Indians, schooling for Indians is dealt with in several sections of the Indian Act,[125] therefore, placing education as a long standing matter within the Department of Indian Affairs. For example, in a report prepared in 1958, the then Indian Affairs branch of the Department of Citizenship and Immigration stated the primary function of Indian Affairs was:

> to administer the affairs of the Indians of Canada in a manner that will enable them to make the necessary adjustments to become fully participating and self-supporting members of the communities in which they live. Functions included the management of Indian and surrendered lands, trust funds, education, social welfare, economic development, descent of property, band membership, enfranchisement of Indians and a variety of other matters (emphasis added).[126]

---

123. Estey J., Ibid.

124. Woodward, Jack, supra, note 42, p. 389.

125. See for example, The Indian Act, sections 114 - 122.

126. A Review of Activities 1948-58, Indian Affairs Branch, Department of Citizenship and Immigration.

Over the years there has also been a great deal of educational experimentation by the Department of Indian Affairs to find ways to promote greater First Nations "adjustments to become fully participating and self-supporting members of the communities in which they live". Some experiments were first initiated entirely by the Department itself.[127] For example

> By 1901, the department had initiated an experiment, the File Hills colony on the Peepeekeesis reserve, designed to release the graduates' uplifting developmental potential. . . . Reports on the colony were promising in 1902 but in ensuing years they were much less so, with the graduates described as being "all the way from 'lazy and indifferent' to 'making favourable or satisfactory progress'".[128]

Experimentation in regard to Indians has also taken place more recently within developing provincial programming and regulatory regimes, particularly in the areas of education and social services.[129]

One could say the failure of the education system documented by the Royal Commission on Aboriginal Peoples, and others, comes from the system of education itself.[130] At the

---

[127]. The Relationship with First Nations: The Organizational Dimension, Department of Indian Affairs and Northern Development, July, 1993, DDV CA1 IA 93R22.

[128]. Royal Commission on Aboriginal People, Vol. I, p. 343.

[129]. See for example, Child and Family Services Act, Ontario, section 194 and 206.

[130]. Dr. George E. Burns, "A Critical Pedagogy of Native Control of Native Education: Towards a Praxis of First Nation/Provincial Boards Tuition Negotiations and Tuition Schooling", paper presented at the Aboriginal Peoples Conferences, Lakehead University, Fall, 1996, makes the argument that the existing school system is "devoid of relevant experience in the

time of Confederation the federal government had "two schools in operation" for Indians. The operation of these schools was based on the "application of the principles of industrial boarding schools." Indian children were removed from their homes because "the influence of the wigwam was stronger than that of the [day] school." With removal from their homes, the children could be "kept constantly within the circle of civilized conditions" where they would receive the "care of a mother" and an education that would fit them for a life in a modernizing Canada.[131] At the peak, 80 residential schools across the country were "erected by a church/government partnership that [managed] the system jointly until 1969" pursuant to s. 114 of the Indian Act.[132] Early on in the operation of the boarding schools "classroom work of the teachers and students was to be guided by the standard provincial curriculum" with students receiving "instruction in a range of subjects, including, for the boys, agriculture, carpentry, shoemaking, blacksmithing and printing and, for the girls, sewing, shirt making, knitting, cooking, laundry, dairying, ironing and general household duties"[133] It is apparent this never happened. In 1968, according to a review of the educational performance of the system up to 1950, conducted

---

preparation of Native students . . . ..

[131]. Royal Commission on Aboriginal People, Vol. I, p. 334.

[132]. Ibid, p. 335.

[133]. Ibid, p. 339.

and reported by R.F. Davey, the practical training that had been in place "contained very little of instructional value but consisted mainly of the performance of repetitive, routine chores of little or no educational value".[134] In 1969 the federal government ended the partnership with the churches and took upon itself, through the Department of Indian Affairs and Northern Development, almost unrestrained control of the residential school system. The Department remained in almost complete control of residential schools until 1986, when at last, it virtually came to the end of the residential school road.[135]

For over the past 20 years First Nations and the Department of Indian Affairs and Northern Development have promoted Indian education, with emphasis on local First Nations control, as part of the Department's policy of devolution. As a policy, devolution means giving control of programming over to the individual bands, an initiative initially started in the 1950s.[136] Education program transfers began as early as 1956 when Indian School Committees had been formed on some reserves and received some funding from the Indian Affairs Branch. These committees were specifically responsible for matters like

---

[134]. Ibid, p. 345.

[135]. Ibid, p. 351.

[136]. Elias, Peter Douglas, supra, note 120, p. 109. "More often than not, aboriginal people were saddled with programs which the government was anxious to be rid of anyway . . . .".

truancy and care of school property and slowly evolved to manage in other areas such as school attendance and scholarships from band funds. By the mid 1970s, a number of Indian bands took initiatives to establish and manage schools on their own reserves.[137] Typical of these schools are problems in securing qualified teachers, diverse standards in education levels, relevant curriculum content and overcoming funding deficiencies.

Prior to the 1987-88 fiscal year the individual budgets of the bands had been "negotiated" by the band with the regional office of the Department. The total budget amount was determined after an item by item consideration of what would be required to cover the cost of each item the following year. The final say as to the amount of money the band would receive was always, ultimately, in the hands of the government. The total (national aggregate for band operated schools) had to be approved by Treasury Board and the monies had to be appropriated by Parliament. The division of the amount thus approved and appropriated as between regions was done by the headquarters office of the Department in Ottawa.[138] In the 1987-88 fiscal year, the Department changed its method of funding Indian band schools. In general, this involved determining the budget by reference to the number of students in the schools and

---

[137] Thomas v. Canada (Minister of Indian Affairs and Northern Development), [1991] 3 C.N.L.R. 169.

[138]. Ibid.

multiplying that number by a dollar amount. A global sum was thus arrived at and this was paid to the school boards for the operation of the schools (block funding).[139]

Block funding or the National Funding Formula used by the Department of Indian Affairs and Northern Development to fund band schools was developed out of studies done in the Department which compared and analyzed education budgets and how they were established in provincial education systems, in some U.S. systems, as well as for the schools for which the Department provided funding. These studies concluded that, in general, non-teacher salary and benefit related expenses accounted for approximately 30% of budgets; teachers' salaries (expenses related to high cost special education needs were not included in budgets) and benefits accounted for the other 70%. In the first year of the application of the National Funding Formula, the cost of teachers' salaries was determined based on what Treasury Board had negotiated to be paid as salaries to teachers. This amount was used to determine the regional costs for teachers salaries. The number of teachers each school would require was determined by reference to a standard pupil/teacher ratio. As a matter of easy arithmetical calculation (number of teachers times regional salaries), an amount could be obtained as representing approximately 70% of the budget required for a given school. It was a matter of simple arithmetic then to

---

[139]. Ibid.

calculate what the total budget allocation should be.[140] In the Department's opinion, among other things, this new system was easier to administer; it gave the Indian school boards a greater degree of autonomy; and they could use the funds for educational purposes as they saw fit without the need to account on a line by line basis.

The Current Situation:

The Statutes: The Indian Act & The Education Act, Revised Statutes of Ontario, 1990, Chapter E.2

Sections 114 to 122 of the Indian Act deal with the matter of schools. Section 114 authorizes the Minister to enter into agreements with the provinces. Specifically, it says

> 114. (1) The Governor in Council may authorize the Minister, in accordance with this Act, to enter into agreements on behalf of Her Majesty for the education in accordance with this Act of Indian children, with
> (a) the government of a province;
> (b) the Commissioner of the Yukon Territory;
> (c) the Commissioner of the Northwest Territories;
> (c.I) the Commissioner of Nunavut;
> (d) a public or separate school board; and
> (e) a religious or charitable organization.
>
> (2) The Minister may, in accordance with this Act, establish, operate and maintain schools for Indian children.

Under this section, the Department of Indian Affairs and Northern Development is given authority to enter into two types of agreements with school boards or departments of education in

---

[140]. Ibid.

the provinces. These are: tuition agreements, to provide instructional and other educational services to Indian students who attend provincial schools; and capital agreements, to contribute on a pro rata basis toward the capital cost of educational facilities where Indian students attend provincial schools. "Indian students" means students living on reserve or on federal crown land (not living under provincial jurisdiction). When a First Nation decides that it wants its young people educated in the provincial system, it negotiates tuition and capital agreements with provincial school authorities and with the Department of Indian Affairs and Northern Development.[141] These negotiations began as tripartite negotiations involving the band, the Department and the Ministry of Education. More recently, the Department has left negotiations in the hands of the Band and the Ministry of Education.

The counterparts of the authority of the Minister of Indian Affairs and Northern Development to enter into agreements on behalf of Her Majesty for the education, in accordance with the Indian Act, of Indian children, are the Ministers of Education for the Provinces. In the case of Ontario, the Minister of Education is authorized under s.12(2) of the Education Act to enter into agreements with the Minister charged with the

---

[141]. The Relationship with First Nations: The Organizational Dimension, Department of Indian Affairs and Northern Development, July 1993, DDV CA1 IA 93R22.

administration of the Indian Act "for the admission of pupils, other than Indian, to schools for Indians operated under that Act". Specifically, s.12(2) says

> 12. (1) . . .
> (2) The Crown in right of Ontario, represented by the Minister, may make agreements with the Crown in right of Canada, represented by the Minister charged with the administration of the Indian Act (Canada), for the admission of pupils, other than Indian, to schools for Indians operated under that Act.

In addition, the Minister of Education for the Province of Ontario is authorized under s.12(3) of the Education Act to enter into agreements with a band, the council of the band or an education authority for the admission of pupils who are not Indians to a school operated by the band, council of the band or education authority. Specifically, s.12(3) says

> 12. (1) . . .
> (2) . . .
> (3) The Crown in right of Ontario, represented by the Minister, may enter into an agreement with a band, the council of the band or an education authority where such band, council of the band or education authority is authorized by the Crown in right of Canada to provide education for Indians, for the admission of pupils who are not Indians to a school operated by the band, council of the band or education authority.

Under the Ontario provincial Education Act the provision of education services to Indian bands are handled at the level of the various Boards of Education in accordance with sections 187 & 188 (see Appendix I for selected sections).

The contractual relationship between the Minister of Indian Affairs and Northern Development and provincial counterparts

when entering into agreements for the provision of education for Indians is quite clear and covered by statute. In the case of bands, which are covered by the same statutes, the situation is less clear in law. For instance, in the case of Courtois v. Canada the Canadian Human Rights Tribunal held that the Department of Indian Affairs, not the band council, is the supplier of educational services within the meaning of s.5 of the Canadian Human Rights Act. In this case, the school is regarded as a service available to the general public. Even though it is a so-called band school, limited primarily to Indians, it is paid for out of public funds.[142] On the other hand, in the Kinistino School Division case, the court held that an Indian band acting through its council, and without involving Her Majesty in right of Canada, may enter into contractual arrangements for the education of its band members' children. The court says that while s.114(1)(d) of the Indian Act, R.S.C. 1970, c.I-6 provides that the Governor in Council may authorize the minister to enter into agreements on behalf of Her Majesty for the education of Indian children, it does not expressly provide that only the minister may enter into such agreements. Similarly, s.92(b)(vii) of the relevant provincial Education Act, R.S.S. 1978, c.E.o 1 (Supp.) does not expressly provide that a board of education cannot deal directly with an Indian band or its council respecting the education of Indian children,

---

142. Courtois v. Canada (Department of Indian Affairs and Northern Development), [1991] 1 C.N.L.R. 40.

not as an agency of the Government of Canada. The band and its council are a creature of statute. Absent a contrary intention being expressed in the Indian Act, the band and its council have the same duties and liabilities as the general law imposes on private individuals doing the same thing.[143]

The position of the Department of Indian Affairs and Northern Development on the education of Indians, in the fall of 1996, was stated in correspondence from the Minister of the Department, The Honourable Ronald A. Irwin, to Mr. Raymond Bonin, M.P., Chairman of the Standing Committee on Aboriginal Affairs and Northern Development. In this communication the Minister was responding to the Second Report of the Standing Committee on Aboriginal Affairs and Northern Development (SCAAND) entitled Sharing the Knowledge: The Path to Success and Equal Opportunities on Education. According to Minister Irwin, the SCAAND report focus is "on solutions, . . . provid[ing] documentation on successful, innovative models as well as emphasizing the need for co-operation between affected organizations, . . . the SCAAND Report on Aboriginal Education is a positive contribution to understanding education issues facing First Nations"[144] and the report "stands as a valuable

---

[143]. Kinistino Sch. Div. 55 v. James Smith Indian Band, [1988] 5 W.W.R. 404, 66 Sask. R. 224, [1988] 4 C.N.L.R. 60 (Q.B), affirmed (1988), [1989] 2 W.W.R. 94, [1989 2 C.N.L.R. 67, 73 Sask. R. 236 (C.A.).

[144]. R. Irwin, supra, note 112.

tool for all Canadians".[145] The Minister's response to the SCAAND report addresses three themes. These are: the quality of First Nation education and the establishment of a national Aboriginal educational institute; the administration of First Nation education and the establishment of a federal legislative framework for First Nation educational authorities; and the funding of First Nation Education and the development of a more flexible funding methodology and funding mechanism.

In addressing these areas the federal government is prepared to support the establishment of a First Nation Electronic Education Institute; it will amend the Indian Act to bring it in line with current administrative practices; and it proposes to capture actual First Nations expenditures using the same structure as the Statistics Canada System of National Accounts[146] in order to improve information on First Nation expenditures by major policy sectors, and across all levels of government.[147]

> The implementation of First Nations jurisdiction over education involves many changes in the current practices of First Nations, federal, provincial, and territorial governments. Jurisdiction must be implemented through a developmental process as defined by First Nations consistent with their languages, cultures, traditions, structures and resource requirements.

---

[145]. R. Irwin, supra, note 112.

[146]. See for example: Statistics Canada Enumeration Data, Basic Departmental Data (Department of Indian Affairs and Northern Development) for comparison.

[147]. R. Irwin, supra, note 112.

> First Nations recognize the importance of developing their own approaches and solutions to meet specific education needs of their communities. The recognition of First Nations rights should not be driven by formula or federal policies. First Nations approaches to exercising self-determination over education programs through self-government is our ultimate goal. This is the central issue that is critical to all First Nations. First Nations have never given up their right to exist as individual First Nations and to be self-governing peoples within Canada.[148]

On July 23, 1996, the Rainy Lake Region, Treaty No. 3, Tribal Chief, Willie Wilson, along with the ten area chiefs signed an agreement with the Minister of Indian Affairs, the Honourable Ron Irwin, with a mandate to develop a structure to allow for the transfer of jurisdiction for education from the Department of Indian Affairs to the Rainy Lake Region Tribal Bands. A Final Agreement with Canada will recognize the jurisdiction of the Fort Frances area First Nations over education. Jurisdiction is defined in the Framework Agreement as "law making authority".[149] For example, in the area of post-secondary education, the consultants submit that transfer of jurisdiction for education would place in the hands of First Nations the power to establish personal, program and institutional eligibility requirements for the receipt of funding support; the power to designate eligible post-secondary

---

148. Regional Chief Royce Wilson, Chair, National Chiefs Committee on Education, Assembly of First Nations, Keynote Address, National Education Conference, Winnipeg Convention Centre, November 6, 1996.

149. Paper presented to working groups entitled "An Examination of First Nation Jurisdictional (Lawmaking) Powers in Education" by DIAND Consultants, September 12, 1996.

institutions; the power to establish application procedures concerning: the preparation and submission of applications, the review and assessment of applications, the process of decision making concerning applications, the process of notifying applicants, the process for review and appeal; the power to establish student support funding components (such as tuition, living expenses, travel, duration) and associated terms and conditions; the power to establish other mechanisms for student support such as: orientation, child care, counselling, tutoring, mentoring/role models; the power to establish structures to manage and operate post-secondary funding programs; the power to establish mechanisms of coordination with other programs, the power to establish processes for program review and evaluation; the power to delegate or otherwise assign responsibility for post-secondary funding to a central education authority. What is missing from this list of "First Nation Jurisdictional Powers with Respect to Education"[150] in the field of post-secondary education is the power to grant certificates, diplomas and/or degrees. In effect, First Nations will have no more power in the area of jurisdiction of education than they in fact already have. They already have all of the powers enumerated by the consultants as parental rights to educate their own children in the same manner and fashion as do any other citizens of Canada. Therefore, once the First Nations have a Final Agreement with Canada in hand, as Indians, they will have agreed to yet another

---

[150]. Ibid.

treaty which merely allows them to continue doing that which they have always had a basic right to do. Educate their own children!

The Final Agreement with Canada and the Fort Frances area First Nations designed to recognize the jurisdiction of the Fort Frances area First Nations over education is on its face little more than adhering to one aspect of the National Funding Formula; if adopted, it would provide greater certainty for the Department to predict the amount required to fund education for the Fort Frances First Nations from year to year.

Just as in the mind of Duncan Campbell Scott, education was "by far the most important of the many subdivisions of the most complicated Indian problem" in the first three decades of the twentieth century, education is still "by far the most important of the many subdivisions of the most complicated Indian problem", only today, for vastly different reasons. In Scott's time, as Oliver predicted, education held the greatest promise to "elevate the Indian from his condition of savagery" and "make him a self-supporting member of the state, and eventually a citizen in good standing". Whereas today, the problem is played out in more glowing terms in transfers of jurisdiction for education. In actual fact a transfer of jurisdiction for education is really a withdrawal of financial support for the education of Indians by the federal government. This in turn is

negligence by the federal government of a fiduciary obligation to act for the benefit of Indians.[151]

For example, in negotiations of the Framework Agreement between the Minister of DIAND and Chiefs in the Fort Frances area, budgetary data was revealed indicating the total band education revenue for the fiscal year 1994/95 for the ten bands in the Fort Frances Tribal Area is $11,015,942. The Rainy Lake Ojibway Education Authority received an additional $5,511,539. In total, the data indicates a financial base of approximately $16.5 million as the amount the Department is willing to transfer. A breakdown by community indicates that for the fiscal year 1994/95, Couchiching Indian Reserve, as a example, is reported to have had 138 post-secondary students with an expenditure of $1,465.798. Therefore, Couchiching expended $10,621.72 per post-secondary student. Student funding allotment for Couchiching post-secondary students is loosely aligned to funding policy circulated by the Department of Indian Affairs and Northern Development in its' E-12 Circular in 1972. Basically, a Couchiching Indian Reserve post-secondary student receives a living allowance while enrolled in an institutional

---

[151]. Guerin v. Canada, [1984] 2 S.C.R. 335.
Where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

program, travel expenses to and from the institution, a book allowance to cover the costs of text books and tuition costs. A typical budget on a per student basis would look as follows:

Living allowance @ 675.00/mth for 8 mths	5,400.00
Travel allowance approximately	1,000.00
Book allowance	400.00
Tuition approximately[152]	2,500.00
Total:	9,300.00

The difference of $1,694.72 in costs between allotments per student at $10,621.72 by the band and the example of 9,300.00 actual cost can be reconciled by taking into consideration such variances as the effect of the number of dependents per individual student on living allowances; the variance of travel costs for individual students; and tuition fees. The numbers used above are an average for undergraduate arts courses at Lakehead University in Thunder Bay, Ontario. Without outside supplement the education allowances per student are inadequate to allow students to attend other institutions further away or with higher tuition fees.

In a period of financial restraint, the government certainly does have cause for concern in dealing with the "Indian problem".

> The number of Registered Indians enrolled in post-secondary institutions more than doubled between 1985/86 and 1993/94, rising from 11,170 to 23,068. In 1994/95, enrolment increased by an additional 3,751 from the previous year, to an estimated 26,819 persons.

---

[152]. Schedule of Academic Fees 1992-93, Undergraduate Full-Time Students (Canadian and Landed Immigrants), Lakehead University, Thunder Bay, Ontario.

As indicated in the negotiation process in the Fort Frances Tribal Region, the education funding presently proposed by the federal government as part of its transfer of jurisdiction in education falls far short of the needed financial support required to see Indian students successfully complete their educational experience. It is common knowledge within administrative circles of post-secondary institutions that monies collected through tuition fees are a small contribution towards the actual costs of education. Until lately the major costs of education, upwards of 80% in these institutions in Ontario, were provided by the provincial government. Over the last year, because of cutbacks in contributions by the provincial government institutions have had to increase their tuition fees by as much as 30% in some cases. A Final Agreement signed under these conditions would certainly place on-reserve First Nations students in the Fort Frances area at a distinct disadvantage as compared to provincial residents. On-reserve First Nations students would then be in a position to be addressed as "foreign students" by provincial institutions and susceptible to be charged similar tuition fees as those charged for "foreign students". Similarly, off-reserve First Nations students would be left without any support from either their bands, the education authority or the Department itself and solely dependent on their own financial resources or the acquisition of student loans.

Securing funding for Indian education is both complex and time consuming as was recognized in the recent review of the post-secondary education system in Ontario by the Advisory Panel appointed by the Harris government to investigate Future Directions of Postsecondary Education. The Advisory Panel dismisses the needs of aboriginal people from its report. In the report of the Advisory Panel, dubbed the "Smith Report", the Advisory Panel says

> We received important briefs from aboriginal groups, and we applaud and encourage their search for policies that will fit their distinctive needs and ensure appropriate standards. We came to understand more fully the special needs of northern universities and colleges which must provide a reasonably comprehensive set of programs to geographically dispersed students. . . . We believe the issues these groups face merit careful attention, but we felt our time was too limited to develop recommendations in these areas that we could advance with confidence.[153]

Back at the negotiating table between consultants for the Department of Indian Affairs and representatives of the Rainy Lake Tribal Region of Treaty No. 3 a fundamental principle of the negotiations process is stated by Department of Indian Affairs consultants. According to the consultants, in the "Transfer of Jurisdiction for Education" negotiations, negotiations are founded on the principle that <u>Indians should not be in any worse position in regard to education after negotiations are completed then they were in before negotiations began</u>.

---

[153]. <u>Excellence, Accessibility, Responsibility</u>, Report of the Advisory Panel on Future Directions for Postsecondary Education, December, 1996, (Toronto: Publications Ontario, 1996), p. 16.

In consideration of the factors before the First Nations bands of Treaty No. 3 at the present time; working with a 25 year old education policy; ever increasing tuition fees to attend provincial institutions; ever increasing student population; reduced willingness of the federal crown to meet fiduciary obligations; and dismissal of their needs by a provincial Advisory Panel on Postsecondary Education: it is easy to see that upon completion of a Final Agreement for the Transfer of Jurisdiction for Education, the First Nations bands certainly will be in worse positions to meet the educational demands of their band members in the future and they will definitely have an uphill battle on their hands merely to maintain what is presently the status quo.

Chapter Five

Entrenchment of Rights: Ultimately A Supreme Court Decision?

Contemporary arguments usually present Indian rights to education either as a requirement of the Indian Act, as a right of treaty or as a constitutional right under s.35 of the Constitution Act, 1982. In the matter of a right to education as a requirement of the Indian Act, Sections 114 to 122 are clear in regard to schooling for Indians ages six (6) to sixteen (16). Attendance of Indians beyond the age of sixteen is at the discretion of the Minister. In the main, attendance at an educational institution by Indians beyond the age of sixteen falls under departmental policy, not as requirement of the Indian Act.

In viewing education as right of treaty it is worthwhile to look at the words of the court in R. v. Badger on the interpretation of treaties. The court says

> First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred . . .
>
> Second, the honour of the Crown is always at stake in its dealings with Indian people. Interpretation of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No

appearance of "sharp dealing" will be sanctioned . . .

Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed . . .

Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights. [W.W.R. p. 474-475]

In addition, when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement . . . As a result, it is well settled that the words of the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. [W.W.R. p. 478]

The Indian people made their agreements orally and recorded their history orally. Thus, the verbal promises made on behalf of the federal government at the times the treaties were concluded are of great significance in their interpretation. [W.W.R. p. 479][154]

In Badger, the court sets out a very comprehensive test for use in the interpretation of treaties based on principles set out in other cases. To reiterate, according to the court Treaties are sacred, the honour of the Crown is always at stake, ambiguity or doubt must be resolved in favour of the Indians, onus of proof is on the Crown, and in interpretation, context must be taken into consideration along with the natural

---

[154]. R. v. Badger, [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77 (S.C.C.).

understanding of the Indians at the time of signing of the Treaty. Principles in Badger explicitly echoes Nowegijick, Taylor and Williams. Those cases set out the principles for Badger in that treaties . . . are to be interpreted liberally and that any doubts respecting their interpretation be construed in favour of the Indians. In the Taylor and Williams cases, it was noted that "in approaching the terms of a treaty . . . the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned." Further, it was held that if there is any ambiguity in the words or phrase used, not only should the words be interpreted as against the framers or drafters of the treaties, but the language should be construed so as not to prejudice the Indians, providing that such construction is reasonably possible. Lastly, evidence of surrounding circumstances or facts of history, including the conduct of the parties, could be relevant to determine what had been meant by the terms of the treaty.[155]

When Treaty No. 3 was negotiated Governor Morris complimented the Chief of Lac Seule

> Chief (of Lac Seule) - - . . . . the time may come when I will ask you to lend me one of your daughters and one of your sons to live with us; and in return I will lend you one of my daughters and one of my sons for you to teach what is good, and after they have learned, to teach us. . . .
>
> Governor - - . . . . What the Chief has said is reasonable; . . . . I wish you were all of the same mind as the Chief

---

[155]. Thomas v. Canada, supra, note 136.

> who has just spoken. He wants his children to be taught. He is right. . . .[156]

This discussion led to a promise by the Governor to supply schools and was written into Treaty No. 3. In particular, Treaty No. 3 says

> And further, Her Majesty agrees to maintain schools for instruction in such reserves hereby made as to Her Government of Her Dominion of Canada may seem advisable whenever the Indians of the reserve shall desire it.[157]

It is argued by Treaty No. 3 negotiators in negotiations for the Transfer of Jurisdiction for Education that this section of Treaty No. 3 is a treaty right to education by the First Nations of Treaty No. 3 and although this may be a very viable argument it has not been challenged in the courts. Given the state of affairs on the interpretation of treaties set out by the court in Badger, Treaty No. 3 members would be following a long and precarious journey should they decide litigation of a treaty right is their only option.

Another unresolved question is whether or not an inherent right to self-government within section 35 of the Constitution Act, 1982, includes a right to education. Subsection 35(1) of the Constitution Act, 1982, states:

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

---

156. Morris, supra, note 69, p. 63-64.

157. Excerpt, Treaty No. 3.

In the Sparrow case the Supreme Court interpreted section 35 as applying to aboriginal fishing rights (which were not based on a treaty but which had existed from "time immemorial") and held that they could only be abrogated if the abrogation was justified. According to the court

> . . . federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.
>
> By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification . . . The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.[158]

Court challenges to the government's social and economic policy objectives in the field of education by the Indian population are not abundant. In the Kinistino School Division 55[159] case the court holds that s. 114 of the Indian Act does not preclude a board of education from dealing directly with a band council to provide educational services and in the Human Rights Commission[160] case challenging s. 115 and s. 118 of the Indian Act the court holds that "s.67 [of the Canadian Human

---

158. Thomas, supra, note 136.

159. Kinistino Sch. Div. 55, supra, note 143.

160. Canada (Human Rights Commission) v. Canada (Department of Indian Affairs & Northern Development), [1995] 3 C.N.L.R. 28, 25 C.R.R. (2d) 230 (Fed. T. D.).

Rights Act] immunized the Indian Act from the provisions of the Canadian Human Rights Act". A review of the case law indicates court challenges to date have focused primarily on tuitions,[161] income tax exemptions,[162] union involvement on reserve,[163] and lands reserved for Indians.[164] None of the cases to date have dealt directly on point with the right of Indians to education as a requirement of the Indian Act, as a right of treaty, or as an aboriginal right under s.35 of the Constitution Act, 1982.

Recent decisions by the Supreme Court of Canada have changed the landscape for Indians to present legal challenges on rights to education. Whether the Supreme Court has decided blindly in these cases or whether they have decided out of ignorance is unknown but they have with certainty set the stage for constitutional challenges to the status and priority of the government's social and economic policy objectives for Indians particularly in the field of education. In their wisdom in

---

[161]. see for example Williams Lake Indian Band v. Abbey, [1992] B.C. J. No. 1435 and R. v. Pratt, [1990] 3 C.N.L.R. 120 (Sask. Prov. Ct.).

[162]. see for example Faries v. Minister of National Revenue (1992), 92 D.T.C. 1142, [1992] 1 C.T.C. 2295 (T.C.C.).

[163]. see for example Manitoba Teachers' Society et al. v. Chief and/or Council of the Fort Alexander Indian Band et al., [1985] 1 C.N.L.R. 172.

[164]. see for example Rosseau River Band No.2 and Rosseau River Band No.2A v. Board of Reference, Province of Manitoba et al., [1983] 3 C.N.L.R. 158, 17 Man.R. (2d) 136.

Reference Re Bill 30 the Supreme Court states that "[t]he basic compact of Confederation with respect to education was that rights and privileges already acquired by law at the time of Confederation would be preserved . . .[165] Roman Catholic separate school supporters had at Confederation a right or privilege, by law, to have their children receive an appropriate education . . .[166] The court says [i]t is immediately apparent that the scope of the rights and privileges protected under the section must be determined by ascertaining the rights and privileges in existence at the time of the Union.[167] In the view of the Supreme Court, prior to Confederation there were three main classes of schools in Upper Canada - common schools, grammar schools and separate schools.[168] In the case of the "common schools", their function was to provide an education for the common or average person.[169] The purpose of the "grammar school" was to provide an advanced form of education. Instruction was to extend to natural philosophy, mechanics, mathematics, Greek and Latin "so far as to prepare students for University College or any College affiliated to the University of Toronto".[170] These schools were governed by the Common

---

165. Reference re Bill 30, supra, note 121.

166. Ibid.

167. Ibid.

168. Ibid.

169. Ibid.

170. Ibid.

Schools Act of 1859 at the time of Confederation whereas the separate schools were governed by the Separate Schools Act (Scott Act) of 1863 so as to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools.[171] Even though the Scott Act fails to provide the level of instruction separate schools were permitted to provide in 1867 the court held that the Scott Act gave separate school trustees the same powers and duties as common school trusties. Roman Catholic separate school supporters had at Confederation a right or privilege, by law, to have their children receive an appropriate education which could include instruction at the secondary school level and that such right or privilege is therefore constitutionally guaranteed under s. 93(1) of the Constitution Act, 1867.[172]

History itself records that the "common schools, grammar schools and separate schools" spoken to by the Supreme Court are in fact "the new kids on the block". In the Reference decision, the Supreme Court does not mention that there were also Indian residential schools "in existence at the time of the Union". In fact, the education of Indian people under a policy of assimilation certainly preceded Confederation by a very long time.

The introduction of European-style education to Aboriginal

---

171. Ibid.

172. Ibid.

> people varied by geographical location, by the timing of contact, and by the specific history of relations between various peoples and Europeans. In some regions, schools operated by religious missions were introduced in the mid-1600s. In other locations, formal education came much later. But if there were many variations in the weave of history, a single pattern dominated the education of Aboriginal people, whatever their territorial and cultural origins. Formal education was, without apology, assimilationist. The primary purpose of formal education was to indoctrinate Aboriginal people into a Christian, European worldview, thereby 'civilizing' them. Missionaries of various denominations played a role in this process, often supported by the state.[173]

In most of Ontario the residential schools were run mainly by Catholic missionaries and must therefore be considered "separate schools" or "denominational schools" within the meaning of s. 93 of the Constitution Act, 1867. The implications of this conclusion are significant. It means that the education of Indians under the rule of law is a provincial right entrenched in the Constitution Act, 1867 under s. 93. It also means that the duties of the Ontario Provincial Government owed to "separate schools" under s. 93 are also owed to Indians. In following the decision of the Supreme Court in Reference Re Bill 30 that "separate schools" or "denominational schools" have a right to funding; likewise, Indian "separate schools" or "denominational schools" also have a right to funding.

The decision of the Supreme Court in Reference Re Bill 30

---

[173]. Royal Commission on Aboriginal People, Vol. 3, p. 434.

was upheld in Adler v. Ontario.[174] In the Adler case, the appellants, by reason of religious or conscientious beliefs, send their children to religion-based independent schools. The "Adler appellants" sought a declaration that non-funding of Jewish schools in Ontario was unconstitutional. The "Elgersma appellants" sought, among other relief, a declaration that the non-funding of independent Christian schools infringed their Charter rights. The appeal was dismissed. In its reasoning the court says s. 93 is "the product of a historical compromise crucial to Confederation and forms a comprehensive code with respect to denominational school rights . . ."[175] and "the appellants, given that they cannot bring themselves within the terms of s. 93's guarantees, have no claim to public funding for their schools"[176] Unlike the appellants in Adler, the Aboriginal people of Canada would have little difficulty bringing "themselves within the terms of s. 93's guarantees". They would argue similarities in minority rights in s. 93 acknowledged by the Supreme Court because of the long history of Indian education, the existence of Indian schools at the time of Confederation, and especially the religious bent of these schools. It would be difficult to reject an argument for

---

[174]. Adler v. Ontario, [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609, (1996) 140 D.L.R. (4th) 385, (1996) 204 N.R. 81, [1994] S.C.C.A. No. 421, [1994] O.J. No. 1427, (1994) 19 O.R. (3d) 1, (1994) 116 D.L.R. (4th) 1, (1994) 73 O.A.C. 81, (1992) 9 O.R. (3d) 676, (1992) 94 D.L.R. (4th) 417.

[175]. Ibid.

[176]. Ibid.

"denominational schools" given the fact both priest and parson (Anglican, Catholic, Methodist and Presbyterian) rigorously "responded to not only a constitutional but to a Christian "obligation to our Indian brethren" that could be discharged only "through the medium of the children" and "education [] given the foremost place".[177] But unlike the spirit and intent of the "common schools, grammar schools, and separate schools" to maintain Protestant and Catholic values, the Indian boarding schools were meant to change the values and eradicate the culture. It could be argued that Indian rights to education entrenched in the Constitution Act, 1867 under s. 93 as rights of citizenship had been dormant for almost 100 years. But in 1960 the politicians of the day decided, as blindly and ignorantly as perhaps has the Supreme Court of today, selfishly to awaken these rights with the inclusion of Indians as citizens in the Citizenship Act in order to get their votes. As a result of this political decision, the Minister of the Department of Indian Affairs, the Minister of Education for the Provinces, local school boards and Band Chiefs and Councils are, for the past 37 years, guilty of violating Indian rights to education entrenched under s. 93 of the Constitution Act, 1867.

There are also moral arguments for Indians to launch a constitutional challenge to s. 93 of the Constitution Act, 1967. Looking at the demographics published by Indian and Northern

---

177. Royal Commission on Aboriginal People, Vol. 1, p. 334.

Affairs Canada in their Basic Departmental Data for 1995 a glimpse of the explosiveness of the situation can be seen. The report highlights that

> In 1994, more that 50 percent of the Registered Indian population was less than 25 years of age. For Canada as a whole, 34 percent of the population fell into the under 25 age cohort. Less than 5 percent of the Registered Indian population occurs in the cohort aged 65 or more, compared to almost 12 percent of the total Canadian population.[178]

In other words, for Canada as a whole, the under 25 age group of the population is at a stand still and Canada is in a period of zero population growth. The contrary is true when looking at the Indian population. In the case of Indians, one-half of the population is under 25 years of age and the Indian population is growing significantly.

It is difficult to appreciate the extent to which "the education system has failed Indians" when you look at the data produced by the Department of Indian Affairs and Northern Development. According to the Department, enrolment in post-secondary institutions by the Registered Indian population more than doubled between 1985/86 and 1993/94, rising from 11,170 to 23,068. In 1994/95, enrolment increased by an additional 3,751 from the previous year, to an estimated 26,819 persons.[179] However, the published graph and accompanying text makes no

---

[178]. Basic Departmental Data, Indian and Northern Affairs Canada, (Ottawa: Information Quality and Research Directorate, 1996), p. 20.

[179]. Ibid, p. 40.

mention of the effects in education caused by amendments to the Indian Act known as Bill C-31. Instead, the effects are stated in the Introduction to the Basic Departmental Data. It says

> In June 1985, amendments to the Indian Act were passed by Parliament. These changes, known as Bill C-31 amendments, restore Indian status and membership rights to individuals and their children who had been enfranchised because of certain clauses contained in the Indian Act. The Population chapter reflects the significant population growth that has occurred in the Registered Indian population since the Bill C-31 reinstatement process commenced in 1985.[180]

It is unfortunate that only the population chapter "reflects the significant population growth that has occurred in the Registered Indian population since the Bill C-31 reinstatement process commenced in 1985" and that these same effects in population were not tracked into other areas such as education. Without this tracking, the data provided by the department artificially inflates percentages and presents a very skewed profile of the accomplishments the Department has made in the field of education.

A more accurate portrayal of the failure of the education system is profiled in the data on social assistance recipients and dependents. According to the data

> the average monthly number of social assistance dependants among Registered Indians increased by 52 percent between 1984/85 and 1994/95. In numeric terms, slightly more than 102,000 dependants were reported in 1984/85, increasing to almost 156,000 by 1994/95. In fact, with the exception of the 1987/88 data year, the average number of social assistance dependants has always increased when compared to

---

[180]. Ibid, p. 1.

the previous year.[181]

It is almost as if the Department were fighting a losing battle! The data reports that the more Registered Indians that are enrolled in post-secondary institutions, the more Registered Indians there are on social assistance. The major difference is that the numeric rate of increase in social assistance recipients and dependents is much greater than the numeric increase in those enrolling in post-secondary institutions.

At the end of the day, whether Indians have a right to education as a requirement of the Indian Act, as a right of Treaty, as a s. 35 right or as a right entrenched in the Constitution under s. 93 is of little difference or consequence. In earlier times statements were made very blatantly that set the ultimate goal for the education of Indians. Indians must assimilate. The strategy used then was to apprehend the young children and "civilize" them by destroying their language and the culture of the Aboriginal people.

Today First Nations people say it is important to maintain your language, your culture and your identity. But again, the question must be asked - how can you expect to maintain your language, your culture and your identity if responsibility for the education of your children is in the hands of another

---

[181]. Ibid, p. 60.

people?

Today First Nations people also say they want to take responsibility for the education of their children, so why don't they? In Ontario, the Education Act does not require children to attend either secular or Roman Catholic schools. Indeed, s. 21 excuses children from school attendance if they are receiving satisfactory instruction elsewhere[182] and the requirement of mandatory education does not conflict with the constitutional right of parents to educate their children as their religion dictates.[183] Special acts of parliament by themselves will not alleviate the situation, nor will court decisions or unlimited funding sources. Past experiences tell us that. Jurisdiction for education quickly becomes a moot point. The only blockage is that Indians in their present form as "legal fictions" present the "rare" case "where it is found reasonable in a free and democratic society to discriminate".[184]

Finding fault or placing blame proves nothing; at this point the answer lies only in the doing. The problems of Indian communities will remain as problems until the Indian population takes responsibility for its own destiny. It certainly is not as the pessimist would say, too late, but it is critical that

---

[182]. Alder, supra, note 174.

[183]. Adler, supra, note 174.

[184]. Adler, supra, note 174.

the cycle of dependency on the handouts of government come to an end. The Indian population must take full responsibility for the education of their children. But they must start at the opposite end of the spectrum. Instead of beginning with educating the young, adults must be re-educated to believe in the value of what they have to offer to their own children. Amazingly, to the contrary of the best of Christian intentions and over one hundred years of overwhelming 'civilizing' efforts of both priest/parson and government Aboriginal people still have their language, their culture and their Aboriginal identity left to pass on to their children.

Appendix I

Selected sections of the Education Act, R.S.O., 1990, C.E-2, as pertaining to Indians.

187. A board may enter into an agreement with the Crown in right of Canada for such periods and under such conditions as are specified in the agreement whereby the board may provide for the education of pupils who reside on land held by the Crown in right of Canada in a school or schools operated by the board on land owned by the board or held by the Crown in right of Canada. R.S.O. 1990, c.E.2, s. 187.

188.--(1) A board may enter into an agreement with,

(a) the Crown in right of Canada; or

(b) a band or the council of a band or an education authority where such band, the council of the band or education authority is authorized by the Crown in right of Canada to provide education for Indians,

to provide for Indian pupils, for the period specified in the agreement, accommodation, instruction and special services in the schools of the board, and such agreement shall provide for the payment by the Crown in right of Canada, the band, the council of the band or the education authority, as the case may be, of fees calculated in accordance with the regulation governing the fees payable by Canada.

(2) A board may enter into an agreement with,

(a) the Crown in right of Canada; or

(b) a band, the council of a band or an education authority referred to in clause (1)(b),

to provide for Indian pupils, for the period specified in the agreement, instruction and special services in schools provided by the Crown in right of Canada, the band, the council of the band or the education authority, as the case may be, and such agreement shall provide for the payment by the Crown in right of Canada, the band, the council of the band or the education authority, as the case may be, of the full cost of the provision of the instruction and special services.

(3) A board may enter into an agreement with the Crown in right of Canada for a period specified in the agreement to provide for a payment from the Crown in fight of Canada to provide additional classroom accommodation and to provide tuition for a maximum of thirty-five Indian pupils for each additional classroom so provided, and the

fees therefor shall be calculated in accordance with the regulations, but exclusive of expenditures for the erection of school buildings for instructional purposes and additions thereto.

(4) A board shall not enter into an agreement under subsection (1), (2) or (3) that requires the board to provide special services for Indian pupils that it does not provide for its resident pupils unless, in addition to the fees referred to in subsection (1) or (3), the cost of such services is payable by the Crown in right of Canada.

(5) Where a board has entered into one or more agreements under this section, the council of the band, or the councils of the bands, to which the Indian pupils, or a majority of the Indian pupils, who are, pursuant to the agreement or agreements, enroled in the schools operated by the board or in the schools in which the board provides all the instruction, belong, may, subject to subsection (6), name one person to represent on the board the interests of the Indian pupils and, where a person is so named, the board shall, subject to subsection (7), appoint the person a member of the board, and the member so appointed shall be deemed to be an elected member of the board, except that,

(a) where the agreement or agreements under this section are in respect of secondary school pupils only, the member so appointed is a trustee for secondary school purposes only and shall not vote on a motion or otherwise take part in any proceedings that affect public schools exclusively; and

(b) where the agreement or agreements under this section are in respect of elementary school pupils only, the member so appointed is a trustee for elementary school purposes only and shall not vote on a motion or otherwise take part in any proceedings that affect secondary schools exclusively.

(6) Where the number of Indian pupils enroled in the schools under the jurisdiction of a board pursuant to one or more agreements made under this section exceeds 25 per cent of the average daily enrolment in the schools of the board, two persons may be named under subsection (5), and subsection (5) applies with necessary modifications in respect of such persons.

(7) Where the number of Indian pupils enroled in the schools under the jurisdiction of the board pursuant to one or more such agreement is fewer than the lesser of 10 per cent of the average daily enrolment in the schools of the board and 100, the appointment under subsection (5) may be

made at the discretion of the board.

(8) For the purposes of determining the number of Indian pupils enroled in the schools under the jurisdiction of a board referred to in subsection (6) or (7), the number of Indian pupils in Indian schools in which the board provides all the instruction shall be included.

(9) Where the agreement is, or the agreements are, in respect of elementary school pupils only or secondary school pupils only, the enrolment referred to in subsection (6) and (7) shall be that of elementary school pupils only or secondary school pupils only, as the case may be.

(10) A member of the board appointed under subsection (5), (6) or (7) is in addition to the number of members of the board otherwise provided for in this Act and the term of office of such member terminates in the same date as the term of office of the elected members.

(11) Where a regulation made under clause 67 (2) (a) provides for the appointment of one or more members to represent on the board the interests of Indian pupils, subsections (5) to (10) do not apply.

(12) Where the office of a member of a board appointed under this section becomes vacant for any reason, it shall be filled in accordance with subsection (5), and the person so appointed shall hold office for the remainder of the term of his predecessor.

(13) Where a person is chosen by a band to represent the interests of Indian pupils on a Roman Catholic separate school board, such person shall be a Roman Catholic and the full age of eighteen years. R.S.O. 1990, c.E.2, s.188.

Bibliography

Apple M., Culture and Economic Reproduction in Education, (Boston: Routledge and Keagan, 1982).

Asch, Michael, "Errors in Delgamuukw: An Anthropological Perspective", in Cassidy, F., (ed), Aboriginal Title in British Columbia: Delgamuukw v. The Queen, (Vancouver, B.C.: Oolichan Books, 1991).

Base Departmental Data, (Ottawa: Indian and Northern Affairs Canada, 1995).

Bowles, S., and H. Gintis, Schooling in Capitalistic America, (New York: Basic Books, 1976).

Burns, G.E., "Factors and Themes in Native Education and School Boards/First Nations Tuition Agreement Education Field", Canadian Journal of Native Education, 1996, (in review).

Common, R., and L. Frost, Teaching Wigwams - A Modern Vision of Native Education, (Muncey: Anishnaabe Kendaaswin Publishing, 1994).

Cumming and Mickenberg, Native Rights in Canada, 2nd ed., (Toronto: The Indian-Eskimo Association of Canada, 1972).

Consolidated Native Law Statutes, Regulations and Treaties 1994, (Toronto: Carswell, 1993).

Dawson, S.J., "Report of the Exploration of the Country between Lake Superior and the Red River Settlement", (Toronto: Legislative Assembly, 1859.

Dawson, S.J., "Report of the Line of Route between Lake Superior and the Red River Settlement", (Toronto: Ontario Archives, Pamphlet #14, 1868).

"Debates of the House of Commons of the Dominion of Canada", (Ottawa: Maclean, Roger & Co., 1876).

Dei, G., and S. Razack, eds. "Inclusive Schooling: An Inventory of Contemporary Practices Designed to Meet the Challenges of a Diverse Student Body", (Toronto: Ministry of Education and Training, 1995).

Dukes, Paul, A History of Europe 1648-1948: The Arrival, The Rise, The Fall, (London: McMillan Publishers Ltd., 1985).

Elias, Peter Douglas, Development of Aboriginal People's Communities, (Toronto, Captus Press Inc., York University Campus, 1991).

Elliott, D.W., ed., Law and Aboriginal Peoples of Canada, 2nd Ed., (Toronto: Captus Press Inc., York University, 1994).

Franciscus De Victoria, The First Relectio on the Indians Lately Discovered, in Ernest Nys ed., De Indis Et De Jure Belli Relectiones, Classics of International Law, #7, Bk.1, (Washington, D.C.: Carnegie Institution of Washington, D.C., 1917).

Freire, P., Pedagogy of Hope, (New York: Continuum Publishing, 1995).

Freire, P., Education for Critical Consciousness, (New York: Continuum Publishing, 1969).

Freire, P., Pedagogy of the Oppressed, (New York: Seabury Press, 1968).

Government of Canada, "House of Commons Report on Aboriginal Education: Sharing the Knowledge - the Path to Success and Equal Opportunities in Education", (Ottawa: Canada Communication Group Publishing, Public Works and Government Services Canada, 1996).

Grant, The Reverend George M., Ocean to Ocean, Sandford Flemings's Expedition through Canada in 1872, (Toronto: The Radisson Society of Canada Limited, 1925).

Haig-Brown, Celia, Resistance and Renewal, Surviving the Indian Residential School, (Vancouver: Tillacum Library, 1988).

Hawley, Donna Lee, The Annotated Indian Act, 1994, (Toronto: Carswell, 1993).

Highwater, Jamake, Ritual of the Wind, (New York: The Viking Press, 1977).

Hind, H.Y., Narrative of the Canadian red River Exploring Expedition of 1858, (Edmonton: Hurtig, 1971).

Hogg, Peter W., Constitutional Law Of Canada, (Toronto: The Carswell Company Limited, 1985).

Indian Claims in Canada, (Ottawa: Research Resource Centre, Indian Claims commission, Information Canada, 1975).

Innis, H.A., The Fur Trade in Canada, (Toronto: University of Toronto Press, 1956).

Imai, Shin, The 1997 Annotated Indian Act, (Toronto: Carswell, 1996).

Kerr, D.G.G., Historical Atlas of Canada, 3rd revised ed., (Toronto: Thomas Nelson & Sons (Canada) Limited, 1975).

Lewis, Norman, The Missionaries: God against the Indians, (London: Martin Secker & Warburg Ltd, 1988).

Little Bear, Leroy, "Aboriginal Rights and the Canadian ~Grundnorm"", Arduous Journey: Canadian Indians and Decolonization, (Toronto: McClelland and Stewart Limited, 1986).

Locke, John, "Of Civil Government", The Works of John Locke, (London: Printed for W. Strahan, J.F. and C. Rivington, L. Davis, W. Owen, S. Baker and G. Leigh, T. Payne and Son, T. Calson, S. Crowder, T. Longman, B. Law, C. Rivington, E. and C. Dilly, J. Wilkie, T. Cadell, N. Conant, T. Beecroft, T. Lawndes, G. Robinson, Jos. Johnson, J. Robson, J. Knox, T. Becket, and T. Evans, 1777).

Lyons, Oren, "Spirituality, Equality, and Natural Law", Pathways to Self-Determination: Canadian Indians and The Canadian State, (Toronto: University of Toronto Press, 1984).

Mauss, Marcel, The Gift, (London, England: Cohen and West Ltd., 1966).

Mealing, S.R., ed., The Jesuit Relations and Allied Documents, A Selection, (Ottawa: Carleton University Press, 1990).

Morey, S. M., and O. L. Gilliam, Respect for Life, (New York: Waldorf Press, 1972).

Morison, Samuel Eliot, Admiral of the Ocean Sea, the Life of Christopher Columbus, (Boston, Mass.: Little, Brown and Company, 1942).

Morse, Bradford W., Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada, (Ottawa: Carleton University Press, 1985).

Morris, The Honourable Alexander, P.C., The Treaties of Canada with The Indians of Manitoba and The North-West Territories including The Negotiations on Which They Are Based, and Other Information relating Thereto, (Toronto: Willing & Williamson, 1880).

Norton, A.S., A History of the Canadian West to 1870-71, (Toronto: University of Toronto Press, 1973).

Nute, G.L. Rainy River Country, (St. Paul: The Minnesota Historical Society, 1950).

Report of the Royal Commission on Aboriginal Peoples, (Ottawa: Canada Communication Group Publishing, 1996).

Purich, Donald, Our Land, (Toronto, Ont.,: James Lorimer & Company, 1986).

Singer, Beth J., Operative Rights, (Albany: State University of New York Press, 1993).

The Royal Commission on the Northern Environment, Issues Report, (Toronto: Ontario Ministry of the Attorney General, 1978).

The Royal Commission on the Northern Environment, Final Report and Recommendations, (Toronto: Ontario Ministry of the Attorney General, 1985).

Tulley, James, An Approach to Political Philosophy: Locke in Contexts, (Cambridge: Cambridge University Press, 1993).

Yolton, John W., The Locke Reader, (New York: Cambridge University Press, 1977).

Waddams, S.M., The Law of Contracts, (Toronto: Canada Law Book Inc., 1984).

Warren, William W., History of the Ojibway People, (St. Paul: Minnesota Historical Society Press, 1984).

Weatherford, Jack, Indian Givers: How the Indians of the Americas Transformed the World, (New York: Crown Publisher, Inc., 1988).

Woodward, Jack, Native Law, (Toronto: Carswell, 1989).

Zander, Michael, Statutory Interpretation: The Law Making Process, 2d, 1985.

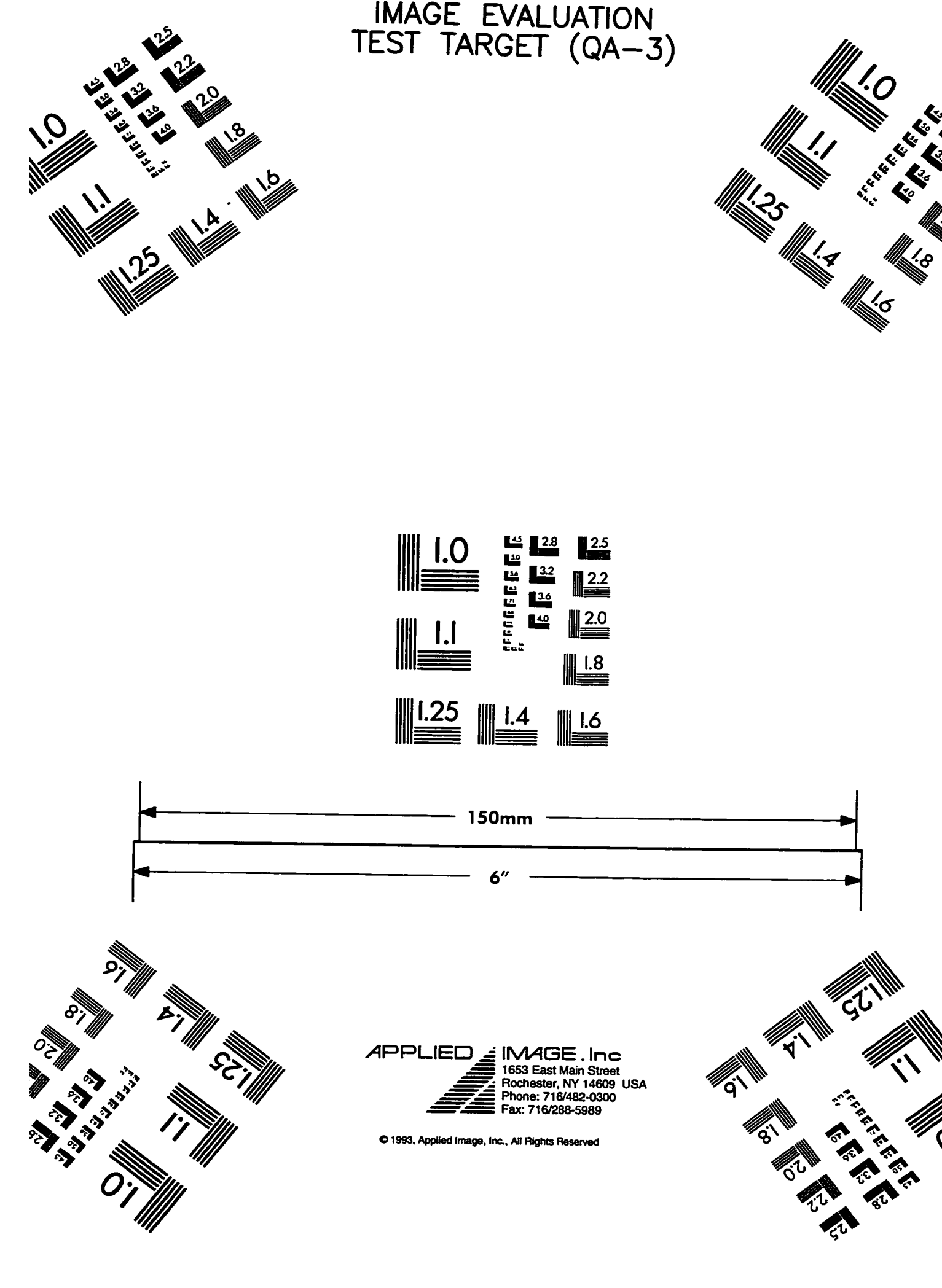
IMAGE EVALUATION
TEST TARGET (QA-3)
1.0
1.1
1.25
1.4
1.6
2.8
2.5
3.2
2.2
3.6
2.0
4.0
1.8
150mm
6"
APPLIED IMAGE, Inc
1653 East Main Street
Rochester, NY 14609 USA
Phone: 716/482-0300
Fax: 716/288-5989
© 1993, Applied Image, Inc., All Rights Reserved