



National Library
of Canada

Bibliothèque nationale
du Canada

Canadian Theses Service

Service des thèses canadiennes

Ottawa, Canada
K1A 0N4

NOTICE

The quality of this microform is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us an inferior photocopy.

Reproduction in full or in part of this microform is governed by the Canadian Copyright Act, R.S.C. 1970, c. C-30, and subsequent amendments.

AVIS

La qualité de cette microforme dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de qualité inférieure.

La reproduction, même partielle, de cette microforme est soumise à la Loi canadienne sur le droit d'auteur, SRC 1970, c. C-30, et ses amendements subséquents.

Permission has been granted to the National Library of Canada to microfilm this thesis and to lend or sell copies of the film.

The author (copyright owner) has reserved other publication rights, and neither the thesis nor extensive extracts from it may be printed or otherwise reproduced without his/her written permission.

L'autorisation a été accordée à la Bibliothèque nationale du Canada de microfilmer cette thèse et de prêter ou de vendre des exemplaires du film.

L'auteur (titulaire du droit d'auteur) se réserve les autres droits de publication; ni la thèse ni de longs extraits de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation écrite.

ISBN 0-315-53859-7

**THE ABORIGINAL RIGHTS PROVISIONS
IN THE CONSTITUTION ACT, 1982**

Thesis submitted in partial fulfillment
of the requirements for the degree of
Masters of Law, Faculty of Graduate Studies,
University of Ottawa

William F. Pentney
University of Ottawa

TABLE OF CONTENTS

ABSTRACT	i
INTRODUCTION	v
Endnotes	viii
ACKNOWLEDGEMENTS	ix
LIST OF ABBREVIATIONS	x
CHAPTER 1 - LEGISLATIVE HISTORY	
Introduction	1
I. Reform Proposals	1
II. Submissions Before the Special Joint Committee	4
III. The Final Stages	7
IV. The London Lobby	9
V. The November Accord and Its Aftermath: The Bitter End	13
VI. The Usefulness of Legislative History	13
Endnotes	15
CHAPTER 2 - THE REASONS FOR AND THE GENERAL EFFECT OF THE ENTRENCHMENT OF ABORIGINAL RIGHTS	
Introduction	20
I. Reasons for Entrenchment	20
II. The Effect of Entrenchment	24
Endnotes	28
CHAPTER 3 - A THEORY OF ABORIGINAL RIGHTS	
Introduction	32
I. The Origins and Content of Aboriginal Rights	33
II. Rights Theory: A Modern Preoccupation	41

III.	Collective Rights	45
1.	Aboriginal Rights in the "Rights System"	51
2.	Individual Rights of Members of Collectivities	56
3.	Conclusion	59
IV.	Applying the Theory	60
1.	A Preliminary Discussion	60
2.	A Case Study	65
3.	Summary	69
	Endnotes	71

CHAPTER 4 - DEFINITION OF ABORIGINAL PEOPLES

	Introduction	81
I.	Purpose of Subsection 35(2)	81
II.	Interpreting Subsection 35(2) - General Considerations	83
III.	"Indian" in Subsection 91(24)	83
IV.	Aboriginal Peoples: A Purposive View	88
1.	Indians	89
2.	Inuit	92
3.	Metis	95
V.	The Significance of Subsection 35(2)	98
	Endnotes	101

CHAPTER 5 - SECTION 25: AN INTERPRETIVE PRISM

	Introduction	108
I.	The Function of Section 25 in a Charter Case	108
II.	The Relationship Between Sections 25 and 35	120
III.	Substantive Content of Section 25	121

1.	Treaty Rights	122
i)	What Constitutes a Treaty?	122
ii)	Principles of Interpretation	129
(a)	Legal Status	129
(b)	Defining the Terms	137
(c)	Interpreting Ambiguities	139
(d)	Extinguishment of Treaty Obligations	142
iii)	Significance of Entrenchment	146
2.	Rights or Freedoms Recognized by the Royal Proclamation, 1763	147
3.	Rights or Freedoms Acquired by Way of Land Claims Agreements	151
4.	Other Rights or Freedoms that Pertain to the Aboriginal Peoples of Canada	153
IV.	The Use of Section 25 as an Interpretive Prism	155
	Endnotes	160

CHAPTER 6 - SECTION 35 - THE SUBSTANTIVE GUARANTEE

	Introduction	178
I.	Section 35(1)	
1.	Overview	179
2.	The Meaning of the Words	179
i)	"Recognized and Affirmed"	179
ii)	"Existing"	181
(a)	The Authors	182
(b)	The Cases	188
II.	Aboriginal Rights	
1.	Overview	191

2.	Minimum Content: Aboriginal Title	192
(a)	The Origins of Aboriginal Title	195
i)	The American Doctrine: "Marshall C.J. — Pragmatic Genius"	195
ii)	The Commonwealth Doctrine: "The Privy Council and the Burden of Empire"	204
(b)	Aboriginal Title in Canadian Law	209
(c)	Extinguishment in Canadian Law	211
i)	Constitutional Competence	211
ii)	Canadian Law on the Manner of Extinguishment	222
iii)	An Alternative Approach	229
3.	Aboriginal Rights: Exploring the Limits	231
	Endnotes	237
	BIBLIOGRAPHY	257

ABSTRACT

This thesis is a legal analysis of the provisions in the Constitution Act, 1982 which protect the aboriginal and treaty rights of the aboriginal peoples of Canada: section 25 of the Charter of Rights and Freedoms, and section 35 of the Constitution Act, 1982.

An examination of the legislative history of these provisions reveals the divergent views about the scope and content of the rights of the aboriginal peoples which prevailed in the period immediately preceding the patriation of the Constitution. Aboriginal groups adopted a political and legal strategy to ensure that their rights were protected in any constitutional reform, and the results of this are revealed in the Constitution Act, 1982. The strategy was a limited success, in that sections 25 and 35 do protect these rights, but the addition of the word "existing" to section 35 was interpreted to be a restriction of the original provision.

Entrenched constitutional guarantees serve an educational as well as a practical legal purpose. The status of the Constitution Act, 1982 requires a purposive analysis, which gives effect to the underlying philosophical and legal rationale for the rights guarantees it contains. The entrenchment of aboriginal and treaty rights provisions in this constitutional reform package was viewed by aboriginal peoples as a meaningful first step in the process of re-negotiating their relationship with the governments of Canada. These provisions therefore have a symbolic as well as a pragmatic purpose.

An adequate theory of aboriginal rights, as collective rights, is a vital missing element in current legal analysis, and it is particularly needed for the interpretation of these constitutional guarantees. Aboriginal rights in Canadian law are rooted in the views of Spanish theologians and international lawyers, which were incorporated into British colonial practice during the settlement of North America. These rights

protect, at the least, aboriginal land use activities in territories which have not been ceded to, or purchased by, the Crown. These rights are subject to extinguishment by the Parliament of Canada.

In modern jurisprudence, "rights" are recognized as claims which require special justification to be over-ridden. Professor Dworkin analyzes these claims, and he situates them in a larger "liberal" theory of law, which focusses on the rights possessed by individuals. Collective rights are "rights" as that term is explained above, but they are enjoyed in community with others in a collectivity. The interaction between individual and collective rights will occasionally bring them into conflict, and principles are required in order to reconcile these competing claims. One key principle which must be adopted if collective rights are to be meaningful is that the capacity of the collectivity to continue as a separate entity must not be impaired either by state intrusion or by claims on behalf of individuals. Against this one can balance an equally strong presumption in favour of the maximum protection of individual rights which is consonant with the survival of the collectivity.

Sub-section 35(2) states that the "aboriginal peoples of Canada includes the Indian, Inuit and Metis people of Canada". The reference to "Indians" in sub-section 91(24) of the Constitution, 1867 had previously been interpreted to apply to Indian and Inuit peoples. The Metis may also fall within that sub-section; sub-section 35(2) clarifies the status of the Metis as an aboriginal people. In the interpretation of this provision the courts are not bound by existing statutory definitions, nor can they merely accept the definitions adopted by the Indian, Inuit and Metis political organizations. Principles for the interpretation of sub-section 35(2) must be created, with reference to the history of each group, and with reference to such factors as ancestry, kinship, lifestyle and community acceptance.

Section 25 of the Charter is similar to several clauses (ss. 26, 27, 29); it is primarily an interpretive prism which modifies the substantive rights guarantees in order to protect aboriginal and treaty rights, and rights acquired by way of land claims agreements. It is not an independently enforceable guarantee of these rights. Section 25 should be applied in a Charter case to modify the scope or content of the substantive right before the court analyzes whether the challenged limit on the right is justified under section 1 of the Charter.

The interpretation of the reference to treaty rights in section 25 requires an analysis of the principles for the interpretation of treaties which are appropriate in the context of a constitutional guarantee. Indian treaties are sui generis in our law; principles for the interpretation of international treaties and domestic contracts are useful but not binding in respect of these unique documents. In order to determine the precise terms of any particular treaty the court can move beyond the written memorial, and examine oral promises made at the time of entry into the agreement, as well as the subsequent conduct of the parties. The inequalities between the parties to these treaties must be recognized, and thus any ambiguities must be resolved in favour of the Indians.

Section 25 also protects rights or freedoms recognized by the Royal Proclamation, 1763, which principally involve land rights, and it applies to rights acquired by way of land claims agreements, and other rights or freedoms that pertain to the aboriginal peoples of Canada.

Section 35 of the Constitution Act, 1982, is an independently enforceable guarantee of "existing aboriginal and treaty rights." The word "existing" is interpreted in this thesis to mean "not extinguished" rather than "not subject to any restriction." Section 35, therefore, protects any rights which have not previously been lawfully extinguished. An analysis of the scholarly commentary and the cases on section 35

reveals a divergence of opinion on this point, but a principled analysis of the provision supports the view advanced in this thesis.

Aboriginal rights must involve more than traditional land use of ancestral lands. The British, American and Commonwealth cases on aboriginal rights mainly involve land disputes, but the concept logically incorporates other aspects of aboriginal social organization, since it is premised on recognition of aboriginal social occupation and use of certain lands. At a minimum, the concept includes aboriginal title. This title is subject to extinguishment; it is argued here that only the Parliament of Canada is constitutionally competent to extinguish aboriginal title, pursuant to sub-section 91(24) of the Constitution Act, 1867. It is also submitted that a plain legislative intention to extinguish this title is required, so that it cannot be done indirectly.

A broader concept of self-direction is also logically included within the concept of aboriginal rights. A principled analysis of these rights, as collective rights, reveals that aboriginal rights must be broader in scope than mere land use and occupancy. The right of aboriginal peoples to self-direction requires that they control internal matters which are necessary for the survival and functioning of a collective entity, and that they control the manner in which their society adapts to external influences.

INTRODUCTION

The aboriginal and treaty rights of the aboriginal peoples of Canada are protected by two provisions in the Constitution Act, 1982: s. 25 of the Canadian Charter of Rights and Freedoms, and s. 35 of the Constitution Act, 1982. In this thesis the legal principles which are relevant to the interpretation of these provisions are examined. Moral, political and pragmatic concerns colour this analysis, but its primary focus is legal.

In chapter 1 the legislative history of ss. 25 and 35 is examined; the significance of constitutional entrenchment of these rights is discussed in chapter 2. A theory of aboriginal rights is then outlined in chapter 3, in order to provide a basis for the examination of the substantive provisions which follows. Sub-section 35(2), which sets out the definition of "aboriginal peoples of Canada", is analyzed as it applies in respect of the Indian, Inuit and Metis peoples, and a method for interpreting this sub-section is provided in chapter 4. In chapter 5, section 25 of the Charter is compared with other similar clauses, and its operation as an interpretive "prism" is explained. Treaty rights are discussed with reference to s. 25, and in the following chapter aboriginal rights are analyzed in the context of s. 35. Although both sections 25 and 35 refer to aboriginal and treaty rights, it was deemed most expedient to discuss these rights separately, in order to demonstrate how ss. 25 and 35 operate, without unnecessary repetition about the substantive content of the rights.

There is no extensive discussion of the pre-existing constitutional framework in this thesis. Although provisions such as s. 91(24) of the Constitution Act, 1867, and the various sections of the Natural Resources Transfer Agreements concerning Indian hunting, trapping and fishing rights (which are contained in the Constitution Act, 1930) are undoubtedly still of considerable importance for aboriginal peoples, an examination

of the body of law which has evolved under these sections is beyond the scope of this thesis.² The existing scholarship on this subject is quite comprehensive,³ and it is not repeated here. These provisions are discussed in this thesis only where they are relevant for the interpretation of ss. 25 or 35.

As well there is no analysis of the aboriginal or treaty rights of any particular aboriginal people or group. A proper analysis of such a claim requires an extensive examination of the legal and historical record; as Dickson J. said in Kruger and Manuel v. The Queen: "Claims to aboriginal title are woven with history, legend, politics and moral obligations."⁴ Such analysis is also beyond the scope of this thesis.

In this thesis a theoretical and legal framework for the interpretation of s. 25 of the Charter of Rights and Freedoms and s. 35 of the Constitution Act, 1982, is set out. These provisions pose formidable interpretive challenges for lawyers, judges and others; this thesis contains a preliminary appraisal of their scope and application. There are few decisions interpreting these constitutional guarantees, and there is considerable disagreement among the commentators who have analyzed these sections. In view of this the arguments advanced in this thesis are grounded largely in existing case-law on aboriginal and treaty rights, and on the Charter of Rights and Freedoms. This is buttressed by the theory of aboriginal rights which is discussed in chapter 3.

The interpretation and application of the Constitution Act, 1982 requires a principled analysis, which adequately reflects its entrenched status. In this thesis the contours of a principled approach to the interpretation of these provisions are explored. This is done in the context of a legal rather than a moral or political analysis. The law cannot solve all of the problems that the aboriginal peoples of Canada currently experience. As the analysis in this thesis demonstrates, however, ss. 25 and 35 can provide a meaningful basis for a refined appreciation of aboriginal and treaty rights in Canada, which in turn may enable the law to reinforce and contribute

to the evolution of a just and lasting place for the aboriginal peoples of Canada in this society.

INTRODUCTION ENDNOTES

1. Canada Act, 1982, England, c. 11, Schedule B.
2. The relevant decisions are discussed in later chapters. Other constitutional obligations respecting aboriginal peoples may derive from provisions such as the Terms of Union by which British Columbia joined Confederation (R.S.C. 1970, App. II, No. 10) and the Rupert's Land and North-Western Territory Order (R.S.C. 1970, App. II, No. 9): see Jack v. The Queen, [1980] 1 S.C.R. 297; K. McNeil, Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations, University of Saskatchewan Native Law Centre, 1982.
3. See: K. Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967), 45 Can. Bar Rev. 513; K. Lysyk, "Constitutional Developments Relating to Indians and Indian Lands: An Overview", [1978] L.S.U.C. Special Lectures - The Constitution 201; P. Hughes, "Indians and Lands Reserved For the Indians: Off-Limits to the Provinces" (1983), 21 Osgoode Hall L.J. 82; H. Brun, "Les droits des Indiens sur le territoire du Quebec" (1969), 10 C. de D. 415; M. Patenaude, Le droit provincial et les terres Indiennes, Montreal: Les editions Yvon Blais, 1986; P. Hogg, Constitutional Law of Canada (2nd ed.), Toronto: Carswell, 1985.
4. [1978] 1 S.C.R. 104, at p. 108.

ACKNOWLEDGEMENTS

Many people helped me during the course of this thesis. I would like to acknowledge the financial assistance of the Department of Justice, Duff-Rinfret Scholarship Program. The Common Law Section of the Faculty of Law, University of Ottawa, provided administrative support, and I particularly want to thank Dean H.A. Hubbard, Mona Carkner, and Francoise Dagenais. I am grateful to Professor Brad Morse, who read an earlier version of this work and provided valuable suggestions for improvement. Mr. Justice Tarnopolsky's guidance during the preparation of this thesis made it better than it otherwise would have been. Finally, I would like to thank my wife Maureen: for her patience, tolerance and encouragement. And also for giving me a little extra nudge just when I most needed it.

William Pentney
October, 1986

LIST OF ABBREVIATIONS

Major law reports are listed in the footnotes under their usual abbreviations, and these are not included in this list.

Alta. L. Rev.	Alberta Law Review
Am. Ind. L. Rev.	American Indian Law Review
Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int. L.	American Journal of International Law
Anglo-Am. L. Rev.	Anglo-American Law Review
Buffalo L. Rev.	Buffalo Law Review
C. de D.	Cahiers de Droit
Can. Bar Rev.	Canadian Bar Review
Can. Bus. L.J.	Canadian Business Law Journal
Can. H.R.Y.B.	Canadian Human Rights Yearbook
Can. J. Native Studies	Canadian Journal of Native Studies
Can. L. Aid Bulletin	Canadian Legal Aid Bulletin
C.N.L.C.	Canadian Native Law Cases
C.N.L.R.	Canadian Native Law Reporter
Can. Pub. Admin.	Canadian Public Administration
Columbia L. Rev.	Columbia Law Review
Dalhousie L. Rev.	Dalhousie Law Review
Fed. L. Rev.	Federal Law Review
Georgia L. Rev.	Georgia Law Review
Harv. L. Rev.	Harvard Law Review
I.C.L.Q.	International and Comparative Law Quarterly
Int'l Legal Materials	International Legal Materials
J. Can. Studies	Journal of Canadian Studies
Man. L.J.	Manitoba Law Journal
McGill L.J.	McGill Law Journal
Minn. L. Rev.	Minnesota Law Review
N.Z.P.C.C.	New Zealand Privy Council Cases
Ottawa L. Rev.	Ottawa Law Review
Oxford J. Legal Studies	Oxford Journal of Legal Studies

Queen's L.J.

Sask. L. Rev.

Sup. Ct. L. Rev.

U.B.C.L. Rev.

U.N.B.L.J.

U.T. Fac. L. Rev.

U.T.L.J.

Queen's Law Journal

Saskatchewan Law Review

Supreme Court Law Review

University of British Columbia Law Review

University of New Brunswick Law Journal

University of Toronto Faculty Law Review

University of Toronto Law Journal

CHAPTER I

LEGISLATIVE HISTORY

Introduction

Canadian Courts traditionally have not examined prior legislative proposals as an aid in the interpretation of statutes.¹ Although this refusal to review legislative history has been criticized as inappropriate in the field of constitutional interpretation,² for the purposes of this discussion an understanding of the genesis of the aboriginal rights provisions in the Constitution Act, 1982 is vital, for reasons which will be discussed below.

I. Reform Proposals

The lengthy and complex history of attempts to accomplish constitutional reform makes any commencement date for this review somewhat arbitrary. It seems appropriate to begin in 1978, because that year witnessed two important events: the introduction of a major proposal for constitutional reform by the federal government, and the invitation of representatives of the three national aboriginal organizations to be observers at the first minister's meeting on constitutional reform in October.

In June 1978, Bill C-60 was introduced by the federal government. It included extensive guarantees of individual rights and freedoms, including egalitarian rights. Section 26 of the Bill, the second³ express reference to aboriginal peoples, stated:

26. Nothing in this charter shall be held to abrogate, abridge or derogate from any right or freedom not declared by it that may have existed in Canada at the commencement of this Act, including, without limiting the generality of the foregoing, any right or freedom that may have been acquired by any of the native peoples of Canada by virtue of the Royal Proclamation of October 7, 1763.

This provision was more extensive than may have been expected, in view of earlier federal recommendations regarding constitutional reform,⁴ but it clearly fell short of the affirmative guarantee of aboriginal and treaty rights sought by aboriginal organizations. Section 26 was essentially protective in nature — it sought to prevent the guarantee of individual rights from adversely affecting a limited class of aboriginal rights.⁵ As well, the reference in s. 26 to "native peoples" marked a departure from s. 91(24) of the British North America Act which refers only to "Indians".

This approach towards the inclusion of aboriginal rights in the constitution may have reflected a predominantly individualistic approach towards rights in general. This argument is significantly undermined by the inclusion of language rights guarantees in Bill C-60 which were conceived of in terms of groups.⁶ A more plausible explanation is that the scope and content of "aboriginal rights" was not sufficiently understood by the drafters of the Bill, and it was therefore not regarded as appropriate for inclusion in the form of an affirmative guarantee.

The major political organization representing Indians, the National Indian Brotherhood (N.I.B.), responded to Bill C-60 by making two specific demands: that aboriginal and treaty rights be guaranteed in a new constitution, and that Indians be involved in the process of constitutional reform.⁷ The N.I.B. threatened to travel to England to ask the Queen to prevent the "patriation" of the constitution if these demands were not complied with.

The federal government reacted to these demands by inviting representatives of the three national aboriginal political organizations — the N.I.B., the Native Council of Canada, and the Inuit Tapirisat of Canada — to participate as observers in the first minister's conference in October, 1978. This limited participation of aboriginal leaders

did not quell their concern that aboriginal and treaty rights would not be adequately safeguarded by the constitutional reforms.⁸

At the next first minister's conference in February, 1979, these organizations were again invited to participate as observers, but "(t)he invitation was particularly meaningless ... since most of the sessions were closed."⁹ Prime Minister Trudeau proposed a "Second List of Items for Study in the Continuing Constitutional Review", which included as one of the eleven further agenda items for future study "Canada's native peoples and the Constitution."¹⁰ In the following months Indian organizations decided to pursue lobbying in the United Kingdom (with a trip scheduled for July, 1979), the Liberal government was defeated in May, 1979, and a new Conservative government assumed office. During this period, aboriginal organizations continued to seek a meaningful role in the constitutional reform process.¹¹

The re-election of the Liberal government in February, 1980, followed by the defeat of the Quebec Referendum on sovereignty-association in May, 1980, added a new urgency to the reform process. Aboriginal matters were not part of the agenda for the first stage of reform agreed upon by the first ministers in June. By September, this process had come to a standstill, and the federal government resolved to proceed unilaterally to patriate the constitution and to entrench a Charter of Rights and Freedoms.

The proposed Charter of Rights in the federal resolution of October 2, 1980 included a guarantee of equality rights (section 15), and provided the following provision, under the heading "Undeclared Rights and Freedoms":

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

This section mirrored the earlier federal proposal in Bill C-60, except that the 1980 version was less specific as to the nature and origin of the rights or freedoms in that the prior reference to the Royal Proclamation of 1763 was deleted. The new provision could then have applied in situations in which the Royal Proclamation would not.

A Special Joint Committee of the Senate and the House of Commons was established to conduct hearings on the constitutional proposal. Aboriginal organizations reacted to this action in a swift and aggressive way, in both domestic and international legal and political institutions. Two of the most important aspects of this process deserve careful scrutiny, because of their continuing relevance to the interpretation of the present constitutional provisions.

II. Submissions Before the Special Joint Committee

The Special Joint Committee of the Senate and House of Commons convened on 6 November 1980, and held public hearings on the Proposed Resolution of October 2 until early in February 1981. During that time all of the national aboriginal organizations, many regional or tribal organizations, and a variety of other groups made submissions concerning s. 24 of the Resolution. These submissions, like most brought before the Committee on any aspect of the Proposed Resolution, favoured a strengthening of its provisions.

The Special Joint Committee's important role in the formulation of the final form of the Charter cannot be denied. But it had other implications, and the following description indicates the major ones:

The activities of the Joint Parliamentary Committee became highly significant in the evolution of the strategies of both the federal government and its provincial opponents. Because the Committee gave non-governmental people and organizations their first opportunity to participate directly in the formation of the new Constitution, it acquired an importance, and a power, that no one had predicted for it.¹²

Both aspects of the Joint Committee hearing process should be examined briefly, because they each provide a useful context for the interpretation of the current provisions respecting aboriginal peoples.

The specific wording of s. 24 of the Resolution was criticized by all of the national aboriginal groups, and each proposed identical amendments to strengthen it. Section 24 stated that the entrenchment of other Charter rights was not to be construed as "denying the existence of" the special rights of the aboriginal peoples. This was attacked as an unacceptable provision. In the words of an Indian representative speaking before the Committee:

We are unhappy about this provision [s. 24] for a number of reasons. It is negative, not positive. We have consistently worked to have treaty and aboriginal rights positively entrenched in a new constitution.

Instead, we have been given only a limited and negative provision.¹³

Mary Simon, speaking on behalf of the Inuit Committee on National Issues, compared s. 24 with the 1978 constitutional reform proposal Bill C-60, and concluded that "the present wording of Section 24 ... dilutes the protection originally provided in the equivalent section under Bill C-60. In this regard, it is arguable that, while the Charter may not in the future deny the existence of certain aboriginal rights and freedoms, it could abridge or otherwise modify their meaning or import."¹⁴

Aside from the specific terminology, s. 24 was also criticized as being too restrictive. Aboriginal peoples had been discussing a broad range of matters in the constitutional reform process since 1978, and the Proposed Resolution failed to take these into account. Perhaps the best way to demonstrate the extent to which s. 24 fell short of the goals of aboriginal peoples, and the extent of their concerns, is to quote

the substantive¹⁵ amendments proposed by all three national aboriginal organizations before the Joint Committee:

A new section, Section 23A would provide that:

(1) For the purposes of this act, the phrase "aboriginal peoples of Canada" or "aboriginal peoples" means Metis, Inuit and Indian peoples of Canada.

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

(3) Within the Canadian Federation, the aboriginal peoples of Canada shall have the right to their self-determination and in this regard the Parliament and the legislative assemblies, together with the Government of Canada and the provincial governments to the extent of their respective jurisdictions, are committed to negotiate with the aboriginal peoples of Canada mutually satisfactory constitutional forms of recognition and protection in the following areas, inter alia:

(a) aboriginal rights;

(b) treaty rights;

(c) rights pertaining to the aboriginal peoples in relation to Section 91(24) and Section 109 of the Constitution Act, 1867;

(d) rights pertaining to the aboriginal peoples of Canada in relation to the Manitoba Act, 1870, the BNA Act, 1871, and the confirmation of those rights in the rest of Canada;

(e) rights or benefits provided in present and future settlements of aboriginal claims;

(f) rights of self-government of the aboriginal peoples of Canada;

(g) guaranteed representation of the aboriginal peoples of Canada in Parliament and, where applicable, in the legislative assemblies;

(h) responsibilities of the Government of Canada and the provincial governments for the provision of services in regard to the aboriginal peoples of Canada;

(i) economic development and the reduction of regional disparities; so as to ensure the distinct cultural, economic and linguistic identities of the aboriginal people of Canada.

(4) No aboriginal right shall be subject to extinguishment by Parliament of Canada or by any legislative assembly.

(5) No lands, waters or resources of the aboriginal peoples of Canada shall be subject to expropriation under any law of the Parliament of Canada or any legislative assembly without the express consent of those aboriginal peoples holding such lands, waters or resources.

Section 24 as amended would have provided for:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate, abridge, or derogate from any undeclared rights or freedoms that exist in Canada, including the aboriginal rights and freedoms that pertain to the aboriginal peoples of Canada and those rights acquired by or confirmed in favour of the aboriginal peoples under the Royal Proclamation of October 7, 1763.¹⁶

III. The Final Stages

On 30 January 1981, in response to these pressures, and with the support of the three political parties and the national aboriginal organizations,¹⁷ the federal government introduced an amendment to the proposed resolution to provide clear recognition of aboriginal and treaty rights.¹⁸ The new section stated:

34(1) The aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

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

This section was to be added as Part II of the Constitution Act, separate and distinct from the Charter of Rights and Freedoms.

The original provision in the October resolution which mentioned aboriginal peoples was to be divided into two sections, and the reference to the rights of aboriginal peoples was expanded. Section 26 of the revised proposal was intended to shield undeclared rights or freedoms from extinction by the Charter. The amended provision respecting aboriginal peoples stated:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

These amendments clearly addressed some of the concerns expressed with respect to the original version of s. 24; for example, the words "denying the existence of" were replaced with "abrogate or derogate" to make clear that diminution as well as complete denial of these rights would not be permitted.¹⁹ But the amendments were also part of a federal strategy to gain broader support for its constitutional initiative by negotiating with interest groups and the provinces as well as by trying to increase public awareness of, and support for, the plan.²⁰

Although these amendments were a compromise which did not meet all of the aboriginal peoples' demands, the reversal of government policy they reflected was welcomed by aboriginal leaders. In the words of Professor Sanders:

Indian, Inuit and Metis leaders declared they were beginning a new era in which they would at last take control of their own destiny. It was, said Del Riley, "an historic moment, a recognition of the right of native peoples to self-determination" and "a new beginning for Indian people in Canada."²¹

The support of the aboriginal organizations for these changes soon disintegrated. On 2 February 1981, two days after the historic agreement, the federal government introduced a new amendment which made it clear that the aboriginal rights provisions would be subject to bilateral amendment between the federal government and a provincial one, in respect of aboriginal rights within the particular province. No provision was made for involvement of aboriginal peoples, nor was their consent required before such an amendment could take effect.²² The proposal was quickly withdrawn after heated protests by the aboriginal organizations and the New Democratic Party, but this episode signalled the end of the euphoria which had surrounded the January 30 agreement.²³

The National Indian Brotherhood (N.I.B.) and the Native Council of Canada (N.C.C.) soon terminated their support of the amended aboriginal rights sections.²⁴ The N.I.B. faced internal dissention stemming from its approval of the amendments,²⁵ and the N.C.C.'s support of the January 30 compromise had been conditional upon the addition of a consent clause to the amending formula.²⁶

The other aspect of the work of the Special Joint Committee which was alluded to earlier was its impact upon the strategy adopted by the groups involved in the constitutional reform process. It is to this that we now turn.

IV. The London Lobby

Aboriginal organizations had been actively bringing their plight before various international bodies for several years prior to the patriation period,²⁷ but after the introduction of the patriation resolution these efforts intensified, with the main focus on Britain. The strategy of lobbying in London to delay, hinder or prevent passage of the constitutional reform package was also adopted by provincial governments.²⁸

Several different aboriginal organizations participated in activity in Britain relating to the reform proposals. The national organizations submitted a joint brief to the Foreign and Commonwealth Affairs Committee of the British House of Commons (the Kershaw Committee),²⁹ which argued that Imperial responsibilities arising from treaties and from the Royal Proclamation of 1763 had not been transferred or devolved to Canada. The position of these groups is succinctly summarized in this submission:

What we are seeking is clear. We are seeking to be self-governing nations within Canadian Confederation. To ensure that we are self-governing, we want to maintain our special relationship to the Crown - a relationship parallel to that of the Government of Canada and parallel to that of the governments of the Canadian provinces. We want this relationship in order to protect our rights of self-government. We want to re-establish the basic principle of the Royal Proclamation that changes in our relations with the Imperial government and the Canadian government will be negotiated and will only proceed on the basis of consent. We are able to assert rights to protection, of self-government and of treaty relationships today because of the Imperial link. We have asserted these rights in Canada, without success. Now either the Imperial Crown must fulfill its obligations and responsibilities itself - or ensure that these protections are explicitly entrenched in a new Canadian constitution (by refusing patriation to any proposal which ignores these matters). Otherwise the legal obligations and responsibilities assumed by the Imperial Crown will have been unilaterally denied by the United Kingdom. It would be a betrayal.³⁰

Unfortunately, from the perspective of these groups, the Report of the Kershaw Committee adopted the views on this matter expressed by a legal advisor in the Foreign and Commonwealth Office, who stated: "In our view, all relevant treaty obligations insofar as they still subsisted became the responsibility of the government of Canada with the obtainment of independence, which at the latest was the Statute of Westminster of 1931."³¹

Political lobbying in Britain was accompanied by the initiation of litigation in British courts. In one case Alberta Indians, joined by organizations from Nova Scotia and New Brunswick, sought a declaration that treaty obligations entered into by the Crown with the Indian peoples had not become the responsibility of the government of Canada, but were still the responsibility of the government of the United Kingdom.³² The three judges involved in the case³³ delivered separate reasons which differ in important respects, but they were unanimous that the responsibilities owed pursuant to the treaties had devolved to the Canadian government. Leave to appeal this decision to the House of Lords was denied; Lord Diplock explained that

for the accumulated reasons given in the judgments of the Court of Appeal, it is simply not arguable that any obligations of the Crown in respect of the Indian peoples of Canada are still the responsibility of Her Majesty's government in the United Kingdom. They are the responsibility of Her Majesty's government in Canada, and it is the Canadian courts and not the English courts that alone have jurisdiction to determine what those obligations are.³⁴

The second case involved motions brought by the English Attorney General to strike out statements of claim issued on behalf of Indian organizations.³⁵ In these actions various declarations were sought in respect of the validity of the Canada Act which had, by then, received Royal Assent, and in respect of the subsisting treaty obligations owed by the Crown to Indian peoples. Vice-Chancellor Megarry granted the motion to strike out the statement of claim, and this decision was upheld on appeal.³⁶ This litigation was a reflection of a larger problem, as Douglas Sanders has pointed out:

Underlying these legal arguments was a fundamental distrust of the Canadian government. Indians argued that while Canada was talking of entrenching aboriginal and treaty rights, it had an Indian Government Bill in the wings to undercut Indian self-government, and had introduced legislation hostile to

Indian land claims in the northern territories. The larger threat was the terminationist policy espoused by the federal government in 1969, which was often alleged to be its hidden agenda. Canada, the argument went, did not have a free hand to terminate Indian rights so long as the treaty link to the United Kingdom existed and so long as the constitution contained its one provision on Indians, section 91(24) of the BNA Act. Patriation would both sever the treaty link and enable Canada to repeal that section.³⁷

The reasoning of the judges in these decisions provides a wealth of interesting commentary on constitutional devolution of authority, the status of the Royal Proclamation and the treaties, and the significance of the specific provisions dealing with aboriginal peoples. However, as the preceding summary indicates, all of the legal actions commenced by the Indian organizations ended in defeat. Similarly, the political lobby did not succeed in preventing passage of the "patriation bill" by the British Parliament,³⁸ nor did it directly result in the amendment of the Canadian request.³⁹ Should the entire London episode therefore be adjudged a failure?

At the beginning of this discussion the London lobby was described as part of a strategy of opposition. Douglas Sanders has extensively analyzed these events, and his conclusion is that although the lobby was expensive, it was an essential element in the political strategy of the aboriginal peoples, who "were seeking recognition as political actors within Canadian Federalism ... The political goal was not to get and protect section 34 [now s. 35]. The goal was to achieve power by being political actors in the constitutional game."⁴⁰ Viewed in these terms, the London lobby and litigation were successful, for they established the aboriginal peoples as important actors in the final drama leading up to patriation of the constitution. In truth, the real impact of this strategy upon events in Canada will never be known, for it is impossible accurately to gauge the extent to which the aboriginal strategy in London affected the Canadian governments' strategy in Canada.

V. The November Accord and Its Aftermath: The Bitter End

The final series of events relating to the aboriginal rights provisions remain clouded in uncertainty.⁴¹ Briefly, the significant occurrences were: following the Supreme Court of Canada decisions in the Patriation References, rendered on September 28, 1981, a first minister's conference was held in Ottawa, which resulted in a compromise agreement on constitutional amendment. This proposal made no reference to aboriginal peoples or their rights, and no explanation was provided for this deletion. An intense lobbying effort was immediately launched;⁴² in a parallel action women's groups actively sought to strengthen the guarantees of sexual equality in the Charter of Rights.⁴³ By November 20 this lobbying had been effective, though not perfect: an amended section 35 was added to the Constitution Act, the new section recognized and affirmed "existing" aboriginal and treaty rights. As well, a provision was added to ensure that aboriginal rights would be discussed in future constitutional conferences (s. 37).

VI. The Usefulness of Legislative History

Earlier in this chapter reference was made to the traditional reluctance of Canadian judges to refer to legislative history.⁴⁴ Despite this, a review of this "patriation" process is relevant for our purposes for several reasons. First, this brief review reveals the radically different interpretations of the current legal status of aboriginal rights which competed for ascendancy in this process and the inadequacy of a purely legal analysis. Some aboriginal organizations alternately participated in the negotiation process, and then rejected the concept of Canadian sovereignty over aboriginal nations. At the same time the federal government and aboriginal organizations attempted to negotiate constitutional rights guarantees which would be acceptable to all concerned. The extent of this divergence, and the fact that the

guarantees never moved beyond a basic skeletal framework, reveals the lack of common understanding of aboriginal and treaty rights, and the perceived marginality of these concerns in the patriation process.

Second, although it is unlikely that courts will depart from the view enunciated by Mr. Justice Lamer in Re Section 94(2) of the Motor Vehicle Act (B.C.)⁴⁵ that "the Minutes of the Proceedings of the Special Joint Committee, though admissible, and granted somewhat more weight than speeches, should not be given too much weight,"⁴⁶ it is submitted that the submissions and amendments in respect of the guarantee of aboriginal rights are illuminative of the meaning of both ss. 25 and 35. Of particular relevance are the changes in s. 25, from "not deny the existence of" to "not ... abrogate or derogate from", and the insertion of the word "existing" in s. 35. The former amendment was in response to direct submissions on the particular point. The latter change was part of a political compromise,⁴⁷ and there is no clear consensus on the intention of the proponents of the change.

CHAPTER I ENDNOTES

1. For a discussion of the relevant materials, see: R.M. Elliot, "Interpreting the Charter-Use of the Earlier Version as an Aid" (1982), (Charter edition) U.B.C.L. Rev. 11; R.M. McLeod, J.D. Takach, H.F. Morton, M.D. Segal, The Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences, Toronto: Carswell, 1983, at pp. 2-65 seq.
2. See ibid.; and Reference re An Act to Amend the Education Act (1986), 53 O.R. (2d) 513 (C.A.).
3. The first reference is in the Preamble, which mentions "Canada's original inhabitants".
4. See, for example, Recommendation 10 of the Final Report of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (Molgat-MacGuigan Report), 1971: "The preamble of the new Constitution should affirm the special place of native peoples, including Metis, in Canadian life".
5. This approach was carried forward into section 25 of the Charter of Rights and Freedoms, as well as ss. 21, 26, 27 and 29. Section 27 has more than a merely defensive function, as its wording makes clear.
6. See, for example, section 22.
7. See N. Zlotkin, Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference, Queen's Institute of Intergovernmental Relations, 1983, p. 21 (hereinafter: Zlotkin, Unfinished Business); D. Sanders, "The Indian Lobby" in And No One Cheered: Federalism, Democracy and the Constitution Act (K. Banting and R. Simeon eds.), Toronto: Methuen, 301, at p. 340 (hereinafter Sanders, The Indian Lobby); S. McInnes, "The Inuit and the Constitutional Process: 1978-81" (1981), 16 J. Can. Stud. 53.

8. See Sanders, The Indian Lobby, 304, quoting Noel Starblanket, N.I.B., Joe Dion, Indian Ass'n of Alberta.
9. Sanders, The Indian Lobby, p. 305.
10. See the list in R. Romanow, J. Whyte and H. Leeson, Canada ... Notwithstanding: The Making of the Constitution 1976-1982, Toronto: Carswell/Methuen, 1984, p. 59, footnote 33.
11. For a comprehensive discussion of these events, see Sanders, The Indian Lobby, pp. 305-308; Zlotkin, Unfinished Business, and McInnes, *supra*, note 7. See also D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in Canada and the New Constitution: The Unfinished Agenda (S.M. Beck and I. Bernier eds.), Institute for Research on Public Policy, 1983, Vol. I, 225 (hereinafter Sanders, Prior Claims).
12. Supra note 10, at p. 121.
13. Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Dec. 16, 1980, Issue No. 27, 27:85. (Hereinafter, Minutes, date, Issue number, page).
14. Minutes, Dec. 1, 1980, Issue No. 16, 16:15.
15. A number of consequential amendments concerning equality rights and the amending formula were also proposed. These are irrelevant to this discussion.
16. See Minutes, Dec. 1, 1980, Issue No. 16, 16:12-13 (Inuit Committee on National Issues), Dec. 2, 1980, Issue No. 17, 17:113-114 (Native Council of Canada); Dec. 16, 1980, Issue No. 27, 27:87-88 (National Indian Brotherhood). There are minor variations between these submissions, which do not affect the substance of the amendments.

17. See Sanders, Prior Claims, p. 232; Zlotkin, Unfinished Business, p. 26. Minutes, Jan. 30, 1981, Issue No. 49, 49-86 ff.
18. Minutes, Jan. 30, 1981, Issue No. 49, 49-9-10.
19. See Sanders, The Indian Lobby, at p. 315.
20. See Sanders, The Indian Lobby, pp. 314-315; Sanders, Prior Claims, p. 232; Romanow, Whyte and Leeson, supra note 10, at pp. 121-22.
21. The Indian Lobby, p. 315.
22. Zlotkin, Unfinished Business, p. 27.
23. Zlotkin, at p. 27; Sanders, The Indian Lobby, p. 315; Sanders, Prior Claims, p. 233.
24. By April 1981 both the Native Council of Canada and the National Indian Brotherhood had withdrawn their support: see Zlotkin, Unfinished Business, p. 28; Sanders, Prior Claims, p. 233.
25. See Sanders, Prior Claims, p. 233, Sanders, The Indian Lobby, p. 316; Zlotkin, Unfinished Business, p. 28.
26. Zlotkin, Unfinished Business, p. 28. As well, a letter sent by Jean Chretien to the N.C.C. which stated that in the federal government's opinion the members of the group possessed no land rights undermined N.C.C. support.
27. See D.E. Sanders, "The Re-emergence of Indigenous Questions in International Law" (1983), 1 Can. H.R.Y.B. 3.
28. See Romanow, Whyte and Leeson, supra note 10, Ch. 5.

29. Reprinted in the Committee Report, Vol. 2, annexed to ICNI submission to the Special Joint Committee of the Senate and House of Commons, December 1, 1980.
30. Ibid., at p. 4.
31. Quoted in Sanders, The Indian Lobby, pp. 312-13.
32. R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Ass'n of Alberta, [1982] 2 All E.R. 118 (C.A.).
33. Lord Denning M.R., Kerr and May LJJ.
34. Reported in [1982] 2 All E.R., at p. 143.
35. Manuel et al. v. Attorney General; Notcho et al. v. Attorney-General, [1982] 3 All E.R. 786 (Ch. D.).
36. Manuel et al. v. Attorney General, [1982] 3 All E.R. 822 (C.A.).
37. Sanders, The Indian Lobby, p. 322.
38. It did succeed in delaying passage: see Sanders, The Indian Lobby, p. 323.
39. As proposed in the Indian Rights Amendment Bill; see ibid., p. 323.
40. Ibid., at pp. 326-27.
41. See, for a summary, Romanow, Whyte and Leeson, supra note 10; R. Sheppard and M. Valpy, The National Deal: The Fight for a Canadian Constitution, Toronto: Fleet Books, 1982, ch. 13; M. Boldt and J.A. Long eds., The Quest For Justice: Aboriginal Peoples and Aboriginal Rights, Toronto: University of Toronto Press, 1985, ch. 2 (particularly the articles by R. Romanow and R. Dalon).

42. P. Jull, "A Necessary Victory - a perspective on the Aboriginal Rights Coalition and the Restoration of Constitutional Aboriginal Rights in Canada. November, 1981", unpublished, December 1981.
43. See P. Kome, The Taking of Twenty-Eight; Women Challenge the Constitution, Toronto: Women's Educational Press, 1983; C. Hosek, "Women and the Constitutional Process" in And No One Cheered: Federalism, Democracy and the Constitution Act (K. Banting and R. Simeon ed.), Toronto: Methuen, 1983, 280.
44. Supra, p. 1.
45. [1985] 2 S.C.R. 486.
46. Ibid., at p. 508.
47. D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983), 61 Can. Bar Rev. 314, at p. 316: "The section was the result of political bargaining."

CHAPTER 2

THE REASONS FOR AND GENERAL EFFECT OF THE ENTRENCHMENT OF ABORIGINAL RIGHTS

Introduction

In order to understand why aboriginal leaders and others viewed the entrenchment of aboriginal rights in the Constitution as essential, it is necessary to understand why any rights were being entrenched, for the aboriginal rights provisions in the Charter of Rights are but part of a larger "rights" movement. It is also important to understand the recent history of these particular rights in law and government policy.

I. Reasons for Entrenchment

A remarkable confluence of events and personalities spurred the constitutional changes of the past few years. The full story of this era has yet to be told, but several particularly relevant factors deserve mention. First, one must acknowledge the role of Prime Minister Trudeau, who was devoted to patriation of the Constitution and the entrenchment of rights long before his entry into politics.¹ This dream became reality, in part, because of the promise of "renewed Federalism" made to the people of Quebec during the Referendum campaign in 1980. Other members of the federal Liberal caucus and cabinet shared the Prime Minister's vision of a renewed and strengthened Constitution, with an entrenched Charter of Rights. This reform was also viewed as a unifying, nation-building exercise.²

The Canadian Bar Association's Committee on the Constitution best expressed the various advantages of an entrenched catalogue of rights:

In our view, the symbolic and educational importance of proclaiming the rights of the individual as being beyond the power of a transient legislative majority can scarcely be exaggerated. A clear statement in the Constitution of the fundamental values all Canadians share would, we think, have an important unifying effect. It would inculcate in all citizens, young and old, a consciousness of the importance of civil liberties and an authoritative expression of the particular rights and liberties our society considers fundamental. To the politician and the public servant, it would provide an authoritative standard for scrutinizing not only statutes but delegated legislation.

Beyond its symbolic and educational functions a Bill of Rights can be an effective instrument of enforcement, particularly of fundamental political and legal rights. The courts can declare laws that violate constitutional rights invalid. In the absence of guaranteed rights, a transient majority in Parliament or a legislature can do incalculable harm to a minority or an individual. Unlike existing human rights legislation, which can always be abrogated or modified by statute, it would constrain future legislatures and governments from acting in violation of human rights.³

As well, the Canadian Bill of Rights⁴ was generally acknowledged to be beyond rehabilitation. Academic comments on the Bill had become increasingly critical, and the legal community seemed committed to an enlarged and more potent Bill of Rights.⁵ Proposals for constitutional reform produced by such diverse groups as the Canadian Bar Association, the Quebec Liberal Party and the Pepin-Robarts Task Force on Canadian Unity differed in many respects, but were uniform in calling for an entrenched Bill of Rights for Canadians.⁶

Together these forces combined to propel the "entrenchment issue" to the forefront of the federal constitutional agenda, a position from which it was not to be moved from despite principled and adamant pressure from some provincial governments.

More broadly, the entrenchment question in Canada cannot be divorced from the world-wide post-1945 trend to write down rights. Although written bills of rights were

not unknown prior to World War II, the end of the War and the establishment of United Nations are taken as a watershed in the development of human rights standards. International standards have been formulated, notably by the United Nations. Many nations have adopted new constitutions or modified their existing constitutions since then, and, in virtually every instance, some rights guarantees were incorporated into the national Charter. Today it seems commonplace to include rights guarantees in constitutional documents. Even Great Britain, that bastion of the unwritten constitution, is now part of the Council of Europe, and thus bound by a written rights guarantee, the European Convention on Human Rights.⁷

In this national and international context, it is reasonably clear why an entrenched Charter of Rights and Freedoms was included in the Canadian Constitution.

If the Charter of Rights actually serves the symbolic function attributed to it,⁸ perhaps one can view the claims of aboriginal peoples for inclusion in it as merely a desire to be part of the symbolic process. While not seeking to deny the importance of symbolism, it is my contention that the Charter is regarded by most Canadians as much more than a mere symbol; it is valued and supported because it offers concrete protection of rights and freedoms. Native people, no less than other Canadians, share this perception of the Charter.

A more important reason for the desire of aboriginal peoples to participate in the process of constitutional renewal is that it offered them an opportunity to participate in, and to influence directly, a process which (it was hoped) would fundamentally restructure the institutions and rules governing Canadian affairs. The major constitutional reform studies and proposals of the past decade had specifically mentioned aboriginal rights as a major issue to be addressed, thus adding legitimacy to

the claim of native peoples of a rightful place at the "constitutional bargaining table".⁹

A more concrete reason for the desire of native peoples to insure that their rights were protected in a constitutional charter was their awareness of the fragility of their legal guarantees. As recently as 1969, with the Trudeau government's White Paper on Indian Affairs, native people had faced the possibility that their claims of special status and unique rights would be unilaterally destroyed by a change in government policy.¹⁰ This policy proposal was never implemented in the face of native opposition and public outrage.¹¹ Indeed, in 1973 the Supreme Court of Canada decision in Calder v. A.G.B.C.¹² presented a legal analysis of aboriginal rights in Canada which was significantly different than that upon which the White Paper was grounded. Despite the fact that the majority judgments in this case made clear that aboriginal rights was a concept recognized in Canadian law, the experience of the White Paper left its imprint upon native peoples. One measure of its continuing importance was the determination of the leaders of the various aboriginal groups to be included in the constitutional renewal process.

As the agenda of federal and provincial governments maintained the focus on "traditional" issues such as the patriation of the constitution, an amending formula and the entrenchment of a rights guarantee, and as provincial proposals to introduce other matters (specifically the re-distribution of legislative jurisdiction) were unsuccessful, it became clear to aboriginal groups that a guarantee of aboriginal rights in the Bill of Rights would have to be the focus of pressure. There was simply no means by which these groups could alter this agenda as they wished; in the idiom of constitutional discussion, the re-negotiation of native-white relations sought by aboriginal groups was a "non-starter".

The entrenchment of an aboriginal rights guarantee in the Constitution was viewed by native leaders as an historic first step towards meaningful constitutional renewal. It possessed a symbolic significance, and it was hoped that the provisions would also provide a solid basis for legal amendments to re-assert aboriginal rights claims. If such a guarantee had not been included in the Charter of Rights, many people would have regarded the omission as of immense symbolic importance. In this context, then, the determination of aboriginal groups to attain recognition and protection of their rights in the Constitution is understandable.

II. The Effect of Entrenchment

What are the general effects of this entrenchment of rights? To be perfectly frank, one must admit that these are largely unknown at this stage in our experience with the Charter of Rights. At best, one can offer an educated prediction about the effects of entrenchment, based on contemporary experience.

The first point which should be emphasized is that "entrenched" rights are not immutable; as new conceptions of these rights or new ideas about their role in the social order changes, so will our definition of the rights.¹³ Equally important is the fact that a Charter of Rights, once written, takes on a life of its own. It is not guided by a "directing hand" in any particular direction. As a consequence of this, the long-term social or legal effects of this Charter remain unknown and unknowable. To demonstrate this point, one need only note that the framers of the United States Constitution and Bill of Rights could not have foreseen the profound effect of their work upon American society. If we accept that the Charter of Rights can be expected to exist for at least a century, it should be clear that accurate assessment of its effects is now impossible.

Nevertheless, some general observations can be made. As the Charter of Rights becomes better known by Canadians, our society will become more "rights conscious" than it was in the past. Debate about social or legal issues, and prescriptions for current problems, will be framed in terms of "rights". Whether or not one thinks this a good thing, it seems impossible to avoid. The other general implication of the entrenchment of rights is that the judiciary is placed in a new position under such a constitutional scheme. This has been the subject of a great deal of discussion elsewhere, which will not be repeated.¹⁴ Suffice it to note that the Charter of Rights offers significantly improved possibilities for meaningful judicial redress of rights violations than was previously available.

Entrenched rights are usually written in broad, vague terms. These are meant to survive for a significant period of time; indeed, "entrenched" rights differ from other sorts of rights mainly because they are written into a law which is more difficult to amend than other statutes. This is, perhaps, the most significant general effect of entrenchment: the rights gain in stature as part of a written constitution which is difficult to alter.

Chief Justice Dickson has eloquently expressed the implications of this, in his decision for a unanimous Supreme Court of Canada, in Hunter v. Southam:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this

idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one". ...

The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action¹⁵

The fact that the Charter of Rights is clearly a part of Canada's basic constitutional structure is significant for several reasons. First, it marks an important change from the Canadian Bill of Rights¹⁶ which was an ordinary federal statute, and thus not subject to the special rules of interpretation employed for constitutional documents.¹⁷ The following statement, interpreting the Bill of Rights, by Laskin J. (as he then was) demonstrates the extent of the change:

[C]ompelling reasons ought to be advanced to justify the Court ... to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government which underlie the discharge of legislative authority under the British North America Act.¹⁸

By s. 52 of the Constitution Act, 1982 and s. 24 of the Charter of Rights, courts do now possess a constitutional jurisdiction to deny operative effect to laws.

The second reason that constitutional entrenchment is significant is that special rules govern the interpretation of constitutional documents. These rules have been discussed elsewhere;¹⁹ for our purposes it is important to remember that the general theme of these rules is that a constitution must be interpreted broadly,²⁰ and that extrinsic data may be resorted to in order to construe the statute.²¹ This will be of

importance in the interpretation of the aboriginal rights provisions of the Constitution, which will be discussed in later chapters.

The final general effect of the entrenchment of these rights to be noted concerns the symbolic effect of this change. Rights which are written into an entrenched Charter which forms part of the Constitution, and is thereby part of the basis upon which our society orders itself, are clearly of a different order than mere common law or statutory rights. One of the fundamental differences between the old legal regime governing aboriginal peoples in Canada and that existence today is that there is now a clear affirmation of the central importance of these rights and a potentially effective means of remedying violations of these rights. To the extent that this matter has thus been drawn into the constitutional "mainstream" in this country, by entrenchment and by the series of highly-publicized constitutional conferences held pursuant to section 37 of the Constitution Act, 1982, this process has been of immense symbolic importance for aboriginal peoples.

The ultimate effectiveness of these provisions, however, will be determined by the transition from the symbolic to the pragmatic. It is to this process that I now turn.

CHAPTER 2 ENDNOTES

1. For a more complete discussion, see R. Valpy and R. Sheppard, The National Deal: The Fight for a Canadian Constitution, Toronto: Fleet Books, 1982; R. Romanow, J. Whyte, H. Leeson, Canada ... Notwithstanding: The Making of the Constitution 1976-1982, Toronto: Carswell/Methuen, 1984.
2. See P. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 60 Can. Bar Rev. 30.
3. Infra note 6, at p. 15.
4. R.S.C. 1970, App. III.
5. See, for example, W.S. Tarnopolsky, "A New Bill of Rights in Light of the Interpretation of the Present One by the Supreme Court of Canada" (1978) Law Society of Upper Canada Special Lectures 161; W.S. Tarnopolsky, "A Bill of Rights and Future Constitutional Change" (1979), 57 Can. Bar Rev. 626; P.C. Weiler, "Of Judges and Rights, or Should Canada have a Constitutional Bill of Rights?" (1980) Dalhousie Rev. 205. See also the literature on specific cases under the Bill of Rights cited in the Bibliography.
6. Canadian Bar Association, Towards a New Canada (1978), ch. 4; The Task Force on Canadian Unity (Pepin-Robarts), A Future Together (1979), ch. 7; The Constitutional Committee of the Quebec Liberal Party, A New Canadian Federation (1980), ch. 3.
7. See on the European Convention: L.A. Collins, European Community Law in the United Kingdom, London: Butterworths, 1980; F.G. Jacobs, The European Convention on Human Rights, Oxford: Clarendon Press, 1975; A. Bayefsky, "The Impact of the European Convention on Human Rights in the United Kingdom: Implications for Canada" (1981), 13 Ottawa L. Rev. 507.

8. See Canadian Bar Association, supra note 6, at p. 15, and see E. McWhinney, Canada and the Constitution 1979-1982, Toronto: University of Toronto Press, 1982, especially ch. 13. See also Russell, supra note 2.
9. See supra note 6: Towards a New Canada, p. 11; A Future Together, pp. 56-59; A New Canadian Federation, pp. 83-84.
10. See S.M. Weaver, Making Canadian Indian Policy, Toronto: University of Toronto Press, 1981, for a thorough analysis of the genesis and content of this policy.
11. See, for example, Indian Chiefs of Alberta, Citizens Plus (1970); L.C. Green, "Canada's Indians: Federal Policy, International and Constitutional Law" (1970), 4 Ottawa L. Rev. 101.
12. [1973] S.C.R. 313, 34 D.L.R. (3d) 145.
13. The word "entrenchment" has been assailed by one American scholar solely because it gives a false impression of immutability: see P. Bender, "The Judicial Protection of Rights" in The U.S. Bill of Rights and the Canadian Charter of Rights and Freedoms (R. McKercher ed.), Ontario Economic Council, 1983, p. 107, at p. 111.
14. See P. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts" (1982), 25 Can. Pub.Admin. 1.
15. (1984), 11 D.L.R. (4th) 641, at pp. 649-50.
16. R.S.C. 1970, App. III.
17. See D. Gibson, "Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations", in The Canadian Charter of Rights and Freedoms: Commentary (W.S. Tarnopolsky and G.A. Beaudoin eds.), Toronto: Carswell, 1982, p. 25, for a discussion of these rules.

18. Curr v. The Queen, [1972] S.C.R. 889, at p. 899. In a later case, Laskin C.J.C. characterized the Bill of Rights as "a half-way house between a purely common law regime and a constitutional one; it may be aptly described as a quasi-constitutional instrument", Hogan v. The Queen, [1975] 2 S.C.R. 574, at p. 597.
19. See, for example, Gibson, *supra* note 17.
20. The traditional reference on this point is Edwards v. A.-G. Can., [1930] A.C. 124, at p. 136;

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada ... Their Lordships do not conceive it to be a duty of this Board —it is certainly not their desire — to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.

More recently, the Privy Council stated, in interpreting the Constitution of Bermuda:

Here ... we are concerned with a Constitution, brought into force certainly by an Act of the United Kingdom Parliament ... but established by a self-contained document ... It can be seen that this instrument has certain special characteristics. (1) it is ... drafted in broad and ample style which lays down principles of width and generality. (2) Chapter 1 is headed "Protection of Fundamental Rights and Freedoms of the Individual". It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period ... was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... It was in turn influenced by the United Nations Declaration of Human Rights 1948. These antecedents, and the form of Chapter 1 itself, call for a generous interpretation avoiding what has been called "the austerity of tabulated legalism", suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.

Ministry of Home Affairs v. Fisher, [1979] 3 All E.R. 21, at p. 25.

21. On the use of extrinsic data, see: Gibson, supra note 16, pp. 34-38; R.B. Buglass, "The Use of Extrinsic Evidence and the Anti-Inflation Act Reference" (1977), 9 Ottawa L. Rev. 183. This is clearly the trend in decided Charter cases: see R. McLeod et al., The Canadian Charter of Rights and Freedoms: The Prosecution and Defence of Criminal and Other Statutory Offences, Toronto: Carswell, 1983, p. 2-65ff.

CHAPTER 3

A THEORY OF ABORIGINAL RIGHTS

Introduction

Aboriginal rights¹ are collective rights. This has important implications for an understanding of the constitutional provisions pertaining to aboriginal peoples. An adequate theory of aboriginal rights is a vital missing element in current legal analysis,² and it is submitted that such a theory is essential to an understanding of the relevant constitutional guarantees. As in other areas of Charter analysis, a principled approach to the interpretation of aboriginal rights is required,³ and this in turn necessitates an analysis of the function of collective rights within the constitution.

This chapter will provide a framework for the analysis of aboriginal rights as collective rights. A brief description of the origin and content of aboriginal rights will be provided in order to focus this discussion. This will be followed by an analysis of modern rights theory, and a review of the dynamics of collective rights. Subsequent chapters will apply this theory to the substantive guarantees contained in the Constitution Act, 1982.

An important preliminary matter relates to the significance of the entrenchment of collective rights provisions in a constitutional document. This may have the effect of "legalizing" these rights, removing them from the domain of the other political institutions which have traditionally protected these group claims.⁴ If this occurs, the collective rights guarantees in the Constitution may reproduce the "history of deep and lasting bitterness" which was the by-product of prior litigation of collective rights issues. This is not a necessary result of the entrenchment of these provisions, but it is certainly a plausible scenario.

Insofar as aboriginal rights claims are concerned, these dangers are particularly acute, given the reluctance of political institutions to recognize the legitimacy of the claims of aboriginal peoples,⁵ and in view of the inadequacy of existing law with respect to aboriginal rights. Aboriginal peoples have favoured political negotiation rather than litigation as a means of vindicating their rights, but the logic of constitutional entrenchment and the consequent change in political dynamics militate in favour of the latter tactic.⁶

I. The Origins and Content of Aboriginal Rights

"Aboriginal rights" are those property rights which inure to native peoples by virtue of their occupation upon certain lands from time immemorial.⁷

This is a concise traditional explanation of the meaning of the term "aboriginal rights"; from it we see that the rights with which we are concerned are property rights, and that it is aboriginal peoples who are entitled to these rights. This entitlement stems from occupation of the land from time immemorial. At this point our discussion should, if past writing be the guide, move to an analysis of "Indian title" which is taken to be the essence of, or synonymous with, aboriginal rights.⁸

An explanation of the merits of this assumption is beyond the scope of this chapter. We are here concerned with the settled meaning of the term aboriginal rights, and an analysis of the outer limits (or "open texture", to use Hart's term) of the definition of the phrase would be otiose. At this juncture it is sufficient to observe that the term aboriginal rights is not necessarily synonymous with the concept of native title; it may encompass other aspects of aboriginal life, and social organization.

Concern with the rights of the native inhabitants of North America dates from the 16th century, when theologians and philosophers attempted to justify the Spanish

conquest of the Indies, Mexico and Peru. One view of the matter, set forth by Juan Gines de Sepulveda, was that the Indians were an inferior race who

require, by their own nature and in their own interests, to be placed under the authority of civilized and virtuous princes or nations, so that they may learn from the might, wisdom, and law of their conquerors, to practice better morals, worthier customs and a more civilized way of life.⁹

In opposition to this view, Bartolome de Las Casas argued that the Indian people were entitled to respect since they were possessed of an evolved culture, with highly developed social, economic and religious institutions.¹⁰ These views were supported by the eminent Spanish theologian Francisco de Vitoria,¹¹ as well as by a Papal Bull in 1537, which stated that the natives "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 ..."¹² The views of de Vitoria were followed and adapted by many conquering and colonizing nations.

The theoretical underpinnings of this doctrine thus originated in the writings of Spanish theologians. It fell, however, to British colonial administrators, as well as the other colonial nations involved in settling the "New World", to apply these precepts, and in this varying degrees of success were achieved.

That the British government felt obliged to conform to Vitoria's direction to respect the native inhabitants of a conquered territory is beyond dispute; clear evidence of this can be found in the Royal Proclamation of 1763, which reserved to the Indians the parts of the Dominion which had not been ceded to, or purchased by, Britain.¹³ The Proclamation also sought to protect the Indians from molestation by white settlers and traders, and established the exclusive right of the Crown to "treat" with the Indians for surrender of their lands. This course of conduct by the British may have resulted from several factors, including the restrictions imposed by the

common law, the military strength of the Indians and the need for allies against other colonizing nations.

The modern concept of aboriginal rights in common law was formulated principally by Chief Justice Marshall of the United States Supreme Court, in a series of landmark decisions. It is worthwhile to note that most of these cases involved disputes concerning the ownership of land, which may help to explain why modern writers have so closely linked native title with aboriginal rights.

In the first of the cases to be discussed here, Marshall C.J. described the doctrine of "discovery", by which European powers regulated their relations with one another, according to the rule that discovery gave title to the discoverer, "which title might be consummated by possession."¹⁴ He went on to point out in this case that the original inhabitants "were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it ..."¹⁵ This possession, according to the Chief Justice, could not have been affected by mere discovery. In a later case, Marshall C.J. offered the following explanation for this view:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.¹⁶

From these judgments it is clear that the modern conception of aboriginal rights was derived from the actual practice of colonial powers, as well as from the rules of international law (embodied in the writing of Vitoria). Canadian courts have largely accepted this legal analysis,¹⁷ although the Royal Proclamation of 1763 was once

thought to be the sole source of aboriginal rights in Canada.¹⁸ Today it is settled that aboriginal rights, which derive from the law of nations, arise at common law independent of any act of recognition by the Crown.

The precise content of the native claim remains a matter of some dispute, and it is here that I shall state an important caveat: in this section I do not seek to explore the outer limits of the concept.¹⁹ At the least, aboriginal rights provide native people with protection for the absolute use and enjoyment of their lands subject to the underlying title of the Crown. This has been described as analogous to a "usufructuary title", which grants to the native people the use and enjoyment of their traditional lands. As one author put it:

While Canadian judicial authority on this point is sorely lacking, the authority we do have would seem to support the view that the aboriginal rights of Canadian Indians includes the right to hunt, farm and exploit the natural resources on the lands which they possess.²⁰

These, then, are the rights with which we are concerned.

Two other related matters should be disposed of before we move to a consideration of certain important elements of this concept of aboriginal rights. The first matter concerns proof of a claim based upon aboriginal rights. In the United States, a claim based upon aboriginal title must rest upon "a showing of actual, exclusive and continuous use and occupancy for a long time prior to the loss of the property."²¹ In Canada, remarkably similar requirements were imposed in one case:

The elements which the plaintiff must prove to establish an aboriginal title cognizable at common law are:

1. That they and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title.

3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England.²²

These are the elements of the claim which must be proved before the rights of the native group will be protected.

The second matter to be mentioned concerns the extinguishment of aboriginal rights. To one familiar with "rights" in other contexts, it may seem remarkable that these rights were, until the passage of the Constitution Act, 1982, enjoyed "at the whim of the sovereign". In the United States, the precarious status of native claims was emphasized by the Supreme Court in a case which affirmed the supreme power of Congress to extinguish Indian title "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise ..."²³ American courts have, however, relied upon several presumptions to require equitable dealings between the government and Indian tribes, and to require very deliberate government action before finding an effective extinguishment of the rights.²⁴

In Canada the exclusive right of the Sovereign to extinguish aboriginal rights was asserted in the Royal Proclamation of 1763, and this view has never been challenged. After 1867, by virtue of section 91(24) of the Constitution Act, 1867²⁵ the Parliament of Canada would seem to have possessed this authority.²⁶ The leading Canadian cases on the issue of extinguishment re-affirm the supreme power of the Sovereign in this regard.²⁷

The rights which are asserted by aboriginal people reflect their relationship to their ancestral lands. At the very least, what is sought is undisturbed possession of their land and the opportunity to engage in traditional land-use (harvesting) activities. It is important to separate myth from reality when examining this problem, for too

many judgments have in the past been based upon an erroneous conception of native lifestyles, and native history. The astonishing variety of unenlightened judgments in cases involving assertions of native title led one author to identify the "menagerie" theory of Indian title, which reasoned that:

Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined.²⁸

One example of such a judgment is found in the following excerpt from In re Southern Rhodesia:

Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged.²⁹

One would think that the mere fact of tribal life constituted some justification for recognizing the validity of aboriginal land-holdings, unless these had been extinguished by a conquering sovereign. The previous review of leading American and Canadian cases illustrates beyond doubt that this theory does not represent the prevailing modern view.

Judicial recognition of aboriginal rights rests upon two essential ideas: that the original inhabitants of North America were entitled to respect as human beings, and that their social, legal and institutional life merited recognition. In light of this, it is clear that aboriginal rights are a species of human rights, which benefit native people who lived in "organized societies", as a means of ordering their relationship with a dominant conquering society. The assertion of an aboriginal right prior to contact with European nations would have been meaningless.³⁰

The fact that the original inhabitants were organized in societies was significant to the colonial powers because, in many ways, it altered the nature of the colonization process. The military strength of Indian tribes prevented white settlers from ignoring totally the native possession of lands. As well, it evidently affected the approach of the British colonial government toward the native people, as the Royal Proclamation exemplifies. That document recognized that the natives were organized in "several Nations or Tribes" and that their lands should be "ceded" or purchased, but not simply taken. The judicial theories of native title rationalize the co-existence of an underlying, dominant title in the Crown and a possessory title in the native groups. That such a theory was required further illustrates the significance of the fact that the native peoples were socially organized.

Another incident of aboriginal rights which derives from the fact of social organization is that the interest is a communal one; that is to say that the right inures to the benefit of the group, not the individual members of it.³¹ This is a recognition of the fact that original native possession of the land was also communal, and that the purpose of aboriginal title is not to "translate indigenous customs into 'transferable rights of property known to English law', but to accord proprietary status to the existing aboriginal system of landholding."³²

This view of the matter, however, is not beyond dispute, as the following exchange illustrates. Professor Douglas Sanders made the following statement in an analysis of the early proposals for Constitutional protection of aboriginal rights:

Aboriginal rights claims are often thought to be limited to land claims or the right to use particular lands for hunting and fishing. The claims to land are, logically, a claim to the recognition of a set of legal rights established under Indian and Inuit customary law, a law that has validity because Indian and Inuit communities had their own governments.³³

In reply, Professor Gurston Dacks questioned whether

in the early Spanish definition or recognition of aboriginal rights, the notion was not so much one of the native people of South America having their own governments, but rather having souls like other human beings.³⁴

The reply would seem to interpret aboriginal rights in a manner consonant with our understanding of individual rights. Professor Dacks is correct in his observation that the Spanish were concerned with the humanity of native peoples, as the theologians quoted earlier illustrate.³⁵

Later writing on the subject however, focuses upon the fact that native peoples were living in organized societies, exercising dominion over the land. For example, the Royal Proclamation of 1763 recognizes and protects the possessory title of Indian "Nations and Tribes"; no mention is made of the individual members of these groups, nor is their title (if any) to these lands considered. Although Spanish theologians were concerned with affirming the humanity of native peoples, later colonizing powers recognized the indigenous social institutions, at least so far as group rules governing possession of lands were observed.

Aboriginal rights have always inured to the benefit of native groups, and they are therefore collective rights, to be asserted by native people as members of, or on behalf of, a particular group.

In summary, aboriginal rights derive from traditional use and occupancy of land by native peoples who lived in organized communities. The rights protected relate to native possession of land on which sustenance or other activities were traditionally undertaken. Finally, the recognition of aboriginal rights represents an attempt to rationalize the underlying title of the Sovereign with the possessory title of the native groups, in recognition of the fact that certain native interests in land remain

unextinguished by treaty, sword, purchase or the exercise of complete dominion by the colonial power.³⁶

II. Rights Theory: A Modern Preoccupation

Rights are claims for specified kinds of treatment made by or on behalf of particular individuals or groups.³⁷

A "right" may be said to be a claim or an advantage possessed by a person or persons which is conferred or protected by law, and which implies a corresponding duty on the part of another.³⁸

These statements are concise definitions of the term "right" as it is commonly understood by lawyers today. They contain much that is of value. In the context of this chapter, we could extrapolate from these excerpts that "aboriginal rights" are claims for specified kinds of treatment, possessed by aboriginal peoples or groups, conferred or protected by law, which imply a corresponding duty on the part of another. It would be wrong to terminate the explanation here however, for there remain many issues that deserve attention.

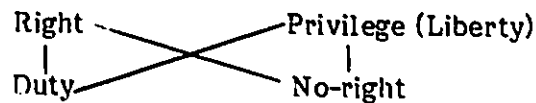
A great many authors have been troubled by the trend so evident today, towards an indiscriminate use of the term "right".³⁹ In the words of one observer:

In our century, but especially since the end of World War II, people have become increasingly inclined to affirm that we all have rights to whatever it is thought that it would be good for everyone to have.⁴⁰

Similarly, Professor Finnis laments the "ambiguity, evasion and overkill afflicting the Western debate since 'rights' became the basic counter in discourse."⁴¹ In positing a theory of aboriginal rights therefore, it is necessary to analyze whether the claims

which the term describes may properly be considered "rights" at all. For example, it is not uncommon to find aboriginal rights described as "claims" rather than "rights".⁴²

Before moving to consider what it means to assert a right, and why it is that rights are thought to be important, we would do well to examine briefly the analysis of Hohfeld, of which much modern rights theory is a direct descendant.⁴³ Hohfeld tried to isolate certain legal conceptions with a view to analyzing their inter-relationship in a precise and orderly fashion. In examining jural relations, rather than attempting to define individual conceptions, Hohfeld chose to set them out as "correlatives" and "opposites". The following diagram is helpful.⁴⁴



Hohfeld connected "right" with "duty", so that if a right was invaded a duty had been violated. All of this seems clear enough, so long as one keeps in mind the principles enunciated by Finnis: that these relations concern only one activity of one person, and that a claim-right is always a claim that someone else do, or omit to do something.⁴⁵

In my view, and with all due respect, Hohfeld's analysis is useful and illuminating for our purposes, but it does not go far enough. It stops just short of discussing the aspect of "rights" which seems to make them worthwhile and interesting. All of which is to say that Hohfeld does not discuss what it means to possess or to assert a right, nor why such a thing is important to have in the first place. For this sort of analysis I will turn to Professor Dworkin.

The theory of rights set out in the writings of Professor Dworkin is part of his larger "liberal theory of law".⁴⁶ As such, he imbeds his conception of rights in the institutional context of a liberal democracy. To quote Dworkin:

My aim is to develop a theory of rights that is relative to the other elements of a political theory and to explore how far that theory might be constructed from the exceedingly abstract (but far from empty) idea that government must treat people as equals.⁴⁷

The focus of his study is upon individual rights, and later in this chapter we shall explore the problems involved in applying this theory to communal or group rights. But the theory itself deserves some explication for it is a powerful analysis of rights as political "tools". Dworkin accepts the "background" setting of a liberal democracy, which employs utilitarian analysis (to some degree) in making political decisions.⁴⁸ He then distinguishes between decisions which are based upon personal preferences "because they state a preference for the assignment of one set of goods or opportunities (to the individual)" and decisions which take into consideration preferences which are external "because they state a preference for one assignment of goods or opportunities to others".⁴⁹ The second type of decision is invalid if it results in a constraint on liberty because it fails to conform to the cardinal requirement of Dworkin's system, which calls for governments to treat people with "equal concern and respect."

For Dworkin, if rights are to be worth talking about, they must be rights in a "strong sense" which means that:

when we say that someone has a 'right' to do something, we imply that it would be wrong to interfere with his doing it, or at the least that some special grounds are needed to justify any interference.⁵⁰

This is what Dworkin believes is involved in "Taking Rights Seriously": the justification for over-riding a "strong" right must involve more than that which would be called for were the right non-existent, or were it merely a right in the "weak" sense of doing no wrong (i.e. doing the right thing).

In order to evaluate such a justification we may borrow several points from Dworkin's description of the necessary elements of a "moral position", which seem equally to apply here: the justification must articulate reasons which are not based upon prejudice, a personal emotional reaction, an implausible rationalization, nor can it "parrot" the views of others.⁵¹ A justification for over-riding a right which did not fall within any of these categories would thus seem to be "acceptable" within our system of government. Dworkin, however, refuses to accept such a decision if it is based upon external preferences, or if the

personal and external preferences are so inextricably tied together, and so mutually dependent, that no practical test for measuring preferences will be able to discriminate the personal and external elements in any individual's overall preference.⁵²

Finally, Dworkin explains why it is important that we possess rights:

We need rights, as a distinct element in political theory, only when some decision that injures some people nevertheless finds prima facie support in the claim that it will make the community as a whole better off on some plausible account of where the community's general welfare lies ... We want to say that the decision is wrong, in spite of its apparent merit, because it does not take the damages it causes to some into account in the right way and therefore does not treat these people as equals entitled to the same concern as others.⁵³

It is in this sense that Dworkin identifies individual rights as "political trumps", and in this sense that he values these rights as important constituent elements in political morality.

Dworkin sets out this conception of rights in opposition to the theory, which he links to the writing of H.L.A. Hart, that

whatever rights people have are at least in part timeless rights necessary to protect enduring and important interests fixed by human nature and fundamental to human development ...⁵⁴

This brief sketch of Dworkin's theory does not do justice to his work, for many of the subtleties have been glossed over. The essence of this part of his theory of law is that rights in the "strong" sense are protective shields for individuals, which are necessary whenever it is antecedently likely that decisions which affect them will involve external preferences. In this theory the assertion of a right amounts to an affirmation of the worth and dignity of the individual. To assert a right is also to exercise the very moral independence which the rights seek to protect from the tyranny of the State, or of some majority within the state. Rights in this theory are political "tools", useful as a means of enveloping the individual with protection against a decision which, as Dworkin puts it, "does not take the damages it causes to some into account in the right way ..."

Dworkin is concerned with the rights of the individual; he seeks to analyze the place of these individuated claims within a political and social framework. Aboriginal rights have already been identified as "communal" rights, and it is therefore necessary to discuss the concept of "group rights" in order to formulate a theory of aboriginal rights.

III. Collective Rights

At the beginning of the last section, rights were defined as claims of individuals or groups. Collective or group rights are the claims made by groups within society for certain kinds of treatment. The distinction between the two types of rights has been expressed in the following manner:

Individual human rights ... are bestowed upon every single human being personally. Collective human rights are afforded to human beings communally, that is to say, in conjunction with one another as a group - a people or a minority ... The group which enjoys them communally is not a corporate entity and does not possess a legal personality. The nature of these human

rights requires ... that they shall be exercised jointly rather than severally.⁵⁵

The following analysis of collective rights will be largely conceptual, because there is relatively little available scholarship on the theoretical aspects of collective rights, and because it is intended to establish a framework for the substantive analysis which is done in later chapters. The differences between individual and collective rights are difficult to elaborate, especially in modern times when the violations of individual rights on a massive scale which occur regularly are referred to as infringements of the rights of "a people" or "a group". These rights are, however, conceptually distinct, and the scale of violation cannot transform an individual right into a collective one. Individual rights benefit each person equally, subject to restriction by the State, and to disentitlement by virtue of some action by the person (i.e. a convicted criminal loses many of the rights accorded other citizens). Widespread violation of these rights does not change their nature; it is still the rights of the individual that are involved.

Group rights benefit some particular class or category within a society, and inure to the benefit of the members of the group through the group; that is, by virtue of their membership these people are entitled to the benefits accorded to the group, which are identified as group rights. An assertion of such a right is meaningful only if the person is a member of the group, however that status is determined. As noted in the quotation cited earlier, the group possesses no separate legal personality distinct from that of its membership, such as that accorded to a company in Canadian law. The distinction between the rights accorded to a group and those of its members as individuals is therefore somewhat nebulous. The matter is further complicated because the two types of rights are often inter-related, because of the fact that a member of the collectivity simultaneously benefits from rights as an individual as well

as group rights, and because individual rights are often meaningless unless group rights are guaranteed. For example, freedom of religion, an individual right, may require an institutional setting for its effective exercise, which in turn requires that the rights of the religious group be protected.

Collective rights are either expressed as the rights of the group itself (in which case it is the individual members or leaders of the group who will exercise the rights) or as individual rights which involve collectivities. An example of the former is section 93 of the Constitution Act, 1867, respecting separate schools.⁵⁶ An example of the latter is contained in article 27 of the International Covenant on Civil and Political Rights:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.⁵⁷

This provision adds another dimension to our understanding of collective rights: they are practiced "in community with the other members of (the) group". To carry this point further, it is not that individual group members who partake of whatever benefits the group is accorded are not exercising group rights, but rather, that individuals themselves cannot assert collective rights unless a group exists. If native groups freely choose to assimilate into the dominant culture(s) in this country, it would be nonsensical for an Indian individually to assert an aboriginal right. The right would have been extinguished with the group's loss of identity.

In order to comprehend the nature of the distinction between individual and group rights, one must grapple with the analytical problems discussed previously. Two vital distinctions can be emphasized:

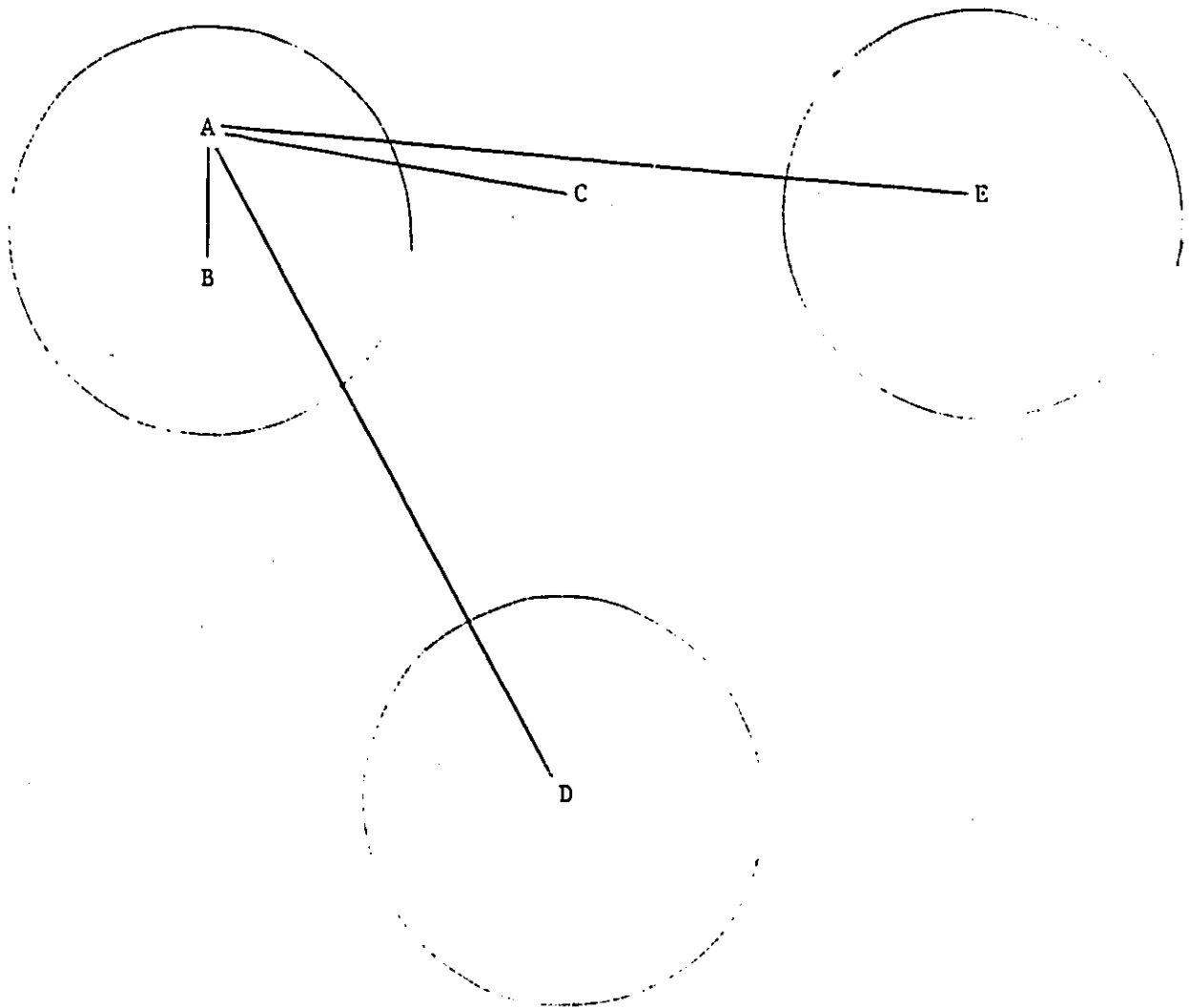
The first distinction which must be made is that an assertion of a human right emphasizes the proposition that everyone is to be treated the same regardless of his or her membership in a particular identifiable group. The assertion of group rights, on the other hand, bases itself upon a claim of an individual or a group of individuals because of membership in an identifiable group. This is an important distinction, and should not be obscured by the fact that certain human rights are either of no consequence unless enjoyed in community with others, or are asserted on behalf of individuals who happen to be members of identifiable minority groups. Thus, although it is true that the fundamental freedoms of expression, religion, assembly and association are intended to be exercised by several individuals in common, or for the purpose of communication, the intention is that each of these freedoms is to be enjoyed equally by everyone.

This leads to the second distinction between group rights and individual rights. The guarantee of a human right like free expression essentially requires the non-interference of the state. A language right on the other hand, requires positive governmental action. It may be that the government is required to have civil servants who can comprehend the language of the citizen and reply to him/her in his/her language. It may be that the government is required to expend funds to provide instruction in the guaranteed language. It may be that the government must expend funds to promote cultural activities which protect and promote the guaranteed language.⁵⁸

It would be wrong to ignore other parallel developments involving groups in society, because the adaptation of the law to a society dominated by groups and organizations is a recent phenomenon which may offer useful guidance.⁵⁹ Similarly, it would be an error to treat each collective right guarantee as a separate and distinct subject. Although these guarantees involve different groups and serve different functions, they share common characteristics which are peculiar to collective rights.⁶⁰ For example, language rights require implementation by positive government action, as does a guarantee of collective education rights.⁶¹ Language, education and culture are the subjects of collective rights guarantees in the Canadian Charter (ss. 16,

23, 27). The implementation of these broad guarantees will be an awesome task, which will be made more difficult by the complex nature of collective rights.

Further complexity is added because of the variety of collective rights guarantees contained in the Charter of Rights and Freedoms. These rights must co-exist, and interact with, the individual rights as well as the other collective rights guaranteed in the Charter. The intricacy of this relationship is illustrated in the following diagram:



- A collectivity, with rights mentioned in Charter
- B individual member of collectivity, possessing all of the individual Charter rights and freedoms, and taking the benefit of collective rights
- C individual, possessing only individual Charter rights and freedoms
- D collectivity, with rights mentioned in Charter
- E Parliament, or Legislature

The following examples are not exhaustive of the relationships between these actors, but they do demonstrate the bewildering possibilities:

- (i) an aboriginal person claims the benefit of a collective right (for example, sustenance hunting) to prevent the operation of a provincial law which impairs the exercise of this right. A non-native person claims that this is a denial of equality (the equal benefit of the law - s. 15) because he is subject to the restrictive game laws.⁶²
- (ii) an aboriginal child is enrolled in a Catholic separate school in Ontario, and her parents challenge the school authorities' refusal to allow her to practice her own religion. The parents claim that their aboriginal rights include control over education and religion, while the school authorities claim immunity from such control on the basis of section 93 of the Constitution Act, 1867, and section 29 of the Charter of Rights.⁶³
- (iii) an Indian band council has decided to refuse to allow the children of non-native mothers whose fathers are status Indians and band members to share in band resources if their parents are divorced or separated and the children no longer reside on the reserve. Representatives of these children argue that this is a denial of their individual rights to equality. The band council argues that its control over internal matters such as membership and entitlement to benefits must prevail, as a consequence of the aboriginal rights provision in the Charter of Rights (s. 25).⁶⁴

Other, equally complex examples are easily imagined. Section 27 of the Charter will be a fruitful source of similar difficulty, because it is both a "defensive" protection for

multiculturalism, and a substantive guarantee of it.⁶⁵ Section 27 has been used as an interpretive shield;⁶⁶ it may also be interpreted as an affirmative guarantee and in this respect it may conflict with other Charter guarantees such as equality rights (s. 15).

This exercise demonstrates that collective rights guarantees are complex, especially when contained in a document containing guarantees of other collective and individual rights. Principles are required to reach an adequate solution to the problems of co-existence and interaction between these different sorts of rights.⁶⁷ For our purposes, as the examples demonstrate, two fundamental issues must be resolved:

- (i) how can aboriginal rights be harmonized with the other rights guarantees in the Constitution?
- (ii) how can the individual rights of aboriginal persons be dealt with when they involve claims contrary to the position of the collectivity?

1. Aboriginal Rights in the "Rights System"

Competition and conflict between individual and collective rights is not a new phenomenon in Canada,⁶⁸ but today a new dimension is added to this process because constitutional guarantees are involved. A further refinement arises from the new collective rights guarantees contained in the Constitution Act, 1982, which increases the likelihood of conflict between the rights claimed by collectivities and those claimed by individuals.

One tempting solution to this problem is to construct a hierarchy of rights, ranking either individual or collective rights as presumptively more important, and

then ranking rights within both categories in order of importance.⁶⁹ There is little textual support for such an interpretation of the Charter of Rights, and it seems even less justifiable when applied to the Constitution Act as a whole.⁷⁰ One could point to the heading "Fundamental Freedoms" for s. 2 in support of an argument that these rights and freedoms are the most worthy of protection.⁷¹ However, an equally plausible ranking would accord greater status to the provisions not subject to the s. 33 over-ride. This would obviously move s. 2 down the list, and elevate ss. 3 to 6 and ss. 16 to 23, and other sections. On balance, however, such an approach to the rights mentioned in the Charter is unwarranted, since all of the rights are "guaranteed", according to s. 1, and all are subject to the same permissible limitations, as described in s. 1. It is submitted that a fixed hierarchy of rights is neither necessary nor justifiable on the basis of principle as a means of resolving conflicts between the rights guaranteed in the Constitution.

A more satisfactory solution requires the application of fixed principles to resolve these conflicts. In order to develop these principles it is necessary to emphasize at the outset that the time for debate about whether these rights should be entrenched in the Constitution is now long past. One cannot resolve this difficulty by seeking to return to an earlier legal regime in which only a very limited number of collective rights were guaranteed in the Constitution. The Constitution Act, 1982 fundamentally altered this regime, and it must be interpreted in a manner that will be meaningful for decades to come. A forward-looking interpretation of the Constitution is required.⁷²

This approach indicates the first principle of interpretation with respect to collective rights: the particular collectivity must not be impaired in its capacity to continue either by intrusion by the State or by claims on behalf of individuals. Although the Constitution does not prevent any or all members of the group from

leaving it to assimilate into society, it does seek to prevent the destruction of the group by outside pressures. Collective rights are meaningless unless the collectivity itself is allowed to survive.⁷³

This principle finds support from a variety of sources. The first international system for the protection of minority rights was established after World War I in the International Protection of Minorities System, under the auspices of the League of Nations. The Advisory Opinion of the Permanent Court of International Justice on Minority Schools in Albania said about this system:

The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.⁷⁴

A basic tenet of any international or domestic measures for the protection of minorities is that the minority is entitled to the right of equality of treatment and consideration with the majority and the concurrent right to preservation of a separate identity. Article 27 of the International Covenant on Civil and Political Rights carries this idea forward into modern international human rights law.

This principle leads to the second, which reflects the importance of individual rights in our legal tradition and in the Charter itself: a particular collectivity must respect the maximum individual rights consonant with the preservation and functioning of the group. Collective rights are not intended to obliterate individual rights, and in most instances it will be possible to achieve respect for both.⁷⁵ If, however, a collective right conflicts with an individual right, the purpose of each right must be evaluated in the particular case. If the collective right being asserted is vital to the continuance of the group, and if it cannot be protected by less destructive means, then

it is submitted that the collective right must prevail. If, however, the collective right is "ancillary" to the vital interests of the group, and the individual right is strongly protected (for example, it is recognized in the Charter) then the collective right should give way in the particular case.

This principle is controversial, because it brings into focus the extent to which collective rights guarantee the group's "different-ness", and because it derogates from individual rights which are strongly protected by the Charter. The value advanced by this principle is the autonomy of collectivities.⁷⁶ Although this value is not absolute, it is a vital aspect of our conception of collective rights. Professor Magnet has expressed this idea in the context of section 27 of the Charter:

'Structural ethnicity' relates to the capacity of a group to perpetrate itself, control leakage, resist assimilation, and propagate its beliefs. It is not a matter of voluntary individual choice. Rather, it depends on the creation, by the group, of an institutional infrastructure, to maintain the well-being of the group and nurture its self-justification.⁷⁷

The extent to which a particular collectivity is immune from interference by other social institutions and the influence of generally accepted values will depend on the nature of the rights accorded the group. As will be discussed in chapter 6, aboriginal rights, like most collective rights guaranteed in the Constitution, are multi-faceted, involving social institutions, collective and individual actions, and having obvious "political" implications for members of the collectivity.

In recent years the issue which has illuminated this question most clearly is the membership or status system under the Indian Act.⁷⁸ This system has been successfully challenged internationally, in a case brought by Sandra Lovelace, but the decision of the United Nations Human Rights Committee is inadequate as a model of

collective rights analysis, because it is based on an individual rights provision and does not address the autonomy question.⁷⁹

In the Lovelace decision, the Human Rights Committee decided that Ms. Lovelace had a right, pursuant to article 27 of the International Covenant on Civil and Political Rights, to return to the Indian reserve so as to be able to enjoy her language and culture in community with other members of the band. This decision was rooted in the specific wording of article 27 of the Covenant, and did not address the larger question which is raised by the application of the principle outlined earlier because the equality rights arguments raised by Lovelace were not considered by the Committee in view of the fact that the alleged deprivation of equality occurred before the Covenant came into effect within Canada.

The key question relates to the power of a communal organization to determine membership qualifications in a manner which would otherwise be unacceptable under the Charter of Rights. Why, for example, should an aboriginal group whose traditional descendancy or leadership rules were matriarchal, be forced to comply with the equality guarantees in sections 15 and 28 of the Charter?⁸⁰ If collective rights provide a guarantee of autonomy to the group in such matters, it may plausibly be argued that membership decisions should be immune from the Charter, for such matters are obviously essential to the future integrity of the group. Indeed, if control of membership is removed from the group its immediate survival may be called into question.

This argument, however, fails to account for the limitations inherent in the guarantee of collective and individual rights. These rights do not always conflict, and in most situations the integrity of the collectivity will not be threatened by its respect for individual rights. This cannot simply be determined according to the number of individuals advancing the particular claim; the challenge to the integrity of the

collectivity in the Lovelace case, for example, was not affected because it was a claim by an individual.⁸¹ Rather, this must be determined according to principles which will be unique to each collectivity. These principles will derive from the nature, history and social context of the collectivity. In a case where individual rights appear to conflict with the rights of the collectivity, these principles must be analyzed in order to determine whether the individual claim has the potential to alter radically the nature of the collectivity in the future.

The principles reviewed thus far provide no guidance in the situation where two collective rights come into conflict, although the second principle outlined earlier is a useful model. The different collective rights guaranteed in the Charter reflect the social value of different groups in Canada. It is conceivable that one person might take the benefit of several collective rights guaranteed in the Constitution.⁸² In case of a conflict between collective rights, the following principle should be applied: the rights of different collectivities must interact so as to preserve the essential interests of each, and in case of conflict a determination must be made as to the nature of the interests involved, and the extent to which the claims advanced by one group will impair the integrity of the other. This is a delicate task, but one which is required by the dynamics of collective rights, and current constitutional guarantees.

2. Individual Rights of Members of Collectivities

As an individual, each member of a collectivity is entitled to benefit from the rights guaranteed in the Charter of Rights and Freedoms. As a member of a collectivity with rights set out in the Constitution Act, this person also benefits from these provisions. In some instances the two sets of rights will be mutually exclusive. An Indian accused of a criminal offence and arrested by a police officer has the same rights under section 10 of the Charter as a non-Indian. In other situations, however,

the individual rights will be modified by the collective right guarantee.⁸³ For example, the right not be subjected to cruel and unusual treatment or punishment (s. 12) may require modification when applied to an Inuit man who follows a traditional lifestyle and who is convicted of a criminal offence the sanction for which includes a prohibition on the future use of a firearm for a specified period of time.⁸⁴ But for the collective rights relating to hunting, this individual would not be able to rely on s. 12; the content of this individual right is modified by the collective right, however, and it is therefore applicable to this case.

The issue of concern here is whether the rights of the collectivity are limited by the individual rights of its members. In the context of aboriginal rights, this debate has most often focussed on status or membership determination decisions. Once again, it is submitted that a principled approach is required. If rights guarantees are important as "trumps" in moral and political discourse, one cannot resolve this difficulty simply by resorting to the most expedient or politically acceptable solution.

The scope of this issue is revealed in the following discussion by the former leader of the Assembly of First Nations, David Ahenakew:

With whom do aboriginal rights lie? Can an individual aboriginal person demand that the federal government recognize his aboriginal rights, or must those rights be demanded by the First Nation to which the individual belongs? Does an aboriginal person have special rights by reason of being 'aboriginal,' or by virtue of his being part of an aboriginal collective, such as a First Nation? . . .

By including self-government as an aboriginal right First Nations are, in effect, distinguishing between those rights an individual aboriginal person might have and those he has by virtue of membership in a First Nation. Could an individual aboriginal person, for instance, demand that the federal government protect his right to fish a certain lake when his First Nation, for conservation purposes, prohibited fishing? Could a First Nation government manage its relationship with the federal government if some of its members individually pressed rights which the collective had determined were not in its best interests? . . .

Although no examples of individually held aboriginal rights come to mind, there may be some. If there are, then there is another categorization of aboriginal rights: (1) aboriginal rights that belong to the individual aboriginal person, and (2) aboriginal rights that accrue to an individual by virtue of his membership in a First Nation. This distinction is particularly crucial in such self-government questions as membership and access to lands, resources, and services. Unless the distinction is clear, First Nation self-government may be undermined by federal governments intervention on behalf of individuals who claim land, resources, and services as individual aboriginal rights. The distinction is essential to the argument that some aboriginal rights flow from aboriginal title, since it is presumed that the undivided title is held collectively by a particular First Nation. If these rights are said to be held individually and severally, they cannot simultaneously be held collectively and jointly.⁸⁵

The principles which were set out earlier will not be repeated, but they provide a useful guide on this question as well. Collective rights are meaningless without the continued existence and vitality of the group, but these rights need not obliterate all individual rights ordinarily enjoyed by residents of this country. To the extent possible, these different sorts of rights should co-exist peacefully . In a case of conflict, however, it is submitted that the maximum individual liberty consonant with the continuance and functioning of the collectivity must be recognized. If the individual right claimed in a particular case calls into question the future existence or status of the collectivity by assailing an essential aspect of its rights, and if no less intrusive interpretation is possible, then the individual right must give way. This may require an adaptation of the common understanding of the individual right, or it may be achieved in other ways.⁸⁶ Whatever the method, this is the logical consequence of the inclusion of collective rights in a Constitution which also incorporates individual rights guarantees in a manner which indicates that the latter rights apply equally to all.

Examples of such conflicts have already been provided. They can arise because aboriginal people in Canada are the beneficiaries of the Charter's various individual rights guarantees, and they also are guaranteed certain additional rights which will be discussed in detail in later chapters. This dual guarantee of rights poses a familiar problem where a conflict arises between the wishes or actions of an individual group member and the dictates of the group itself. In other situations involving similar conflicts the interests of the collectivity have often prevailed if no less drastic solution can be devised.⁸⁷ Thus the situation of aboriginal peoples is not unique, and the problems connected with possible conflicts between individual and collective rights have been addressed before.

The rationale for this presumption in favour of the maximum individual liberty derives from the dual nature of the rights guaranteed to aboriginal people by the Charter, and reflects the historical significance of individual rights in Canadian law and society. Although this heritage included guarantees relating to linguistic, religious and aboriginal minorities, it was primarily individualistic. The Charter mirrors this pattern.

3. Conclusion

This discussion of rights theory and the dynamics of collective rights has been primarily conceptual and abstract, for several reasons. First, there is exceedingly little available scholarship on which to rely. It was necessary to analyze these issues in order to provide a theoretical framework for the analysis of the substantive provisions which will follow, without delving too deeply into particular cases, which will be analyzed later. Second, it was necessary to discuss collective rights as "things", apart from the specific context of aboriginal rights, in order to understand the complex dynamics of these sorts of rights, and to examine the principles which

should be applied to resolve conflicts between collective rights and other rights (individual and collective) guaranteed in the Constitution.

This analysis may be objectionable because it advanced the argument that in certain instances collective rights must prevail over individual rights. A key point which must be remembered in evaluating the merit of this contention is that if a collective right is to be meaningful it must protect the group's "different-ness". All individuals are guaranteed basic rights and freedoms by the Constitution. If collective rights could not alter these rights, and occasionally over-ride them, then the group itself would eventually be subsumed within society. And collective rights, at the very least, must ensure the continuance of the conditions necessary for the survival of the group, so long as its members choose to maintain it.

IV. Applying the Theory

I. A Preliminary Discussion

A theory of rights should rationalize and justify the content of the rights, and this I will attempt to do. This analysis does not seek to describe what these rights, properly understood, actually are, but rather, what content they might have, in the context of a particular theory.

This approach is obviously derived from Dworkin: his methodology is attractive because it situates rights theory within a political framework, and it offers a powerful argument of why rights are important. The problem with applying his theory to native rights is manifest; Dworkin constructs a theory of individual rights, rooted in a system in which equality is the cardinal principle, and which employs utilitarian analysis in making political choices. How can we adopt such a theory in Canada, in relation to a claim which we have identified as a collective right?

Several key elements of Dworkin's conception of rights have already been isolated: decisions are often made based upon criteria which are unacceptable in a liberal democracy; rights are important only if they connote some sort of meaningful protection which requires special justification to be over-ridden; rights are useful as a means of counter-acting decisions which are antecedently likely to involve inappropriate considerations. These propositions can be applied to the concept of aboriginal rights in a relatively straightforward manner.

Dworkin asserts that decisions which are justified by reference to external preferences are an unacceptable violation of the fundamental rule of utilitarianism in a liberal democracy, which requires that everyone be treated with equal concern and respect. If one accepts that equality, as Dworkin understands that term, is such a fundamental value, then it does seem improper to allow people to enforce their preferences of what others should prefer, through the medium of "majority rule".

One need not embrace this rationale, however, to accept the proposition that some criteria for decision-making are unacceptable in a liberal democracy. Professor Conklin grounds his defence of fundamental rights in the conception of a person "as a potentiality, always in the process of becoming."⁸⁸ In this theory the judgments of society must respect the fact of self-creation, so that the process of individual choice cannot be burdened or altered by others. This, essentially, amounts to an assertion that certain decisions are invalid because they are based upon unacceptable criteria; that is, they reflect someone else's determination of what a person should become. Aboriginal rights within such a theory would protect individual native people in their collective process of discovery. One could argue that part of the individuality of a native person which demands respect is the person's connection to a culture and ancestral heritage. Any decision or judgment which failed to respect this individuality, this "person-ness", would therefore be unacceptable. Assuming that

aboriginal persons are not expected to assimilate into mainstream culture, the imposition of a cultural preference upon that person which would be the result of a denial or abrogation of aboriginal rights would amount to an irreversible failure to treat that person as a "person", in the fullest sense of that term.⁸⁹ The exercise of the individual right of choice, for a native person, therefore, requires the protection of collective aboriginal rights.

Similar arguments could be marshalled from notions of the respect which is due to organized societies when these are conquered or over-run. Our conception of liberal democracy calls upon us to respect the internal laws and customs of a colonized society, so far as these may be consonant with fundamental precepts of our law.⁹⁰ A further argument could be founded upon the respect which is accorded possession from time immemorial, or long-standing use. In our society it seems wrong to ignore or to trample upon rights of possession or use which have survived for a lengthy period of time. The doctrine of adverse possession in property law is an example of the respect which is accorded to possession for an extended period.⁹¹ A decision which ignored these notions in order to enforce the preferences of the dominant culture, for no other reason than the desire of the majority to enforce its will, would run contrary to our notions of liberty and freedom, and in that sense would seem to be wrong.

A more complete elaboration of these arguments is not necessary in this chapter. They are mentioned only as illustrations of the different foundations upon which Dworkin's proposition may be based. One need not accept his underlying rationale of equality in order to assert that some criteria are unacceptable justifications for decisions in a liberal democracy. Several sorts of criteria justifying decisions which deny aboriginal rights have been explored and found wanting.

This analysis makes sense only if aboriginal rights are rights in the strong sense which Dworkin identified, e.g. claims which require special justification to be over-

ridden. Otherwise, one could not assert that some criteria are improper or unacceptable. Any reason will justify over-riding a right in the weak sense. As well, it seems illogical to assert rights unless there is a likelihood that unacceptable criteria will be employed in arriving at a decision affecting the interests protected by the right. Both of these elements of Dworkin's theory are equally applicable to individual or group rights.

Having situated aboriginal rights within this theoretical framework, it remains to pour some content into the rights, and to explore what it means to assert them. If rights are "political tools", their assertion is essentially a political act. This is no less true of collective rights than of individual rights. As with individual rights, the assertion of a group right is a re-affirmation of, and indeed an exercise of, that independence and dignity which the right seeks to protect. This is what it means to assert a group right.

Formulating the content of these collective aboriginal rights is difficult. There are three major native groups within Canada — Inuit, Indians and Metis. There are many sub-divisions within each group -- for example, status and non-status Indians. These groups traditionally followed disparate lifestyles which in turn meant that some groups were organized into highly complex societies, while others lived within simple extended family units.⁹² Today native people exist and function within a variety of social and institutional contexts, which makes it difficult to formulate one blanket definition of aboriginal rights which will serve these groups equally.

The first point to notice is that the rights are communal, they are a recognition of a historical pattern of group organization and group use and occupancy of land. It is evident, therefore, that the group's existence must be maintained in order for the collective nature of the rights to be meaningful. In order to ensure that the group can carry on as a separate entity, the determination of who is a member must be

controlled primarily by the group itself. If it became attractive for financial or other reasons to be a member of a particular group, and if the group itself could not control membership decisions, an influx of new members could virtually overwhelm the original group. One essential element in any meaningful concept of aboriginal rights is control over internal membership decisions. Ordinary procedural standards of fairness might be enforced by a court on review of an aboriginal organization's decision regarding membership termination, for example. The group's basic power to make these decisions, however, should be protected by the concept of aboriginal rights, and this is a reflection of the collective nature of these rights.

Next, possessory title to areas of traditional use and occupancy should be recognized and respected, as should traditional harvesting activities. However, many of these groups no longer occupy or use their ancestral lands. The Metis did not exist prior to contact with European powers, and many Indian groups have been displaced by settlers. The Metis claim of aboriginal rights resembles those of other groups in all respects except historical antiquity. They exercised dominion over lands, as an organized community, for a substantial period of time. Surely we cannot refuse to recognize this claim simply because the group did not exist prior to the earliest aboriginal contact with colonial nations. The Metis society was effectively organized long before non-native settlement of western Canada, and their claims derive from this fact.

As well, dislocation should not disentitle native groups entirely, so long as a substantial period of occupancy and use can be demonstrated, for if the community exercised dominion over the new territory in a similar fashion to that exercised over the ancestral lands, the change in location seems unimportant.⁹³ Problems may arise where two groups assert claims to the same territory, but these can be resolved by an examination of the historical record. The exercise of dominion by a dislocated Indian

tribe would extinguish the previous user's aboriginal rights, unless both groups utilized the area simultaneously. Just as the Sovereign could extinguish native title by the exercise of dominion adverse to that title, so could a native group establish a claim to certain territory by the exercise of its traditional rights, to the exclusion of other groups.

Finally, if aboriginal rights do derive from a recognition of the group's existence as an organized society, it is illogical to give effect to the group's rules of land-holding but to ignore the other customs and laws by which it was governed. If the native group was socially organized to such a degree that binding rules regulating such matters as political power, marriage, and adoption existed, these should be recognized as rightful elements in a definition of aboriginal rights.⁹⁴ In sum, if the "independence" or integrity of the group is to be protected by a "right", that protection should extend to all elements necessary to the group's existence as a social entity; the group should be guaranteed the opportunity to do whatever it was that it did prior to contact with the colonial power, subject always to the underlying power of the dominant state to interfere, where such intervention can adequately be justified.

2. A Case Study

The application of this theory in particular situations is discussed in later chapters. A recent decision of the Federal Court of Appeal will be used as an example of how the theory might work in an actual case. The case, Boyer v. Canada,⁹⁵ is chosen because it presents the relevant issues in particularly stark terms.

The case concerned an application by an Indian Band for a declaration that a lease of reserve land, purportedly under the authority of the Indian Act, was void because it was not entered into in accordance with the procedures specified in the Act. The lease was between the Crown, acting for the Band, and a company owned by

an individual member of the Band. The relevant provisions of the Indian Act provide for the leasing of reserve land with the consent of the council of the Band (s. 58(1)(b)), but also allow reserve lands in the possession of an individual Indian to be leased, in which case the consent of the Band is not required (s. 58(3)).

If we assume that the individual involved in this case originally obtained possession of the parcel of reserve land in accordance with the relevant rules,⁹⁶ the case can be dealt with as a conflict between individual and collective rights; otherwise it would simply involve fraud. The consent clause in the Indian Act must be viewed as the minimum requirement for the preservation of the land base of the collectivity, which in this case is a single Indian Band. If this is correct, the key question then becomes whether the original consent given by the Band to the allocation of the land to this individual is sufficient, or whether some further consent is required once the purpose for which the land was to be used is revealed. In terms of rights theory the case can be viewed as involving a question of "jurisdiction". Is the individual member of the collectivity subject to special restrictions such as the requirement of group consent to property use, when the property at issue is part of the land base essential to the continued survival of the group?

The application of the principles outlined earlier requires an immediate assessment of the potential impact of the case upon the status, functioning or basic integrity of the collectivity. Control over the land-base is obviously a vital concern, whether the land was acquired by way of a treaty or is part of the group's ancestral territory. Any disposition of this land without the consent of the group is therefore a potential threat to its integrity.

In the Federal Court decision these issues are, not surprisingly, skirted by the majority,⁹⁷ who based their decision solely upon a close reading of s. 58 of the Indian Act. In a concurring judgment however, MacGuigan J. addresses the conflict between

collective and individual rights; in his view this case "embodies a new version of the age-old problem of the person and the state, as particularized in the microcosm of an Indian community under the Indian Act."⁹⁸ The learned judge derives, from a review of the scheme of the Indian Act as a whole, "the fundamental principle that a reserve must be preserved intact for the whole band, regardless of the wishes of any individual Indian as to the disposition of the allotment of which he is a locatee."⁹⁹ He also accepts that "the spirit of native culture is a communal rather than an individualistic one, and that the [Indian] Act should be interpreted to this effect as fully as possible."¹⁰⁰

In his view the statutory provisions involved in this case admitted of two interpretations, one favouring a community consent requirement and the other rejecting such a concept. In the absence of any clear guidance from the Act or from precedent, MacGuigan J. decided to seek guidance from the preamble to the Constitution Act, 1867, which declared that Canada is to have "a Constitution similar in principle to that of the United Kingdom." A review of judicial and scholarly commentary related to this phrase, and an examination of the current Canadian Constitution, including the Charter of Rights, propelled MacGuigan J. to the following conclusion:

... the freedom of the individual person in Canada, with a constitution similar in principle to that of the United Kingdom, is prior to the exigencies of the community ...

In sum, in the absence of legal provisions to the contrary, the interests of individual persons will be deemed to have precedence over collective rights. In the absence of law to the contrary, this must be as true of Indian Canadians as of others.¹⁰¹

As a matter of legal statutory interpretation, the decision of MacGuigan J. is, it is respectfully submitted, inadequate. Although he correctly points out that when

group rights are given priority in the Constitution a specific provision to that effect is included, and he states that the Charter of Rights and Freedoms "is itself a fundamental affirmation of the rights and freedoms of the individual person",¹⁰² incredibly he neglects to mention the specific constitutional guarantees respecting aboriginal peoples. It was not necessary for him to conclude that any of these provisions actually applied in this case in order for them to be relevant to his analysis, because he was, at that stage, seeking interpretive guidance from the principles enshrined in the Constitution.

As a matter of rights theory, this judgment is also questionable. Although it is undoubtedly correct to state that one unifying principle embodied in our Constitution is respect for individual rights and freedoms, it is respectfully submitted that it does not follow from this that a specific provision is required in order for any collective right to supersede an individual right. Collective rights have been part of our constitutional structure at least since Confederation, and aboriginal rights are rightfully considered to be as important as the other rights (individual and collective) protected by that structure.

The decision of MacGuigan J. may be argued to reach the correct result, but that is not relevant to this discussion because for our purposes it is the reasoning process employed in it which is important. If the principles enunciated earlier in this chapter are applied to the facts of this case, a different pattern of analysis emerges. First, the implications of the case must be assessed: the potential threat to the integrity and survival of the collectivity is thereby revealed. Only once this is done can the balance between the rights of the collectivity and those of the individual be properly assessed. Although this does not automatically lead to a different result than the Federal Court of Appeal reached in this case, it is submitted that it does ensure that all relevant considerations are taken into account when the facts are analyzed.

3. Summary

This is my theory of aboriginal rights. The following chapters elaborate upon and apply it. The principle features of this theory are summarized for convenience:

1. The claims which are associated with the term aboriginal rights may properly be considered rights, as definite claims for specified treatment which imply a corresponding duty. These claims are rights in the "strong" sense, since they are constitutionally entrenched, and possess a long history of respect and recognition.
2. Aboriginal rights are collective rights, which inure to the benefit of native groups. These rights have always been understood to derive from the existence of native groups as organized societies prior to contact with colonial powers, and the activities to which the claims relate were, and remain, group activities.
3. Where collective rights conflict with other individual or collective rights principles recognizing the importance of individual rights, and the right of the group to survive, must be applied.
4. Aboriginal rights are an important means of protecting the dignity and independence of aboriginal peoples. They "trump" decisions which deny these entitlements, whether by virtue of the failure to treat the group with equal concern and respect, or by virtue of neglect of the individuality of aboriginal persons. Similar "improper" considerations may relate to the failure to respect an organized society following colonization, or the denial of the respect which we accord to that title which arises by virtue of lengthy possession and use.
5. The content of aboriginal rights is difficult to formulate. At the least the right should include the determination of group membership, and the recognition of

possessory title to ancestral lands or to lands over which the group has exercised effective dominion for a substantial period of time. Traditional harvesting activities should also be recognized and protected. Finally, the laws and customs of the group should, so far as possible, be recognized as incidents of aboriginal rights, derived from a recognition of the fact that these groups were organized societies prior to the colonial invasion.

CHAPTER 3 ENDNOTES

1. This discussion will not address treaty rights per se, but it should be emphasized that in some respects treaty rights are also collective rights. The origins and content of aboriginal rights are explained infra, text at note 7 et seq.
2. The only other attempts to propound a theory of aboriginal rights of which I am aware are: P.A. Cumming and N. Mickenberg, Native Rights in Canada (2nd ed.), Toronto: General Publishing, 1972, ch. 3; D.J. Gormley, "Aboriginal Rights as Natural Rights" (1984), 4 Can. J. Native Studies 29.
3. See, for example, M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982), 4 Sup. Ct. L. Rev. 131; Hunter v. Southam Inc. (1984), 11 D.L.R. (4th) 641 (S.C.C.).
4. See J. Magnet, "The Supreme Court of Canada and the Charter of Rights", unpublished paper presented at the Conference on the Supreme Court of Canada, Ottawa, 1985.
5. This is discussed more fully in Ch. 1, supra, with particular reference to the patriation process.
6. See, for example: R. Daniel, A History of Native Claims Processes in Canada, Ottawa: D.I.A.N.D., 1980; M. Boldt and J.A. Long eds., The Quest For Justice: Aboriginal Peoples and Aboriginal Rights, Toronto: University of Toronto Press, 1985, chapter 4.
7. Cumming and Mickenberg, supra note 2, at p. 13.
8. Perhaps the most glaring example of this is the following statement: "Throughout this article, the term 'aboriginal rights' is used interchangeably with the terms 'original Indian title', 'Indian title' and 'aboriginal title.'" in N. Mickenberg, "Aboriginal Rights in Canada and the United States" (1971), 9 Osgoode Hall L.J. 119, at p. 119, footnote 6.

9. Quoted in T. Berger, "Native History, Native Claims and Self-Determination", paper prepared for a Continuing Legal Education Seminar, Vancouver, B.C., October 1982.
10. Ibid., p. 2.
11. In his work De Indis et de Jure Belli Relectiones, Vitoria asserted that all men, regardless of their religion, were entitled to undisturbed possession of their goods by virtue of their humanity.
12. Papal Bull Sublimus Deus, 1537, cited in G. Bennett, "Aboriginal Title in the Common Law: A Stoney Path Through Feudal Doctrine" (1978), 27 Buffalo L. Rev. 617, at p. 619.
13. R.S.C. 1970, App. II. See excerpts in Mickenberg, supra note 8, at p. 155; see also Cumming and Mickenberg, supra note 2, Appendix II, p. 291.
14. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 240 (1823), at pp. 253-54.
15. Loc cit.
16. Worcester v. Georgia, 31 U.S. (6 Pet.) 350 (1832), at p. 377.
17. The leading cases are Calder v. A.-G.B.C. (1973), 34 D.L.R. (3d) 145 (S.C.C.); Hamlet of Baker Lake v. Minister of Indian Affairs (1979), 107 D.L.R. (3d) 513 (Fed. Ct. T.D.).
18. See St. Catharines Milling & Lumbering Co. v. The Queen (1888), 14 App. Cas. 46, at p. 54.
19. For example, a National Indian Brotherhood statement to the House of Commons Standing Committee on Indian Affairs and Northern Development includes, within this concept, "a right to use and exploit all the economic potential of the land and the waters adjacent thereto, including game, produce, minerals and all

other natural resources ..." Quoted in Indian Claims in Canada, Ottawa: Indian Claims Commission, 1975, p. 6.

20. Mickenberg, supra note 8, at p. 150.
21. Ibid., at p. 138.
22. Hamlet of Baker Lake, supra note 17, at p. 542, per Mahoney J.
23. United States v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941), at p. 347.
24. See Mickenberg, supra note 8, at pp. 130-31.
25. 30-31 Vict., c. 3 (U.K.), as re-named by the Constitution Act, 1982.
26. See K. Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967), 45 Can. Bar Rev. 513. This point is discussed more fully infra, Ch. 6.
27. Calder, supra note 17, pp. 156-64; Hamlet of Baker Lake, supra note 17, pp. 547-57.
28. F.S. Cohen, "Original Indian Title" (1947), 32 Minnesota L. Rev. 28, at p. 58.
29. [1919] A.C. 211 (P.C.), at pp. 233-34, per Lord Sumner.
30. J.C. Smith, "The Concept of Native Title" (1974), 24 U. of T.L.J. 1.
31. See M. Jackson, "The Rights of the Native People" in The Practice of Freedom (R. St. J. Macdonald and J. Humphrey eds.), Toronto: Butterworths, 1979, 267, at p. 271.
32. Bennett, supra note 12, at pp. 622-23.
33. "Aboriginal Peoples and the Constitution" (1981), 19 Alta. L. Rev. 410, at p. 412.

34. "Commentary" (1981), 19 Alta. L. Rev. 433, at p. 433.
35. Supra, text accompanying notes 9-12.
36. To paraphrase the United States Supreme Court, supra note 23.
37. D.V. Smiley, "Rights, Powers and Values in Canadian Society" in The Practice of Freedom (R. St. J. Macdonald and J. Humphrey eds.), Toronto: Butterworths, 1979, 1, at p. 2.
38. W.S. Tarnopolsky, The Canadian Bill of Rights (2nd ed. rev.), Toronto: Macmillan, 1975, p. 1.
39. It seems to me that much of the work of Hohfeld, Hart and Dworkin reflects this concern.
40. A. Flew, "What is a Right?" (1979), 13 Georgia L. Rev. 1117, at pp. 1134-35.
41. J. Finnis, "Some Professorial Fallacies About Rights" (1971-72), 4 Adelaide L. Rev. 377, at p. 377.
42. See, for example, R. Dalon, "An Alberta Perspective on Aboriginal Peoples and the Constitution" in The Quest for Justice: Aboriginal Peoples and Aboriginal Rights (M. Boldt and J.A. Long eds.), Toronto: University of Toronto Press, 1985, 83, at p. 104.
43. H.N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, New Haven: Yale University Press, 1923.
44. This is taken from Glanville Williams, "The Concept of Legal Liberty" in Essays in Legal Philosophy (R.S. Summers ed.), Oxford: Basil Blackwell, 1968, 121, at p. 128.
45. Finnis, supra note 41, at pp. 379-81. The third principle he enunciated is ignored because it seems only marginally relevant, and has been cast into doubt by E.

- Attwooll, "Liberties, Rights and Powers" in Perspectives in Jurisprudence (E. Attwooll ed.), Glasgow: University of Glasgow Press, 1977, 79, at pp. 85-86.
46. Unless otherwise specified all of the following references to Professor Dworkin's work are from Taking Rights Seriously (rev. ed.), Cambridge, Mass.: Harvard University Press, 1978.
47. R. Dworkin, "Is There a Right to Pornography?" (1981), 1 Oxford J. Legal Studies 177, at p. 210.
48. See especially "What Rights Do We have?", p. 266, at pp. 274-76.
49. Ibid., p. 275. See also "Reverse Discrimination", p. 233, at pp. 235-38.
50. "Taking Rights Seriously", p. 184, at p. 188.
51. "Liberty and Moralism", p. 240, at pp. 249-50.
52. "Reverse Discrimination", p. 233, at p. 236.
53. Dworkin, supra note 47, at p. 211.
54. Ibid., at p. 210. Dworkin was responding to Hart's critique found in "Between Utility and Rights" (1979), 79 Col. L. Rev. 828.
55. Yoram Dinstein, "Collective Human Rights of Peoples and Minorities" (1976), 25 I.C.L.Q. 102, at pp. 102-3.
56. The relevant portion of section 93 states:
93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—
- (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to

Denominational Schools which any Class of Persons have by Law in the Province at the Union:

- (2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec.

57. This provision was relied on in the case Lovelace v. Canada, infra text at note 79.
58. W.S. Tarnopolsky, "The Equality Rights" in The Canadian Charter of Rights and Freedoms: Commentary (W.S. Tarnopolsky and G.A. Beaudoin eds.), Toronto: Carswell, 1982, 395, at pp. 437-38.
59. There is a rich body of literature on this phenomenon. For example, Ontario law is struggling to adapt to the unique demands of class actions, which are being resorted to in order to protect diffuse and unusual legal interests. Class actions involve ad hoc collectivities, but in many other ways share characteristics of collective rights, including the determination of membership and conflict between the interests of the group and those of individuals within it. See: Naken v. General Motors of Canada (1983), 144 D.L.R. (3d) 385 (S.C.C.); W. Bogart, "Naken, The Supreme Court and What Are Our Courts For?" (1984), 9 Can. Bus. L.J. 280. On the more general question of the adaptation of the law to respond to the role of groups in society, see: J. Vining, Legal Identity: The Coming of Age of Public Law (1978); A. Chayes, "Foreword: Public Law Litigation and the Burger Court" (1982), 90 Harv. L. Rev. 4; O. Fiss, "Foreword: The Forms of Justice" (1979), 93 Harv. L. Rev. 1.
60. An especially relevant and fruitful source for guidance is the field of labour relations and freedom of association. Unions have for some time now been involved in disputes relating to control over membership, compulsory check-off, and other conflicts between individual and group rights.

61. Tarnopolsky, supra note 58, at pp. 437-38.
62. See, for example: R. v. Rocher (1984), 14 D.L.R. (4th) 210 (N.W.T.C.A.).
63. This sort of concern has recently received a great deal of attention in relation to the extension of funding by Ontario to separate schools. See Bill 30, discussed in Reference re an Act to Amend the Education Act (1986), 53 O.R. (2d) 513 (C.A.).
64. This concern is related to the recent changes in Indian status and membership rules; see Bill C-31, An Act to Amend the Indian Act, S.C. 1985, c. 27.
65. See the discussion supra note 61, at pp. 438-42.
66. See R. v. Big M Drug Mart, [1985] 1 S.C.R. 295; Reference re Education Act of Ontario and Minority Language Rights (1984), 47 O.R. (2d) 1 (C.A.). These decisions are discussed infra, chapter 5.
67. See Gold, supra note 3; see also R. Dworkin, Taking Rights Seriously (rev. ed.), Cambridge: Harvard University Press, 1978, at pp. 22-28.
68. See, for example, Caldwell v. St. Thomas Aquinas School, [1984] 2 S.C.R. 603; Magnet, supra note 4.
69. This seems to have occurred in the United States, with individual rights and freedom of expression and racial equality respectively ranking at the top of these "lists".
70. For example, s. 35 is not subject to ss. 1 or 33. Should it therefore rank higher than all of the Charter guarantees?
71. See, on the use of these headings: Re Skapinker and Law Society of Upper Canada (1984), 11 C.C.C. (3d) 481 (S.C.C.).

72. See R. v. Big M. Drug Mart, [1985] 1 S.C.R. 295; and Hunter v. Southam Inc., [1984] 2 S.C.R. 145.
73. Magnet, supra note 4, p. 5.
74. (A/B 64) 17 (1935).
75. See E. Ratushny, "Contextual and Functional Dimensions of Human Rights: A Canadian Perspective", paper delivered at Zagazig University, Centre for International Legal and Economic Studies, November 1985.
76. See Magnet, supra note 4.
77. J.E. Magnet, "Interpreting Multiculturalism: Collective and Individual Rights", unpublished paper presented to Canadian Human Rights Foundation Conference on Multiculturalism, n.d., p. 7.
78. There is a wealth of literature on this subject. See, for example: D. Sanders, "The Bill of Rights and Indian Status" (1972), 7 U.B.C.L. Rev. 81.
79. The decision is reproduced in (1983), 1 Can. H.R.Y.B. 305. See also my article "Lovelace v. Canada: A Case Comment" (1982), 5 Can. L. Aid Bulletin 259.
80. For examples of such traditions see the evidence presented on behalf of Sandra Lovelace to the Human Rights Committee: Selected Documents in the Matter of Lovelace versus Canada, September 1981: see my article, ibid.
81. If many other people would take the benefit of a favourable decision to one party in a case, the decision might have the effect of undermining the right of the collectivity to survive.
82. Indeed, this has occurred in Ontario where Catholic members of the francophone minority have been granted the right to establish and administer school boards:

see Reference re Education Act of Ontario and Minority Language Education Rights (1984), 47 O.R. (2d) 1 (C.A.).

83. This is discussed more fully in Chapter 5, infra.
84. See R. v. Tobac (1985), 20 C.C.C. (3d) 49 (N.W.T.C.A.), and the cases cited infra, Chapter 5, note 186.
85. "Aboriginal Title and Aboriginal Rights: The Impossible and Unnecessary Task of Identification and Definition", in The Quest for Justice: Aboriginal Peoples and Aboriginal Rights (M. Boldt and J.A. Long eds.), Toronto: University of Toronto Press, 1985, 24, at pp. 25-26.
86. For example, by the application of s. 35 to over-ride a Charter right, or by the use of s. 1.
87. This point is best illustrated by the cases in which Catholic separate school teachers have been disciplined for failing to conform to the rules of the Church, and thereby breaching their contracts of employment. See: Re Essex County Roman Catholic Separate School Board and Porter et al. (1978), 89 D.L.R. (3d) 445; Caldwell v. St. Thomas Aquinas School, [1984] 2 S.C.R. 603.
88. W. Conklin, In Defence of Fundamental Rights, The Netherlands: Sijthoff & Noordoff, 1979, at pp. 96-97.
89. Ibid., at p. 218, and Chapter 6.
90. See, for example, The Royal Proclamation, 1763, reprinted in R.S.C. 1970, App. II; Campbell v. Hall (1774), 98 E.R. 1045, [1558-1774] All E.R. 252.
91. See A.H. Oosterhoff and W.B. Rayner, Anger and Honsberger Law of Real Property (2nd ed.), Toronto: Canada Law Book, 1985, Vol. 2.

92. See D. Jenness, The Indians of Canada (7th ed.), Toronto: University of Toronto Press, 1977; E.P. Patterson, The Canadian Indians: A History Since 1550, Don Mills: Collier Macmillan Ltd., 1972; H.E. Driver, Indians of North America (2nd ed. rev.), Chicago: University of Chicago Press, 1968.
93. See B. Slattey, "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 Am. J. Comp. L. 361, at pp. 373-74.
94. See B. Morse, "Indian and Inuit Family Law and the Canadian Legal System" (1980), 8 Am. Ind. L. Rev. 199; N. Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases", [1984] 4 C.N.L.R. 1.
95. (1986), 65 N.R. 305.
96. There is nothing in the report of the case to indicate otherwise.
97. Marceau and Heald JJ.
98. Supra note 95, at p. 312.
99. Ibid., at p. 313.
100. Loc cit.; MacGuigan J. quotes with approval the decision of Judson J. in R. v. Devereaux, [1965] S.C.R. 567, in which the same points are made (at p. 572).
101. Ibid., at p. 315.
102. Loc cit.

CHAPTER 4

DEFINITION OF ABORIGINAL PEOPLES

Introduction

Subsection 35(2) of the Constitution Act, 1982 states:

In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

This relatively simple definition presents a host of difficulties which must be confronted in order to define exactly who will be able to claim the benefits of the protection of sections 25 and 35. As well, it may have an impact upon other constitutional guarantees pertaining to native people, including sub-section 91(24) of the Constitution Act, 1867,¹ and later Constitution Acts.²

One small point should be emphasized at the outset; sub-section 35(2) applies to section 25 as well as to section 35, although the former provision is within that part of the Constitution Act entitled the Canadian Charter of Rights and Freedoms (section 34). This is made clear by the opening words of sub-section 35(2): "In this Act". The Act to which reference is made is the Constitution Act, 1982, which incorporates both of these sections.

I. Purpose of Subsection 35(2)

This constitutional definition is obviously meant to define the class of persons to whom these provisions apply. It may be compared to sub-section 91(24) of the Constitution Act, 1867, which vested the federal government with jurisdiction over "Indians, and lands reserved for the Indians". Both of these provisions apply only to a

limited group, defined by a general racial name. Neither constitutional provision provides any criteria for determining who is a member of the named group.

This definition section was inserted into the Constitution primarily in order to satisfy the claims of the Metis to recognition as an aboriginal people. By sub-section 91(24) the Indian people of Canada were recognized as a distinctive group, and their aboriginal rights have been recognized in Canadian law.³ The Inuit were also protected by this provision in the Constitution Act, 1867⁴ and their aboriginal rights are also recognized in law.⁵ The important change marked by sub-section 35(2) is to include the Metis within the definition of "aboriginal peoples of Canada".⁶

It is beyond the scope of this chapter to explore the aboriginal rights claims advanced by the Metis. At this point it must suffice to note that sub-section 35(2) does not, on its face, purport to grant or confirm any rights. It merely defines who the aboriginal peoples of Canada are. Metis claims are not negated by this provision; neither, however, are their claims satisfied by it.

The essential problem which courts will face in applying sub-section 35(2) in a particular case will be to determine exactly who is a member of the named group. In some cases it is conceivable that membership in a particular group will not be essential where both groups (for example, Indians and Metis) assert claims over substantially the same territory and where the right asserted applies to both groups. In most cases, however, a prerequisite to entitlement will be membership in the particular group asserting the claim. Since the courts are responsible for interpreting the Constitution, they will be forced to develop criteria for the identification of members of the named groups. Neither Parliament nor the political organizations representing the Indian, Inuit or Metis peoples are competent to define authoritatively the three groups named in sub-section 35(2).

The purpose of sub-section 35(2) then is to define, by broad category, the aboriginal peoples of Canada in order to clarify that the rights of the Indians, Inuit and Metis people are within sections 25 and 35.

II. Interpreting Subsection 35(2) — General Considerations.

If we compare sub-section 91(24) and sub-section 35(2), it could be argued that the latter provision must refer to a different class than that described by the former, since the definition of "Indians" in sub-section 91(24) has been judicially determined to include the "Inuit", while sub-section 35(2) refers to these groups separately.⁷ On the other hand, one could plausibly argue that sub-section 35(2) names the three aboriginal peoples solely for greater certainty, and that as these provisions co-exist in a single constitutional document (the Constitution Act, 1867 to 1982; see section 60) they ought to be read together, and if possible interpreted in a similar way.

From this it seems that there are two possible approaches which can be adopted in order to define the scope of the class governed by sub-section 35(2). One could analyze it with reference to the class circumscribed by sub-section 91(24), namely "Indians", or one could analyze it sui generis, on the basis of contemporary understanding of these terms, and in the light of the purpose of the constitutional guarantee. Each method of analysis will be described, and a method for defining each of the named groups will be suggested, followed by a more general discussion of the significance of sub-section 35(2).

III. "Indian" in Sub-section 91(24)

The word "Indian" in sub-section 91(24) is somewhat misleading. It has been judicially interpreted to include the Inuit (then known as Eskimos),⁸ while the federal Parliament has excluded from the legislative regime established to administer Indian

affairs, by the application of the definition sections of the Indian Act,⁹ many persons who are descendants of the original Indian inhabitants of Canada. To complicate matters further, many racially non-Indian people have been drawn into the legislative regime established pursuant to sub-section 91(24); perhaps the most notorious example is that of women who marry status Indian men, thereby gaining status as "Indians" under the Indian Act.¹⁰

In terms of strict constitutional law, however, statutory definitions of "Indian" are irrelevant, since Parliament is not competent to alter the terms of the Constitution Act, 1867.¹¹ As noted earlier, the word "Indian" in sub-section 91(24) has been defined so as to include two of the groups mentioned in sub-section 35(2), namely the Indians and the Inuit. If sub-section 91(24) is to be used in the interpretation of sub-section 35(2), a court might adopt the existing law governing the former provision, thereby incorporating the known constitutional definition of Indian and Inuit. This approach would require a court to develop a new method of defining the Metis. An alternate approach would be to re-assess the scope of sub-section 91(24), in order to determine whether it applies to the Metis as well as to Indians and Inuit.

Are the Metis included within sub-section 91(24)? The point has never been authoritatively determined. In order to answer this question, it is appropriate to follow the reasoning process employed by the Supreme Court of Canada in the only case in which it has specifically addressed a similar issue: Re Eskimos.¹² Although it is possible that a court today would approach this question on an entirely different footing, this process of analysis will allow for a discussion of the major issues which would have to be addressed by any court considering this matter.

In Re Eskimos three different decisions were delivered by the Supreme Court. The majority judgment was delivered by Duff C.J., with Justices Davis, Hudson and Crockett concurring. Justices Cannon and Kerwin wrote separate judgments

concurring in the results reached by Chief Justice Duff. In all of these judgments the same basic format of analysis was followed. Official documents, government studies or published texts (especially dictionaries) were consulted in order to determine the way in which the Canadian and British politicians responsible for the drafting of the British North America Act would have understood the term "Indian". These sources revealed to the judges that the term "Eskimaux" was generally synonymous with "Indian". In the words of Duff C.J.:

Thus it appears that, through all the territories of British North America in which there were Eskimo, the term "Indian" was employed by well established usage as including these as well as the other aborigines; and I repeat the British North America Act, in so far as it deals with the subject of Indians, must, in my opinion, be taken to contemplate the Indians of British North America as a whole.¹³

If we apply this reasoning to the Metis (or half-breed) population, it is significant that in the documents cited in the case the "half-breed" (or Metis) population is distinguished from the aboriginal inhabitants. For example, in the census prepared by the Hudson's Bay Company for the Select Committee of the British House of Commons, Indians (including Inuit) are listed separately from "whites and half-breeds".¹⁴ As well, the report of the Bishop of Newfoundland, cited by Duff C.J., contains the following passage:

In the race of mixed blood, or Anglo-Eskimaux, the Indian characteristics very much disappear, and the children are both lively and comely.¹⁵

This points to another difficulty: that of defining who the "Metis" are. In order to know whether this class of people were intended to be included within the term "Indian" in sub-section 91(24) of the Constitution Act, 1867, it is first necessary to define who was (or should have been) included within the Metis group itself, at the

relevant time (i.e., prior to 1867). This matter is also relevant to sub-section 35(2) of the Constitution Act, 1982, which includes "Metis" within the definition of "aboriginal peoples".

It is clear that in the nineteenth century distinctions were drawn, by the Metis themselves and by other observers, between the Metis and other half-breeds.¹⁶ The Metis were the descendants of French fathers and Indian mothers. Half-breeds were the product of other non-native/Indian unions. It would be wrong to assume that the Metis were a unified, homogeneous group; for example, it is clear that the Riel Rebellions of 1870 and 1885 were not supported by all of the Metis inhabitants of the region.¹⁷

Despite these differences, writers at the time, and later historians, were able to identify the Metis as a distinct group. With respect to the term "Indian" in sub-section 91(24) of the Constitution Act, 1867, therefore, it is possible to identify the class of persons called the Metis who could have been contemplated by the framers of that document. Other historical evidence than that cited in Re Eskimos can be referred to in support of the assertion that the term "Indian" does encompass the Metis.

No attempt will be made here to cite all of the relevant evidence; instead illustrative examples will be provided.¹⁸ In testimony before the Select Committee of the British House of Commons, Governor Simpson, the author of the census relied on in Re Eskimos, made the following statements:

1681. Mr. Roebuck. In that census which you have given in, is there an account of the number of half-breeds in the Red River Settlement? — Yes; 8,000 is the whole population of Red River; that is the Indian and half-breed population.

1682. Can you give any notion of how many of those are half-breed? — About 4,000, I think.

...

1747. Mr. Grogan. What privileges or rights do the native Indians possess strictly applicable to themselves? — They are

perfectly at liberty to do what they please; we never restrain Indians.

1748. Is there any difference between their position and that of the half-breeds? — None at all. They hunt and fish, and live as they please. They look at us for their supplies, and we study their comfort and convenience as much as possible; we assist each other.¹⁹

Other evidence gathered by the Committee also classified half-breeds with Indians.²⁰

As well one could point to the pre-Confederation legislation passed by the Assembly of the United Provinces of Upper and Lower Canada, which included half-breeds within the definition of "Indian". The first such legislation, entitled An Act For the Better Protection of Lands and Property of the Indians in Lower Canada,²¹ contained the following definition of "Indian":

... be it declared and enacted: That the following class of persons are and shall be considered as Indians belonging to the Tribe or Body of Indians interested in such lands:

First. — All persons of Indian blood, reputed to belong to the particular Body or Tribe of Indians interested in such lands, and their descendants.

Secondly — All persons intermarried with any such Indians and residing amongst them, and the descendants of all such persons.

Thirdly — All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitled to be considered as such: And

Fourthly — All persons adopted in infancy by any such Indians, and residing in the Village or upon the lands of such Tribe or Body of Indians, and their descendants.

Similar legislation was enacted in the same year for the province of Upper Canada.²²

In the following year a new definition was enacted for the province of Lower Canada, which included the following:

... the following persons and classes of persons, and none other, shall be considered as Indians belong to the Tribe or Body of Indians interested in any such lands or immoveable property:

Firstly: All persons of Indian blood, reputed to belong to the particular Tribe 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, or either of them was or is, descended on either side from Indians, or an Indian reputed to belong to the particular Tribe or Body of Indians interested in such lands or immoveable property, and the descendants of all such persons: And
Thirdly. All women, now or hereafter to be lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.²³

In all of these definitions it is clear that half-breeds who lived among the Indian tribe would be included within the statutory definition of "Indian". Other legislation passed before Confederation adopted similar or identical definitions of "Indian".²⁴ From this, it could reasonably be inferred that the Metis, or half-breeds, who ordinarily resided with, and shared the lifestyle of, Indian bands, were contemplated when the Resolutions which preceeded the enactment of the Constitution Act, 1867 were drafted.

Thus, it is clear that the class of persons circumscribed by sub-section 91(24) might be identical to that defined by sub-section 35(2) of the Constitution Act, 1982; at the very least the Indian and Inuit groups should be similarly defined under both provisions.

IV. Aboriginal Peoples: A Purposive View

The second way in which one might now approach the problem of defining the class of persons circumscribed by sub-section 35(2) is to analyze it sui generis, based on the current understanding of the meaning of the terms viewed in the light of the purpose of the constitutional guarantee of rights. In order to arrive at such a definition in the absence of a commonly accepted meaning, one might consult dictionaries, statutes, census data and other sources.

This will be done for each of the groups named in sub-section 35(2), in order to demonstrate the variety of approaches which might usefully be taken by courts in interpreting this provision.

1. Indians

The Oxford English Dictionary defined "Indian" in this way:

Belonging or relating to the race of original inhabitants of America and the West Indies.²⁵

This definition is clearly only a starting point, for it is too vague to be a useful guide to the courts. To supplement this one might refer to statutes which refer to, or define, the word "Indian".

The Royal Proclamation of 1763²⁶ makes reference to "the several Nations or Tribes of Indians" who resided within British territory. As well, numerous earlier and later statutes, Royal Commissions to traders or colonial governors, and treaties made reference to Indians or particular tribes of Indians.²⁷ One might consult these sources in order to determine whether a particular Indian tribe or band was recognized within Canadian territory at Confederation. From this one could proceed to develop a charter list of Indian groups, and require a claimant under section 25 or section 35 to trace his or her ancestry to this group. The status registration system created under the Indian Act²⁸ would also be useful (though not determinative) in order to ascertain whether a person was, for the purposes of the Constitution, an "Indian".

The current Indian Act contains the following definition:

s. 2(1) "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.

Statutory definitions of the term Indian can be traced to a pre-Confederation statute of 1850, which is quoted above.²⁹

For the purposes of sub-section 35(2), it may be appropriate to begin the process of defining who is an Indian by stating that it is clear that some racial considerations must be important. The case of A.-G. Can. v. Lavell³⁰ has made it clear that the courts will not require that exclusively racial criteria are employed in this process, but neither does the case require that such factors be ignored. Various Indian Act amendments and other legislation relating to Indians have defined "Indian" in different ways.³¹ As well, the federal Department of Indian Affairs has maintained a registry of Indians for many years. When treaties were negotiated the tribes or bands of Indians taking part in the treaty were identified. All of these sources provide a useful means of defining who is an Indian today, although each of them is admittedly incomplete.

The courts could require a person who asserts a claim under sections 25 or 35 to prove, if challenged, that he or she is a descendant of a person named in one of these sources. The advantage of such an approach is that one does not thereby become ensnared by the restrictive Indian Act membership registration system, while at the same time one does not ignore the requirement that an aboriginal person should be a descendant of the original inhabitants of this continent.

In advancing this argument, I am not unmindful of the fact that Canadian courts have previously departed from the course here suggested in two significant ways. First, in Lavell,³² Mr. Justice Ritchie, for a majority of the Supreme Court of Canada, refused to scrutinize too closely the status definition system in the Indian Act, adopted by Parliament pursuant to sub-section 91(24) of the Constitution Act, 1867. He stated:

In my opinion the exclusive legislative authority vested in Parliament under s. 91(24) could not have been effectively exercised without enacting laws establishing the qualifications required to entitle persons to status as Indians and to the use and benefit of Crown "lands reserved for Indians".³³

It is submitted that this contention is incorrect with respect to subsection 91(24);³⁴ it is clear that similar reasoning does not have to be adopted for the purposes of sections 25 or 35. Neither of these provisions requires Parliament to enact statutory definitions of entitlement. Indeed, in interpreting the present Constitution the courts would seem to be required (by section 52) to scrutinize any such statutory definition in order to determine whether it is inconsistent with the Constitution. From this it should be clear that a statute cannot deprive any persons of rights that are recognized and protected in the Constitution, without adequate justification.

The second obstacle in the way of the argument advanced here is the existing case law on the interpretation of the word "Indian" in the Natural Resources Transfer Agreements. These Agreements, which were confirmed in the Constitution Act, 1930,³⁵ effect the transfer of beneficial ownership of lands and natural resources from the federal government to Manitoba, Alberta and Saskatchewan. Each Agreement contains an identical paragraph by which the right of "Indians" to hunt and fish for food on certain lands is preserved.

In the case of R. v. Laprise³⁶ the Saskatchewan Court of Appeal held that the Game Act³⁷ provision which guaranteed to Indians certain hunting rights in conformity with the Natural Resources Transfer Agreements, did not apply to the accused because he was not an Indian within the meaning of the Indian Act. Woods J.A. stated that the Indian Act definition of Indian prevailing when the Transfer Agreements were entered into "would be that intended by the parties to the agreement ...".³⁸ This decision has been strongly criticized by scholars,³⁹ but it has been followed by later decisions.⁴⁰

The approach suggested here towards the definition of Indian in sub-section 35(2) would not require courts to adhere to the definition in the Indian Act. In light of the different purposes and status in law of that Act and the Constitution and in light of the fact that the prevailing view is that although a statutory definition may be persuasive in interpreting a provision in the Constitution, it cannot be determinative, it is submitted that the interpretation of "Indian" in sub-section 35(2) should not be limited to the Indian Act definition.⁴¹ A contrary approach would constitute an unwarranted and unacceptable denial of the aboriginal and treaty rights of persons who have lost their Indian status by the operation of a federal statute.

2. Inuit

The Oxford English Dictionary defines Inuit (Innuits) in this way: "An Eskimo; the Eskimos collectively."⁴² The following definition of Eskimo is set out by the O.E.D.:

A number of widely spread people inhabiting the Arctic from Greenland to Eastern Siberia.⁴³

These descriptions of the Inuit are too imprecise to provide useful guidance to the courts in the interpretation of s. 35(2).

The Inuit are included within the term "Indians" in s. 91(24) of the Constitution Act, 1867, according to the case Re Eskimos. The federal government has not exercised its jurisdiction with respect to the Inuit to the full extent, but it is clear that this cannot cause a change in the constitutional division of powers. As noted recently by Beetz J., speaking of the Inuit inhabitants of Quebec:

Another example is provided by the legal status of the Eskimo inhabitants of Quebec. They are not Indians under the Indian Act, R.S.C. 1970, c. I-6, s. 4(1), but they are Indians within the contemplation of s. 91.24 of the Constitution: Reference as to whether "Indians" in s. 91(24) of the B.N.A. Act

includes Eskimo inhabitants of the Province of Quebec. Should Parliament bring them under the Indian Act, provincial laws relating to descent of property and to testamentary matters would cease to apply to them and be replaced by the provisions of the Indian Act relating thereto.⁴⁴

From this passage it is obvious that federal legislation cannot define constitutional enactments. This does not, however, serve to define the group of aboriginal peoples called the Inuit.

The Inuit are defined, by exclusion, in s. 4 of the Indian Act:

4(1) A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit.

This definition is also vague and unhelpful. No other statutory definition of "Eskimo" or "Inuit" can be found, although prior Indian Acts and other statutes have made special reference to Eskimos.⁴⁵

In 1924 the Indian Act was amended to give the Superintendent-General of Indian Affairs control over "Eskimo Affairs."⁴⁶ As originally proposed by the Government, this amendment would have included Eskimos in the definition of "Indian" for the purposes of the Act.⁴⁷ However, strong objection by members in the House of Commons resulted in the deletion of this part of the amendment. In the 1951 revision of the Indian Act the present provision excluding the Inuit from the Act was introduced.⁴⁸

Other statutory references to Eskimos can be located, but they are not helpful in defining the scope of the group.⁴⁹ In such a legislative vacuum the courts will be forced to look to other sources for aid in interpreting the word "Inuit" in s. 35(2).

The courts might seek guidance from the enrollment procedures adopted under the James Bay and Northern Quebec Agreement⁵⁰ which provide a mechanism for determining Inuit entitlement to the provisions of the Agreement. The enrollment

process established by the Agreement provides for a large amount of community involvement, but it also establishes some "racial" criteria. The following provision is illustrative:

3.2.4 A person shall be entitled to be enrolled as a beneficiary under the Agreement and be entitled to benefit therefrom if on November 15, 1974 he or she was:

- a) a person of Inuit ancestry who was born in Quebec or is ordinarily resident in Quebec or, if not ordinarily resident in the Territory, is recognized as a member thereof, by one of the Inuit communities, or
- b) a person of Inuit ancestry who is recognized by one of the Inuit communities as having been on such date a member thereof, or
- c) the adopted child of a person described in subparagraphs a) or b).⁵¹

Similar proposals have been put forward by other Inuit organizations in land claims negotiations.⁵²

This approach, it should be emphasized, does not entail the abdication of judicial responsibility to interpret the Constitution. Rather, what is proposed is that judges establish the minimum criteria by which an aboriginal person must be defined, and accept a community decision about membership if these criteria are met. For example, if an Inuk hunter claims an aboriginal right to hunt, a judge in evaluating whether such a person can derive the benefit of ss. 25 or 35 (assuming this matter is challenged) could examine the criteria by which the local community judged that person to be part of their group. If the person could prove no native ancestry at all, and simply lived among the Inuit, surely the claim would fail. It is clear that "aboriginal" rights must pertain to "aborigines", who are the descendants of the original inhabitants of this continent. However, if the person can claim some Inuit

ancestry, the court should examine the community criteria, and any other evidence which is available, in order to determine whether the person is an Inuk.

In establishing such minimum criteria for entitlement, the courts must impose some racial, "blood" or kinship factor, if the guarantee of aboriginal rights in the Constitution is to be meaningful. As is clear from the case Re Eskimos,⁵³ the word "Indian" in s. 91(24) of the Constitution Act, 1867 is primarily racial, being broadly synonymous with "aborigine." Equally, it could be argued that the broad phrase "aboriginal peoples of Canada", and the specific reference to the "Indian", "Inuit" and "Metis" peoples makes clear that some aboriginal descent or connection is required for being a member of these groups.

In determining whether a person is a member of the group of persons called the Inuit, the court should not focus solely upon heredity. Other factors, including lifestyle, language, community acceptance, kinship and self-identification should be examined in order to reach a conclusion on this question.⁵⁴ This method of determining entitlement to the constitutional provisions pertaining to the aboriginal peoples would, it is submitted, be consonant with the purpose of these provisions and with the proper discharge of judicial responsibilities in interpreting the Constitution.

3. Metis

The Oxford English Dictionary defines "Metis" in this way:

The offspring of a white and an American Indian, especially in Canada.⁵⁵

Once again, the courts must explore other sources in order to make meaningful the classification in s. 35(2). Some of the relevant evidence has been referred to previously.⁵⁶ If it is accepted that one need not be entirely of Indian descent to

qualify as an "Indian" under s. 35(2), the problem becomes more acute. How can a Court distinguish between an Indian who is racially of "mixed blood", and a person of Metis descent?⁵⁷

The Metis have received some recognition in Canadian constitutional law prior to 1982,⁵⁸ and this provides a useful point of departure for this analysis. Douglas Sanders states:

If there is a legal definition of Metis, it means the people who took Half-Breed grants under the Manitoba Act or the Dominion Lands Act and their descendants. Section 12(1)(a)(i) of the Indian Act excludes these people from registration as Indians.⁵⁹

The Metis emerged as a distinct group, distinguishable from other "half-breeds", in the Canadian West during the height of the fur trade. One can define the Metis with reference to legal, political, historical or geographic factors. It is suggested that some combination of these elements must be employed in order to determine who are the Metis. Further, it is obvious that significant legal consequences flow from this determination.

To return to the basic legal definition of the Metis identified by Professor Sanders, section 31 of the Manitoba Act⁶⁰ provided for the division of one million four hundred thousand acres of land between "the children of the half-breed heads of families residing in the Province at the time of transfer to Canada ..." The administration of this provision was and still remains a source of bitter controversy;⁶¹ nevertheless, it might plausibly be argued that the Metis in Canada today are the descendants of this charter group identified at the time of the creation of the province Manitoba. The fact that many of these people took "scrip" under the various administrative regimes established pursuant to the Manitoba Act is not of particular importance for the purpose of s. 35(2); what is vital is the entitlement to this benefit.

That is, if one can trace one's ancestry to the original "half-breed" population in Manitoba in 1870, one is a Metis for the purposes of the Constitution, regardless of whether any scrip was obtained by one's ancestors. The description of the legal definition of the Metis by Professor Sanders which was quoted earlier⁶² should, therefore, be re-phrased to state that Metis are the descendants of the people who were entitled to Half-breed grants under the Manitoba Act or related legislation.

The half-breed population of Manitoba in 1870 numbered 9,800, and was comprised of 5,720 French-speaking half-breeds and 4,080 English-speaking half-breeds. From this charter group one can begin to define the Metis as a distinctive aboriginal collectivity. Many half-breeds were included as Indians in the negotiation of treaties with various Indian groups.⁶³ As well, modern political organizations representing the Metis include within their membership many who do not trace their ancestry to this charter group.⁶⁴ Can the legal definition of Metis include persons who are not the descendants of the original Manitoba Metis, if these people identify with the Metis collectivity today? An Alberta statute which is currently in force, The Metis Betterment Act,⁶⁵ contemplates just such a situation when it provides the following definition:

2(a) "Metis" means a person of mixed white and Indian blood having not less than one-quarter Indian blood, but does not include either an Indian or a non-treaty Indian as defined in the Indian Act (Canada).

If this question is answered in the affirmative, one must move beyond purely historical considerations in defining the Metis. Ancestry will no longer be the determinative factor. Here, as with the Inuit, a court should evaluate a person's claim to the entitlement to aboriginal rights as a Metis by referring to several factors, including ancestry, kinship, culture, community acceptance, lifestyle and self-

identification. If the Metis as a people can evolve over time, and grow in numbers other than by direct descent, it is essential that these criteria be examined in order to define this group today.

V. The Significance of Subsection 35(2)

Earlier in this Chapter it was emphasized that the purpose of sub-section 35(2) was to ensure that Metis people were included within the Constitution Act, 1982. The preceding discussion of the problems in the interpretation of sub-section 35(2) reveals that a "purposive" approach is required in order to resolve its inherent ambiguity. The suggested method of interpreting the words Inuit and Metis in this provision offers an insight into the complexity of this process, and demonstrates the vital significance of a general theory or concept of aboriginal rights as collective rights. Without reference to such a theory the interpretation of sub-section 35(2) may become unacceptably difficult. Alternatively, it may create a guarantee of aboriginal rights which is nearly impossible to enforce, unless one is a registered Indian or can take the benefit of an existing treaty list or statutory provision defining one of the aboriginal peoples.

From this it is evident that the significance of sub-section 35(2) extends far beyond the express inclusion of the Metis; it involves a question of "jurisdiction" which relates to collective rights. The problem has been described in the following way:

Assuming that under our new constitution some aspects of aboriginal and treaty rights have been placed beyond the ordinary legislative powers of Parliament, the question arises whether these rights are within the communal control of the aboriginal groups who retained or bargained for them. Stated another way, the issue is this: if an aboriginal person can assert his special rights against other Canadians, is he nonetheless subject to the control of the aboriginal group to which he belongs?⁶⁶

The answer to this question can be derived in a number of different ways. From a strict constitutional law perspective, it is clear that the courts, as guardians of the constitution, are the only authoritative source for the interpretation of sub-section 35(2). But this answer does not reflect the importance of this matter for the aboriginal peoples, nor does it indicate the weight that judges should accord criteria for membership adopted by the aboriginal organizations.

As a political matter, aboriginal organizations agree unanimously that self-identification is vital to their survival and should therefore be protected in law.⁶⁷ Some native people claim the authority to define their membership as an inherent aboriginal right which has never been relinquished. Others have sought to capture control over membership in comprehensive land claims agreements.

One example of the central importance aboriginal people place upon this matter is found in the opening words of the Declaration on Treaty and Aboriginal Rights adopted by the Joint Council of the National Indian Brotherhood in 1981:

"Aboriginal people" means the First Nations or tribes of Indians in Canada and each nation having the right to define its own citizenship.⁶⁸

A similar viewpoint was expressed in the Report of the Metis and Non-Status Indian Constitutional Review Committee:

Broad, realistic and equitable definitions of Indian, Inuit and Metis should be adopted for the purposes of the Constitution and subsequent legislation in order to avoid the fragmentation of Native collectivities which has hitherto occurred.

These definitions should include notions of:

- (i) descent from common ancestors;
- (ii) a common and continuous history;

- (iii) a form of social organization rooted in distinctive modes of economic enterprise;
- (iv) distinctive cultural attributes, values and willingness to identify as part of the Indian, Inuit or Metis collectivity.⁶⁹

Textual support for an interpretation of sub-section 35(2) which would recognize the basic right of aboriginal peoples to define their membership, by giving sufficient weight to these definitions in courts of law, derives from the use of the term "peoples" in the sub-section.⁷⁰ This term, which is repeated in section 25 of the Charter of Rights and sub-section 35(1) of the Constitution Act, 1982, makes it clear that the rights involved are collective or group rights.⁷¹ The identification of the beneficiaries of these guarantees must, therefore, reflect their collective nature.

The previous discussion of this point will not be repeated. At this juncture it is sufficient to point out the irony inherent in the denial of a guarantee of collective right to an individual who was included within the relevant group by its existing "political" authority, but excluded by the courts without reference to the group's membership criteria. This is not to argue that courts should abdicate their ultimate authority to interpret the Constitution. Rather, it is submitted that the identification of the aboriginal peoples referred to in sub-section 35(2) should be done with reference to the group's membership criteria, which should in turn be evaluated by the courts according to a fixed minimum standard. At the very least, this standard would require that some aboriginal ancestry be required by all group membership criteria. This process would properly reflect the collective nature of the rights guaranteed in sections 25 and 35, and the significance of the fact that the beneficiaries of these guarantees are "peoples".

CHAPTER 4 ENDNOTES

1. Sub-section 91(24) gives Parliament jurisdiction over "Indians, and Lands reserved for the Indians".
2. For example, the Constitution Act, 1930, 20-21 Geo. V., c. 26 (U.K.), R.S.C. 1970, App. 25, which implemented the Natural Resource Transfer Agreements, includes a reference to "Indians": Schedule 1, art. 13; Schedule 2, art. 12; Schedule 3, art. 12.
3. See Calder v. A.G. B.C., [1973] S.C.R. 313, 34 D.L.R. (3d) 145.
4. Re Eskimos, [1939] S.C.R. 104, [1939] 2 D.L.R. 417.
5. Baker Lake v. Min. for Indian Affairs and Nor. Dev., [1979] 1 F.C. 487, 87 D.L.R. (3d) 342 (Fed. Ct., T.D.).
6. See, accord, D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 Can. Bar Rev. 314, at p. 332.
7. See K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 Sup. Ct. L. Rev. 255, at p. 261.
8. Re Eskimos, supra note 4.
9. R.S.C. 1979, c. I-6.
10. Pursuant to para. 11(1)(f) of the Act, and its predecessors.
11. If any authority is required in support of this statement, see K. Lysyk, "The Unique Constitutional Position of the Indians" (1967), 45 Can. Bar Rev. 513, at p. 515.

12. Supra note 4. See also C. Cartier, " 'Indian': An Analysis of the Term Indian as Used in Section 91(24) of the British North America Act, 1867" (1978-79), 43 Sask. L. Rev. 37.
13. Supra note 4, at pp. 114-15.
14. Ibid., p. 107.
15. Ibid., p. 114.
16. See A. Lussier, "The Question of Identity and the Constitution: The Metis in Canada in 1984", unpublished, n.d.
17. See ibid., p. 8. There is a petition appended to this article which was prepared by Metis in 1869 to protest the Riel Rebellion. A similar petition was prepared in 1908.
18. Much of this evidence remains to be examined, and the Metis organizations are currently researching this matter; see H. Daniels, The Forgotten People, Ottawa: Native Council of Canada, 1979; see also K. McNeil, Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada, University of Saskatchewan Native Law Centre, 1983, at pp. 24-30.
19. Cited in Cartier, supra note 12, at p. 145.
20. This evidence is not conclusive, however. Professor Bryan Schwartz has analyzed these sources and he concluded that the Metis were not then classified with Indians: First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1882-1984, Kingston, Queen's Institute of Intergovernmental Relations, 1985, pp. 203-228.
21. 13 and 14 Vict., c. 42 (1850).

22. An Act for the Protection of Indians in Upper Canada from Imposition, and the Property Occupied or Enjoyed by Them from Trespass and Injury, 13 and 14 Vict., c. 74 (1850).
23. 14 and 14 Vict., c. 59 (1851).
24. See, for example, An Act to Encourage the Gradual Civilization of the Indian Tribes, 20 Vict., c. 26, s. 1 (1857); An Act Respecting Indians and Indian Lands, 23 Vict., c. 14, s. x (1860). See also J. Leslie and R. Maguire, The Historical Development of the Indian Act (2nd ed.), Ottawa: D.I.A.N.D., 1978.
25. O.E.D., Oxford: The Clarendon Press, 1933, Vol. V., p. 204.
26. R.S.C. 1970, App. 1.
27. See, for a description of these, B. Slattery, The Land Rights of Indigenous Canadian Peoples, Ph.D. Thesis, Oxford, 1979, especially Parts II and III.
28. R.S.C. 1979, c. I-6.
29. Supra note 21.
30. [1974] S.C.R. 1349, 38 D.L.R. (3d) 481.
31. See Leslie and Maguire, supra note 24; see also D. Sanders, "The Bill of Rights and Indian Status" (1972), 7 U.B.C.L. Rev. 81.
32. Supra note 30.
33. Ibid., at p. 1359 (S.C.R.), p. 490 (D.L.R.).
34. The critical commentaries on this case are legion: see, for example, P.W. Hogg, "The Canadian Bill of Rights — 'Equality Before the Law' — A.G. Can. v. Lavell" (1974), 52 Can. Bar Rev. 263; V.S. MacKinnon, "Booze, Religion, Indians and the

Canadian Bill of Rights", [1973] Public Law 295; D. Reaume, "Women and the Law: Equality Claims Before Courts and Tribunals" (1979), 5 Queen's L.J. 3.

35. Supra note 2.
36. [1978] 6 W.W.R. 85 (Sask. C.A.).
37. S.S. 1967, c. 78.
38. Supra note 36, at p. 88.
39. See D. Sanders, "Metis Rights in the Prairie Provinces and the Northwest Territories: A Legal Interpretation" in The Forgotten People (H. Daniels ed.), Ottawa: Native Council of Canada, 1979, 5, at p. 20; A Jordan, "Who is an Indian?", [1977] 1 C.N.L.R. 22; McNeil, supra note 18.
40. R. v. Budd; R. v. Crane, [1979] 6 W.W.R. 450 (Sask. Q.B.); R. v. Genereaux, [1982] 3 C.N.L.R. 95 (Sask. Prov. Ct.). See also R. v. Pritchard (1972), 32 D.L.R. (3d) 617 (Sask. Dist. Ct.).
41. See Lysyk, supra note 11.
42. O.E.D. Supplement, Oxford: Clarendon Press, 1976, Vol. II, p. 312.
43. O.E.D., Supplement, Oxford: Clarendon Press, 1976, Vol. I, p. 974.
44. Canadian Pioneer Management Ltd. et al. v. Labour Relations Board (Sask.), [1980] 1 S.C.R. 433, at p. 469.
45. See infra note 49.
46. 14-15 Geo. V., c. 47.
47. See Leslie and Maguire, supra note 24, at p. 119.

48. S.C. 1951, c. 145, s. 4; amended S.C. 1956, c. 40, s. 1.
49. See, for example, the Liquor Ordinance, R.O.N.W.T. 1956, c. 60, s. 24, which prohibited certain Eskimos from consuming alcohol. This provision was declared ultra vires in R. v. Otokiak (1959), 30 C.R. 401.
50. Quebec: Editeur officiel du Quebec, 1976, section 3. This Agreement has been given statutory force: S.Q. 1977, cc. 82, 93; S.C. 1976-77, c. 32. See B. Morse, "The Resolution of Land Claims" in Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada (B. Morse ed.), Ottawa: Carleton University Press, 1985, 617.
51. Ibid., s. 3.2.4. See s. 3.2.6 for an illustration of the community involvement in this process (community may enroll a person not on the original list, subject to certain criteria).
52. See the C.O.P.E., C.Y.I. and I.T.C. land claims proposals and agreements, discussed in: In All Fairness: A Native Claims Policy, Ottawa, D.I.A.N.D., 1981; B. Morse, "The Resolution of Land Claims" in Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada, supra note 50, at p. 617.
53. [1939] S.C.R. 104, [1939] 2 D.L.R. 417. See also P. Hogg, "The Canadian Bill of Rights - 'Equality Before the Law' - A.G. Can. v. Lavell" (1974), 52 Can. Bar Rev. 263, at p. 270. Professor Hogg concludes that s. 91(24) in British North America Act "seems to insist upon a racial classification ...".
54. See, for example: D. Sanders, "The Bill of Rights and Indian Status" (1972), 7 U.B.C.L. Rev. 81.
55. Oxford: Clarendon Press, 1933, Vol. VI, p. 397.
56. See above, text accompanying note 12 ff.
57. See J. Foster, "The Metis: the People and the Term" in Riel and the Metis (A. Lussier ed.), Riel Mini-Conference Papers, Manitoba, 1979 (originally published in Vol. 3, No. 1, Prairie Forum).

58. See, the Manitoba Act, S.C. 1870.
59. "Aboriginal Peoples and the Constitution" (1981), 19 Alta. L. Rev. 410, at pp. 419-420. See also D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in Canada and the New Constitution: The Unfinished Agenda (S.M. Beck and I. Bernier eds.), Montreal: Institute for Research on Public Policy, 1983, Vol. 1, p. 225, at p. 254.
60. Supra note 58.
61. See D. Sprague, "Government Lawlessness in the Administration of Manitoba Land Claims" (1980), 10 Man. L.J. 415. Professor Sanders states that a lawsuit has been instituted to challenge the government's administration of the land grants system; see D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983), 61 Can. Bar Rev. 314, at pp. 332-33.
62. Above, at text accompanying footnote 55.
63. See, for example, A. Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Toronto: Bedford Clarke and Co., 1880, pp. 16-18, on the negotiation of the Robinson-Huron and Robinson-Superior treaties of 1850.
64. These organizations are the Native Council of Canada and the Metis National Council.
65. R.S.A. 1980, c. M-14; rep. and sub. Metis Betterment Restoration Act, S.A. 1982, c. 26.
66. W.B. Henderson, "Canadian Legal and Judicial Philosophies on the Doctrine of Aboriginal Rights", in The Quest For Justice: Aboriginal Peoples and Aboriginal Rights (M. Boldt and J.A. Long eds.), Toronto: University of Toronto Press, 1985, 221, at p. 228.

67. See, for example, N. Zlotkin, Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference, Kingston: Queen's Institute of Intergovernmental Affairs, 1983, at pp. 70-71; N. Lyon, Aboriginal Self-Government: Rights of Citizenship and Access to Government Services, Kingston: Queen's Institute of Intergovernmental Relations, 1985; S. Imai and K. Laird, "The Indian Status Question: A Problem of Definitions" (1982), 5 Can. L. Aid Bulletin 113. See also Principle 5 of the Declaration of Principles of Indigenous Rights, adopted by the World Council of Indigenous Peoples, Panama, 1984.
68. Reprinted in As Long As the Sun Shines and Water Flows (A. Getty and A. Lussier eds.), Vancouver: U.B.C. Press, 1983, at p. 338.
69. Quoted in Imai and Laird, supra note 67, at p. 122.
70. This point has been commented upon by the United Nations Working Group on Indigenous Peoples: see R.L. Barsh, "Indigenous Peoples: An Emerging Object of International Law" (1986), 80 Am. J. Int. L. 369, at p. 377, footnote 41.
71. See infra Chapter 3. See also A. Cassese, "The Self-Determination of Peoples" in The International Bill of Rights (L. Henkin ed.), New York: Columbia University Press, 1981, 92; G. Nettheim, " 'Peoples' and 'Populations' - Indigenous Peoples and the Rights of Peoples", unpublished, n.d.

CHAPTER 5

SECTION 25: AN INTERPRETIVE PRISM

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

[As originally enacted, paragraph (b) read:

- (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.¹

Introduction

Section 25 is the only provision in the Canadian Charter of Rights and Freedoms which expressly refers to the rights of the aboriginal peoples. This section is one of several interpretive provisions in the Charter.¹ In order to understand the legal significance of s. 25 it is necessary to examine its function within the structure of the Charter, its relationship with s. 35, and its substantive content.

I. The Function of Section 25 in a Charter Case

As an interpretive provision, s. 25 is not directly enforceable by way of an individual application under subsection 24(1) of the Charter. Rather, it must be given effect to in a more circuitous manner. The structure of the Charter, and the legal rules which have developed with respect to Charter litigation, offer guidance on the function of s. 25 in a Charter case.

The structure of the Charter itself indicates that s. 25 is intended only as an interpretive guide and not as an independent, enforceable guarantee of aboriginal and treaty rights. The section appears in the part of the Charter under the heading "General", which is separate and distinct from the parts containing substantive rights guarantees.² The other similar provisions under this heading are clearly not rights guarantees, although s. 28 may be interpreted as containing a substantive element. Section 27 may provide a substantive protection for multiculturalism but it is phrased as an interpretive provision.

The text of s. 25 is consistent with this interpretation, in that it draws a distinction between "The guarantee in this Charter of certain rights and freedoms" and "aboriginal, treaty or other rights". Presumably if the latter rights were to be guaranteed in a manner similar to other rights, s. 25 would not draw such a distinction. Instead one would expect it to provide a simple guarantee of aboriginal rights.

Existing scholarly interpretation of s. 25 accords with this view.³ The provision is usually explained as a shield, protecting aboriginal and treaty rights from being adversely affected by other Charter rights. In particular, s. 25 is intended to protect the rights of aboriginal peoples from being obliterated by the equality rights guarantee contained in s. 15 of the Charter. This fear may have been fuelled by the obiter comments of Pigeon J. in Lavell v. The Queen⁴ which offered the view that the equality provisions in the Canadian Bill of Rights might be effective to render inoperative the entire Indian Act.⁵ This opinion has been seriously challenged, and it is clearly rejected by the terms of s. 25 of the Charter.

The terms of s. 25 indicate that its operation is not limited to s. 15 cases. In an appropriate factual situation any Charter right may need to be reconciled with the particular rights guaranteed to the aboriginal peoples of Canada. This brings into focus the central unresolved question concerning this provision: how and when will it

apply in an actual case? The answer to this question requires an analysis of the substantive provisions of s. 25, i.e. "aboriginal, treaty or other rights or freedoms"; it also calls for an analysis of s. 25 as an interpretive provision, in the context of the structure of the Charter.

The interpretive provisions in the Charter do not share identical wording, and they obviously pertain to different rights and interests. Despite this it is submitted that ss. 25, 26, 27 and 29 are intended to operate in a similar fashion in the Charter. Section 28 may fall within this classification as well, although its unique wording may lead to a separate manner of application. As well, section 27 provides a more "active" or substantive protection than the other sections, in that it provides for both the "protection" and the "enhancement" of the interests it protects. Section 21 is another interpretive provision, but by its very terms it applies only with respect to ss. 16-20.

These interpretive provisions operate, it is submitted, as a prism. The scope, content and operation of the rights and freedoms guaranteed by the Charter will differ depending on whether the factual circumstances trigger an interpretive section. If, for example, an equality rights claim involves a treaty right respecting an Indian, the s. 25 interpretive "prism" will operate so as to alter the scope or content of the s. 15 equality right. Without s. 25, the equality claim could be resolved by applying the principles which ordinarily affect such cases.⁶ Different principles must apply once s. 25 comes into play, for otherwise the section would be meaningless.

The "prism" effect of each interpretive provision will depend on the particular phraseology employed. Section 25 states that in giving effect to the rights and freedoms contained in the Charter, a court must construe these guarantees "so as not to abrogate or derogate from" the rights of the aboriginal peoples of Canada. Of the other interpretive provisions, only ss. 21 and 29 employ the words "abrogate" and

"derogate". Section 26 provides only that Charter guarantees do not "deny the existence of" other rights or freedoms, and this wording was also contained in an earlier version of s. 25 (September, 1980). Section 27 merely requires an interpretation of the Charter which is "consistent with the preservation and enhancement of the multicultural heritage of Canadians."

The terminology employed in s. 25 is similar to that contained in s. 2 of the Canadian Bill of Rights, which requires the courts to construe and apply federal laws so as not to "abrogate, abridge or infringe" the rights or freedoms recognized and declared in the Bill. Like the Bill of Rights provision, s. 25 is mandatory.⁷ Unfortunately, as experience with the Bill of Rights demonstrates, this clear directive is not, of itself, a guarantee that the section will achieve its assigned purpose.

Dictionary definitions of the words used are a useful point of departure in the interpretation of s. 25, in the absence of authoritative relevant precedent. The Oxford Illustrated Dictionary defines "abrogate" as "repeal, cancel", and "derogate" as "detract, make improper or injurious abatement." That dictionary defines "derogation" as "lessening or impairment of law, position, dignity ... deterioration, debasement".

From this it is clear that s. 25 is intended to prevent any diminution, impairment or infringement of the rights and freedoms that pertain to the aboriginal peoples. It will apply even if there is no absolute denial of these rights. However, this does not resolve the question of when and how s. 25 is to come into operation in an actual case. In answering this question guidance may be drawn from existing case-law under the Charter involving other interpretive provisions.

An examination of this case-law indicates that the view of the function of the interpretive provisions presented here has been accepted and applied by the courts. The meaning and scope of the substantive guarantees contained in other Charter

sections have changed when the "prism" effect of the interpretive provisions has been triggered.

The freedom of religion guarantee in s. 2(a) of the Charter provides a useful example of this trend. In R. v. Videoflicks Ltd.⁸ several retailers challenged the validity of the day of rest provision of the Ontario Retail Business Holiday Act⁹ as a violation of s. 2(a) of the Charter. In support of the conclusion that the guarantee of freedom of religion extends to the effects of a law upon the practice of one's religion, and that a law which had the effect of making the practice of one's religion more difficult or costly infringes that freedom, Tarnopolsky J.A. referred to s. 27:

Finally, I draw support for my conclusions, both as to the meaning of freedom of religion under the Charter and as to the distinction between that freedom and its interpretation under the United States Bill of Rights from a provision which has no counterpart in the American Constitution, namely s. 27 of the Charter ...

It is not for the courts to express their opinion concerning the justification for this constitutional entrenchment of a policy of pluralistic cultural preservation and enhancement. Nor should the courts avoid giving it any significance. It is merely our duty to try to define how the Charter "shall be interpreted" in light of this provision ...

It is thus the clear purpose of s. 27 that, where applicable, any right or freedom in the Charter shall be interpreted in light of this section ...¹⁰

Similarly, in R. v. Big M Drug Mart,¹¹ Dickson C.J.C. referred to s. 27 in support of the conclusion that the prohibition of Sunday commerce in the Lord's Day Act¹² violated s. 2(a) of the Charter. In his judgment, Chief Justice Dickson stated "that to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians."¹³

In both of these decisions judges have departed from previous Canadian and American interpretations of the phrase "freedom of religion" in order to give effect to the command in s. 27 to interpret the Charter so as to preserve and enhance the multicultural heritage of Canadians. The same result might have been reached in both cases without the interpretive guidance of s. 27, but the provision guided the analysis and buttressed the conclusion.

A similar application of s. 27 occurred in the Ontario Education Act Reference,¹⁴ in which the guarantee in s. 23 of minority language educational facilities was interpreted to mean that the linguistic minorities were entitled to manage and control their schools, in part because this was the only means of harmonizing ss. 23 and 27. In the words of the Court of Appeal:

In the light of s. 27, s. 23(3)(b) should be interpreted to mean that minority language children must receive their instruction in facilities in which the educational environment will be that of the linguistic minority. Only then can the facilities reasonably be said to reflect the minority culture and appertain to the minority.¹⁵

Guidance on this matter also arises out of the issue of the preservation of denominational school privileges in s. 29 of the Charter. In the Ontario Education Act Reference, the Ontario Court of Appeal considered, inter alia, whether the scope and operation of the guarantee respecting minority language education rights in s. 23 of the Charter was modified by s. 29.¹⁶ The Court concluded that as the terms of s. 23 draw no distinction between denominational and non-denominational education, and since the rights protected by s. 29 are those contained in s. 93 of the Constitution Act, 1867, namely the rights and privileges of denominational schools, which do not include linguistic rights, therefore there was no need to modify s. 23. The analysis of the Court in this judgment is a clear indication of acceptance of the "prism" effect of

these provisions. In the particular circumstances of the case the interpretive provision did not affect the substantive guarantee, but the process of analysis reveals that it might have done so. After an analysis of the scope of s. 93 as determined by prior case-law, the Court states:

Before the advent of the Charter, the province's power over education was plenary, with respect to the separate schools; its power was limited only to the extent provided in s. 93. Manifestly, s. 23 of the Charter imposes a further limitation, applicable to both public and denominational education, on the province's power to legislate in relation to education. Now, the constitutional right to minority language education created by s. 23 must be given effect - save only in so far as the exercise of that right conflicts with the denominational rights protected by s. 93 of the Constitution Act, 1867 and reinforced by s. 29 of the Charter.¹⁷

Section 29 played an even more important role in the resolution of the issue of whether the extension of separate school funding violated other constitutional guarantees, in Reference re an Act to Amend the Education Act.¹⁸ The majority judgment¹⁹ concluded that this was not a constitutional violation, and this conclusion is supported mainly by a detailed analysis of the terms and prior versions of s. 29. In this case s. 29 served to shield a Bill dealing with denominational education, which was passed under the provincial authority in respect of education, from the Charter guarantees of freedom of religion (s. 2(a)) and equality (s. 15). The dissenting judgment²⁰ applied s. 29 in the same fashion, but came to an opposite conclusion in the particular circumstances of the case.

These cases provide guidance on the operation of the interpretive provisions in a Charter case. These sections operate as a shield, to preserve existing rights guaranteed by or under the Constitution (or other law, in the case of s. 26)²¹ from diminution or obliteration by other Charter rights. Alternatively, these provisions act as a prism, which alters the content or scope of a right guaranteed by the Charter. In

either situation these sections have the effect of altering the operation of Charter rights in order to reflect unique Canadian historical, cultural and social realities.

The two functions of the interpretive provisions which have been referred to derive from their different purpose and phraseology. One unifying feature of these sections is their embodiment of Canadian values and traditions. Denominational school rights, multiculturalism, other existing rights and aboriginal rights are all a reflection of the unique fabric of Canadian society. In this respect these provisions (along with ss. 16-23, 24 and 33) are vital elements in the creation and maintenance of a Canadian jurisprudence of rights and freedoms.

Another unifying feature of these interpretive guides is their mandatory nature. All of these sections except s. 29 employ the word "shall", and s. 29 is, by its terms, imperative. None of these sections is subject to legislative override by section 33 of the Charter. A final common aspect of these provisions is that they all apply to the determination of the scope or operation of substantive Charter guarantees and do not stand alone as independently enforceable rights protections. One could not apply pursuant to s. 24 for a remedy for the simple violation of one of these provisions.

The last matter which requires clarification is when these provisions are to be applied in a Charter case. Obviously these sections will only be triggered in a case involving a Charter right. The real question to be determined is whether these guides will apply when the substantive Charter right is defined, or whether they will come into operation when the limitations clause (s. 1) is applied.²² This may seem to be a picayune detail, hardly worthy of analysis. Upon reflection, however, it becomes clear that this is a vital threshold question which will affect the presentation of a case, the content and structure of analysis and, inevitably, the outcome of certain decisions. It is submitted that ss. 25, 26, 27 and 29 apply to the definition stage of a Charter case, rather than to the limitations analysis.

There are two main arguments which can be advanced in support of this assertion: one based on the existing case-law and one based on the logic and structure of the Charter itself. From the Charter case-law discussed previously in this Chapter, it is evident that the other interpretive provisions have been applied at the first stage of analysis, when the definition and scope of the substantive rights are discussed. Thus, freedom of religion and minority language education rights have been shaped and moulded by the interpretive provisions into a uniquely Canadian structure.

The other relevant aspect of existing case-law on the Charter are the decisions which indicate that s. 1 analysis will only be triggered if the law or practice being challenged is properly described as a "limit".²³ As Professor Hogg points out: "The Supreme Court of Canada has decided that not every Charter infringement is a "limit", and any infringement that is more severe than a limit cannot be justified under s. 1".²⁴ Thus some Charter cases will be analyzed and decided entirely without reference to s. 1. In light of the mandatory direction in the interpretive provisions, and their vital function of "Canadianizing" the rights and freedoms contained in the Charter, it would be anomalous indeed if a decision impinging on the interests sought to be protected by these sections was made without reference to them.

The other argument in favour of applying these interpretive guides at the "definitional" stage of a Charter case flows directly from the last argument advanced with respect to the decided cases, and is based on the logic and structure of the Charter itself. The purpose of the interpretive provisions has been described earlier as a "prism"; the framers of the Charter were aware of the potential impact of the guarantee of certain rights and freedoms upon other rights, values and interests which had gained recognition in Canada. The interpretive sections were added in order to minimize the adverse consequences of super-imposing the Charter guarantees onto this existing structure.

The limitations clause, on the other hand, was included out of an abundance of caution, so that courts, legislators and others would have a fixed standard against which limits on rights and freedoms could be measured. The terms of s. 1 indicate the touchstones for this analysis: "reasonableness", "prescribed by law", and a "free and democratic society".²⁵ The leading case on s. 1 contains an elaborate discussion of the various tests to be employed in analyzing whether a limitation on a Charter right is acceptable, which is premised by the following statement:

A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society." Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society ...

The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.²⁶

This statement, like the wording of s. 1, emphasizes that the process of determining whether a limit on a Charter right is justified involves a balancing of the interests of individuals and groups, as reflected and embodied in the substantive Charter guarantees, and those of society as a whole. The limitations analysis called for in s. 1 takes as its starting point the definition of the substantive right or freedom which is involved: that determination is the first stage of analysis. For example, if a law restricting commercial advertising is challenged as a violation of s. 2(b), the first stage of analysis would involve the determination of whether "commercial speech" such as advertising is protected by s. 2(b).²⁷ Only once the scope of the right itself is defined and a violation of the right as defined is found may the Court move to the

second stage of analysis, which involves the question of whether the restriction is a demonstrably justified limit in a free and democratic society (s. 1).²⁸

Given this analytical structure, the argument in favour of triggering the interpretive provisions in the definitional stage of a Charter case proceeds along the following lines. If s. 1 limitations analysis takes as its starting point the substantive right as defined in stage 1, and if the purpose of the interpretive provisions is to act as a prism, altering the prevailing scope and meaning of one of the substantive rights, where appropriate, it follows that these provisions have no role to play in s. 1 analysis. The "prism" must already have been applied before s. 1 can operate, because it is the limit on the substantive right as modified by the interpretive prism which must be evaluated by reference to s. 1.

The second-stage limitations analysis involves a balancing of interests, and it is submitted that it would be inappropriate to invoke the interpretive provisions in this process, for it is precisely in order to ensure that these particular rights and interests are not obliterated by the Charter guarantees or general social interests that these special provisions were inserted. Multiculturalism and aboriginal, treaty and other rights, for example, are not to be factored into a Charter case only when the general social interests are balanced against the particular interest embodied in the Charter right. Instead, these over-riding constitutionally protected values should be utilized, in an appropriate case, to modify the usual definition or understanding of a Charter right so that it does not diminish, abrogate or infringe the values reflected in ss. 25, 26, 27 and 29. Any other approach would not adequately reflect the logical structure of the Charter, and it would raise the possibility that these mandatory directives would not be accorded an appropriate role or sufficient weight in the analysis of a particular case.

If the interpretive sections are applied at the second stage of analysis it is antecedently likely that they would not be effective, because the interests they seek to protect would be intermingled with the other social interests in the balancing equation. The values reflected in ss. 25, 26, 27 and 29 must be accorded the importance which their status as parts of the Constitution requires. Otherwise there would have been no point in specifically including them in this way.

The logical structure of the Charter supports the argument advanced here in quite another way. The interpretive provisions are designed, as their wording indicates, to preserve certain pre-existing or over-arching values and interests. They can accomplish this either by modifying the definition of the substantive guarantees, or by rendering "limits" on rights (that are otherwise valid) unacceptable when viewed in the light of the interpretive guides.

The latter option is plausible in view of the directive in these sections that the Charter be "construed" and "interpreted" in a particular way. The problem with it is that the provisions and s. 1 do not refer to each other, and s. 1 itself does not allow other limits to be placed on these rights. Furthermore, it is difficult to interpret these sections as applying to the limits on rights, rather than to the substantive guarantees. For example, a law which provides that the punishment for certain crimes may include termination of the privilege of possessing a firearm does not ordinarily impinge upon the guarantee against "cruel and unusual treatment or punishment" in s. 12, as that right is usually understood. When that law is applied to a native person who relies on hunting for sustenance, however, the Charter right is triggered, not because a limit on a right in the particular situation has become unacceptable because of s. 25, but rather because the right itself takes on new meaning when it is viewed through the prism of s. 25. These interpretive guides do not alter the s. 1 tests directly; instead

they modify the meaning or scope of the substantive rights guaranteed by the Charter, and these "new" rights may then be subject to s. 1 analysis.

In summary, it is submitted that the interpretive provisions in the Charter, including s. 25, are to be applied at the first stage of analysis in a Charter case when the scope and meaning of the substantive right is defined. These interpretive guides function as a prism, which alter the traditional meaning attributed to the Charter rights and freedoms so that the latter do not diminish or obliterate the former. This can be accomplished by adding a new dimension to the usual meaning of a right or freedom or by limiting the scope of a Charter right. The interpretive provisions will function properly, in the context of the Charter as a whole, only if they are applied in this fashion.

II. Relationship Between Sections 25 and 35

There is much support for the idea that constitutional provisions should be interpreted with reference to other relevant constitutional guarantees, in order to ensure that the entire document is interpreted and applied in a consistent manner.²⁹ Since s. 25 of the Charter and s. 35 of the Constitution Act, 1982 deal with broadly similar matters, and since they both form part of the same constitution, it is useful to explore their relationship.³⁰

The most obvious difference between ss. 25 and 35 is that the latter is phrased as an independently enforceable confirmation or guarantee of rights, whereas the former is phrased as an interpretive guideline or shield, which is not itself enforceable. As Professor Hogg states: "[s. 25] does not create any new rights or even fortify existing rights. It is simply a saving provision."³¹ From this it is evident that there is no need to strain to infuse s. 25 with substantive content as a rights guarantee,

because s. 35 already serves that function. Section 25 will meet its purpose if it is used as an interpretive prism, and it need not be independently enforceable.

A related matter which is emphasized by the comparison of the two sections is that s. 25 must operate within the overall context of the Charter of Rights and Freedoms, and therefore it must find a place alongside the substantive guarantee of rights and freedoms, as well as ss. 24, 1 and 33. Section 35 on the other hand occupies a separate Part of the Constitution (Part II), and is not subject to ss. 1 or 33. Neither, however, is it enforceable by means of s. 24. Once again the purpose of s. 25 as an interpretive guide is supported by a comparison with s. 35.

The final aspect of the relationship between ss. 25 and 35 is the interpretive guidance which may be gleaned from a comparison of the substance of each section.

III. Substantive Content of Section 25

The legal significance of s. 25 will be determined largely by the meaning attributed to its substantive content. The importance of the argument based on the structure of the Charter outlined earlier in this Chapter should not be minimized, but this analysis cannot overcome the restrictions inherent in the section itself.

The key words in s. 25 are "aboriginal, treaty or other rights", and these are amplified by the references to the rights or freedoms recognized by the Royal Proclamation of 1763, and rights acquired by way of land claims agreements.³² That these latter references are not exhaustive of the meaning of "aboriginal, treaty and other rights" is clear from the use of the word "including" at the end of the introductory words of the section. In this part, the words "treaty and other rights" will be analyzed in detail, as will the specific references in paragraphs (a) and (b) of the section.³³

1. Treaty Rights

In order to ensure that the guarantee of certain rights and freedoms in the Charter does not abrogate or derogate from any treaty rights, the specific terms of each particular treaty will have to be analyzed in considerable detail. Such a task is beyond the scope of this thesis, and of questionable value without reference to a specific factual context. A more worthwhile task is to develop general principles to guide such an analysis. This requires an understanding of the meaning of the word "treaty" and an examination of the principles for the interpretation of treaties which now guide courts. The significance of constitutional recognition and protection of these rights can then be analyzed in an informed manner.

(i) What Constitutes a "Treaty"?

Two distinct problems are associated with the definition of the word "treaty" in s. 25:³⁴ first, what is required to prove the existence of a "treaty" in the sense of an agreement between aboriginal peoples and the Crown?; second, does the reference in s. 25 include stipulations in international treaties pertaining to aboriginal peoples?

The legal status of these treaties remains uncertain. As will be discussed later, these agreements have not been classified as treaties in the international law sense, but no single legal label is appropriate to describe the variety of agreements usually subsumed within the concept of "Indian treaty".

Indian treaties have taken many forms, and some of the agreements have not generally been accepted as Indian "treaties" in the usual sense of that term. The early Maritime treaties are in the form of international pacts, and include terms regarding peace, friendship, allegiance and trade. A common view of these "treaties of peace and friendship" is that they are unenforceable political documents;³⁵ the Maritime provinces have been referred to as "non-treaty areas".³⁶ The orthodox view, stated in

a paper prepared for the Department of Indian Affairs, was that "(t)he Maritime treaties stressed mutual peace and friendship, the objective to ensure the assistance or neutrality of the Indian people".³⁷

Other early treaties reflected the growing political and economic dominance of European nations, and these defined the relationship with aboriginal nations in terms of dependency and allegiance. Later treaties were more pedestrian, taking the form of simple land transfers and exchanges of promises.³⁸ Various labels were attached to these agreements, but most of the nineteenth and twentieth century treaties are indisputably within the ambit of s. 25. Particular difficulties may be encountered with respect to the Maritime treaties of peace and friendship, and the agreements made by Governor Douglas on Vancouver Island. As the status of both of these types of agreements as "treaties" has previously been challenged, the cases dealing with these arguments merit consideration.

Prior to 1951 the question of concern here would undoubtedly have been answered with reference to R. v. Syliboy.³⁹ In this case an Indian who was accused of unlawfully possessing pelts contrary to the Nova Scotia Lands and Forests Act⁴⁰ asserted a defence based on a 1752 treaty between Nova Scotia and a tribe of Mi'kmaq Indians. The Court accepted the argument of the Crown that the agreement at issue was not a "treaty" as that term was then understood in international law.

'Treaties are unconstrained acts of independent persons.' But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.

In my judgment the Treaty of 1752 is not a treaty at all and is not to be treated as such; it is at best a mere agreement made by the Governor and council with a handful of Indians giving them in return for good behaviour food, presents, and the right to hunt and fish as usual ...⁴¹

The Court buttressed its conclusion with the observation that the treaty of 1752 would be invalid until ratified and implemented by Parliament.

As will be discussed later, the enactment of s. 88 (originally s. 87⁴²) of the Indian Act, and the development of a more refined view of the meaning of the word "treaty" renders critical analysis of the Syliboy decision unnecessary; suffice it to recall the words of Dickson C.J.C., who stated: "(i)t should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada."⁴³

Today the meaning of the word "treaty" in s. 25 of the Charter can be illuminated with reference to an ample body of case-law which has interpreted this word in the context of s. 88 of the Indian Act. Section 88, which was originally enacted in the 1951 revision of the Indian Act, states:

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province ... (emphasis added)

The leading case on this provision is R. v. White and Bob,⁴⁴ which involved an assertion of a treaty right as a defence to a charge under the British Columbia Game Act.⁴⁵ The document relied on as evidence of the treaty was an informal agreement for the sale of land between the ancestors of the accused, members of the Saalequun tribe, and Governor Douglas. It is not clear from the document whether Governor Douglas signed the treaty in his capacity as Governor or as the representative of the

Hudson's Bay Company.⁴⁶ As well, the agreement did not include the clause which appears in all other Vancouver Island transfers of Indian land, which specifically preserves traditional hunting and fishing rights.⁴⁷

The Crown argued that the agreement was not a treaty as that term was used in s. 87, which it alleged required:

(1) A document that on its face is so described or one that uses that word in the text; and (2) Deals with fundamental differences between the parties (quaere, political differences?) and not merely with private rights, such as in this case the sale of land; and (3) A formal document in which the terms are set out with some degree of formality; and (4) An agreement to which the Crown is a party, or which it has authorized one of the parties to make on its behalf.⁴⁸

This argument was rejected by the Court.

The criteria to be applied in determining what constitutes a "treaty" for the purposes of s. 87 (now s. 88) were succinctly stated by Norris J.A.:

The question is, in my respectful opinion, to be resolved not by the application of rigid rules of construction without regard to the circumstances existing when the document was completed nor by the tests of modern day draftsmanship. In determining what the intention of Parliament was at the time of the enactment of s. 87 [now s. 88] of the Indian Act, Parliament is to be taken to have had in mind the common understanding of the parties to the document at the time it was executed. In the section "Treaty" is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term "the word of the white man" the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied.⁴⁹

This passage was recently adopted by Dickson C.J.C., on behalf of a unanimous Supreme Court of Canada, in a case involving a 1752 Treaty between the British Crown and a tribe of Micmac Indians.⁵⁰ In a marked departure from the reasoning in

the Syliboy decision, which involved remarkably similar facts, the Chief Justice concluded that the accused could rely on the terms of this treaty as a defence to a charge under the Nova Scotia Lands and Forests Act.⁵¹ Chief Justice Dickson stated:

The Treaty was entered into for the benefit of both the British Crown and the Micmac people, to maintain peace and order as well as to recognize and confirm the existing hunting and fishing rights of the Micmac. In my opinion, both the Governor and the Micmac entered into the Treaty with the intention of creating mutually binding obligations which would be solemnly respected.⁵²

Having accepted this purpose for entering into this treaty, Dickson C.J.C. proceeded to find that the 1752 Treaty protected a right to hunt, that the obligations under it were not terminated, and that the accused was a descendant of the tribe which was a party to the agreement. The final hurdle facing the appellant Simon was the Crown's argument that the 1752 Treaty was not a "treaty" within the meaning of s. 88 of the Indian Act. The Court rejected this argument. After adopting the statement of Norris J.A. in R. v. White and Bob quoted above, Dickson C.J.C. stated:

In my view, Parliament intended to include within the operation of s. 88 all agreements concluded by the Crown with the Indians that would otherwise be enforceable treaties, whether land was ceded or not. None of the Maritime treaties of the eighteenth century cedes land. To find that s. 88 applies only to land cession treaties would be to limit severely its scope and run contrary to the principle that Indian treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians.

...

The Treaty was an exchange of solemn promises between the Micmacs and the King's representative entered into to achieve and guarantee peace. It is an enforceable obligation between the Indians and the white man and, as such, falls within the meaning of the word "treaty" in s. 88 of the Indian Act.⁵³

These two cases, it is submitted, settle the question of whether the Maritime, Vancouver Island and other similar agreements are treaties as that term is used in s. 25 of the Charter. A "treaty" for the purpose of this section need not be evidenced by a formal document; it need not be entitled a treaty; land or water rights need not be ceded. As was stated by Norris J.A. in R. v. White and Bob:

In the section "Treaty" is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term 'the word of the white man'.⁵⁴

A question which naturally follows from this definition of the criteria to be applied to determine the scope of the word "treaty" in s. 25 is whether it extends to stipulations respecting native people in international agreements entered into between Canada (or Great Britain) and other countries.⁵⁵ By its terms s. 25 is broad enough to cover such treaties, whether signed by the Imperial Crown or the Queen in right of Canada. One example of such a provision is Article III of the Jay Treaty of 1794, entered into by Great Britain and the United States: "it shall at all times be free ... to the Indians dwelling on either side of the said boundary line, freely to pass and repass ... into the respective territories and countries of the two parties ... and freely to carry on trade and commerce with each other."⁵⁶

In Francis v. The Queen⁵⁷ this provision was relied on under s. 88 of the Indian Act as a defence to a charge of unlawfully importing goods from the United States without paying customs duty. The only two members of the Supreme Court who dealt with this argument rejected it, stating: "I think it is quite clear that 'treaty' in this section does not extend to an international treaty such as the Jay Treaty but only to treaties with Indians which are mentioned throughout the statute."⁵⁸ Although this interpretation of the Indian Act is not binding with respect to the interpretation of s.

25, it will likely be accorded deference by the courts.⁵⁹ What principled basis is there for departing from this decision?

According to the Vienna Convention on the Law of Treaties, a "treaty" is an international agreement concluded between States in a written form ... whatever its particular designation."⁶⁰ There is no doubt that the Jay Treaty and other similar treaties fall within this description. As these sorts of agreements would normally be understood to be "treaties" as that term is commonly interpreted, and therefore should be expected to be within the ambit of s. 25, it seems logical to seek instead a reason to exclude these treaties.

The usual explanation for the decision in the Francis case is that a contrary ruling would have limited Parliament's supremacy to alter or abrogate international treaty obligations respecting native people, by requiring implementing legislation to be passed in respect of such treaty guarantees.⁶¹ As well, the aboriginal people were not a party to this treaty. This need not deter courts from including stipulations regarding native people in international treaties within s. 25, because such constitutional protection would only apply in respect of treaty rights which are implemented by domestic legislation.⁶² A treaty provision would otherwise not be capable of abrogation or derogation by the operation of another Charter right or freedom, and therefore s. 25 could offer no protection in respect of it.

Support for this argument can also be drawn from the text of s. 25 itself, which preserves treaty rights that "pertain" to the aboriginal peoples of Canada. Plainly the relevant stipulations in international treaties "pertain" to aboriginal people, and once again the burden of the argument shifts to those who would seek to justify the exclusion of international treaties from s. 25.

A slightly more difficult question concerns treaties between the Imperial Crown and Indian tribes who inhabited territory which is now within the boundaries of the

United States. If some of the beneficiaries of these agreements now reside in Canada can they utilize s. 25 to protect their treaty rights? Once again the broad wording of the section seems to offer support for such an argument: the particular right arises by virtue of a "treaty"; and it pertains to aboriginal people in Canada.

(ii) Principles of Interpretation

Canadian law has evolved a number of principles which govern the interpretation of agreements between aboriginal peoples and Canada. These principles concern the legal status of these agreements, the determination of the terms of a treaty, the approach which is to be taken to ambiguous or uncertain phrases, and the manner in which these obligations may be altered or extinguished.

(a) Legal Status

As discussed earlier, treaties have been in existence in the area which is now Canadian territory for over two centuries. Since Confederation there has been a great deal of litigation in respect of these treaties, involving several decisions of the highest appellate courts. Yet, as Douglas Sanders points out, "(t)he lack of a clear definition of the status of an Indian treaty in Canadian law is striking."⁶³ Canadian courts and others have variously described these treaties as international agreements, contracts, mere declarations of intent, and subordinate legislation. Each of these descriptions is not wholly adequate, but each contains a kernel of truth.

The prevailing orthodoxy in Canadian law is that these agreements are not treaties as that term is understood in international law. Professor Green relies on the definition of "treaty" used in the Vienna Convention of the Law of Treaties⁶⁴ in support of this conclusion:

There are some commentators, particularly among political scientists who have little or no knowledge of international law, who describe these agreements as if they were treaties in the normal sense of international law, simply because they are given the title of treaties ... Clearly, a document does not have to be called a treaty in order to be one ... In spite of modern assertions of a right to self-determination ... the Indians of North America do not constitute a state - though the various tribes may be 'peoples' and even regard themselves as such - and therefore the documents they have entered into cannot amount to treaties in the eyes of international law.⁶⁵

A contrary argument has been asserted by various authors, and support for it may be drawn from a wide variety of sources. The Royal Proclamation of 1763, which established the framework for all of the treaty-making which followed it, describes the aboriginal peoples as "the several Nations or Tribes of Indians with whom we are connected, and who live under our protection" and protected any of their lands which were not "ceded to or purchased by Us ..."⁶⁶ This description would support the argument that the Crown recognized that these treaties were made between separate nations, and that the extent to which a relationship of dependency existed between the parties is irrelevant in this regard.

Further evidence in support of this view can be drawn from the report of a special Royal Commission in 1749, which concluded:

The Indians, though living amongst the king's subjects in these countries, are a separate and distinct people from them, they are treated with as such, they have a polity of their own, they make peace and war with any nations of Indians when they think fit, without control from the English.⁶⁷

A more direct means of challenging the contention that these agreements are not treaties in the sense of international law is simply to challenge the racist and ethnocentric ideas upon which the conclusion is based, and to review the history of the treaty-making process itself. Delia Opekokew has forcefully advanced this

argument,⁶⁸ and her analysis reveals the a-historical and self-serving nature of the orthodox view of Indian treaties. In her view, the treaty-making process itself points to the status of the resultant agreements as international compacts:

The Crown came to the Indian people and at all times conducted itself in recognition of the powers and symbols of Indian nations. Through the very process of negotiating the treaties, the Crown recognized the power of Indian government leaders to enter into binding agreements on ... national matters ...

The pomp and pageantry attending the negotiations followed the pattern of any meeting between two nations. It adhered to a definite protocol established by nations all over the world when entering into any major negotiations. The events surrounding the treaty negotiations are proof of the intent of the two parties to treat each other as independent, sovereign nations.⁶⁹

The self-serving and racist overtones to the argument that these treaties are not cognizable in terms of international law are succinctly stated by Ms. Opekokew. She connects the treaty-making process with the doctrine of discovery which was itself based on non-recognition of aboriginal sovereignty or nationhood, and which provided a basis for the regulation of competing European interests in North America.⁷⁰ As will be recalled from the passage quoted earlier,⁷¹ the argument that these agreements are not treaties in the sense of international law proceeds from the assumption that the Indian nations who were signatories to the treaties were not "nations" in the international sense. The ethnocentric basis for this conclusion is obvious; what is less clear is whether it will now be departed from.

A variant of the argument presented above is that the law must distinguish between various categories of Indian treaties. No generic labels can be attached to such disparate agreements, and thus the fact that some of the treaties are clearly not in the form of international treaties does not mean that others cannot attain that

status. The principal focus of this argument is upon the Maritime treaties of peace and friendship, discussed earlier in this Chapter.⁷² These treaties are in the form of international compacts between sovereign and independent equals, and thus more easily fit within the category of agreements described in the Vienna Convention on the Law of Treaties. There is considerable evidence that at the time of entry into these treaties and shortly thereafter the Imperial Crown regarded these agreements as international treaties, and that this view was communicated to the Indian signatories.⁷³

If this argument is accepted, what consequences would flow from it? Obviously this argument has the potential to create a basis for challenging land cessions by the Crown in violation of the treaty guarantees. It is a truism that international treaties are not self-executing within Canada, and that domestic legislation implementing treaty obligations is required before they become enforceable in domestic courts.⁷⁴ However, it might be possible to construe s. 88 as implementing legislation, at least with respect to the relationship of treaties to contrary provincial laws after 1951.⁷⁵ Of equal importance is the possibility that the principles governing the interpretation of international treaties, as embodied in the Vienna Convention on the Law of Treaties, would be applied to the interpretation of these agreements. A final consequence would be that the treaty obligations would subsist indefinitely and not be extinguished by contrary legislation.⁷⁶ Thus the domestic enforcement of these obligations could incrementally expand as new laws were passed which implemented the treaty obligations.

A major stumbling block facing this argument is the assertion by Dickson C.J.C., in Simon v. The Queen, that "(w)hile it may be helpful in some instances to analyze the principles of international law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement sui generis which is

neither created nor terminated according to the rules of international law."⁷⁷ This case actually concerned one of the Maritime treaties, and thus this statement is particularly damaging. In view of this, and the other possible interpretations of treaties in Canadian law, this argument will not be pursued.

A common view of the legal status of treaties in Canadian law is that they are contracts or analogous to contracts. An early indication of this trend is the decision of the Judicial Committee of the Privy Council in the Treaty Annuities⁷⁸ case, in which an arbitration award that treated two 1850 treaties as international agreements to be construed liberally was rejected in favour of the following conclusion:

Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities ... beyond a promise and agreement, which was nothing more than a personal obligation by its governor ...⁷⁹

The contractual aspects of this "personal obligation" were emphasized by Lord Watson: "Seeing that the substantial question involved in these appeals is that of contractual liability for a pecuniary obligation, they are of opinion that the rule followed by them in some really international questions between Canadian Governments ought not to apply here."⁸⁰ The annuity obligations arising from these treaties were treated as private law matters concerning contractual liability.

This view has been carried forward into modern law with respect to both pre-Confederation and post-Confederation treaties, although recently courts have pointed out that the analogy to contracts is imperfect. An example of this reasoning is the judgment of the Federal Court in Pawis v. The Queen:

It is obvious that the Lake Huron Treaty, like all Indian treaties, was not a treaty in the international law sense. The Ojibways did not then constitute an "independent power", they were subjects of the Queen. Although very special in nature

and difficult to precisely define, the Treaty has to be taken as an agreement entered into by the Sovereign and a group of her subjects with the intention to create special legal relations between them. The promises made therein by Robinson on behalf of Her Majesty and the "principal men of the Ojibewa Indians" were undoubtedly designed and intended to have effect in a legal sense and a legal context. The agreement can therefore be said to be tantamount to a contract, and it may be admitted that a breach of the promises contained therein may give rise to an action in the nature of an action for breach of contract.⁸¹

Prime Minister Trudeau,⁸² and the White Paper issued by his government in 1969,⁸³ both advanced the view that treaties are mere contracts, although this opinion was inextricably linked with the larger idea that these agreements, along with the other incidents of aboriginal special status, should gradually be terminated.⁸⁴

Some of the problems associated with this analysis of Indian treaties are identified by Douglas Sanders:

The most common analysis of the treaties in the case law views them as contracts. But courts have been aware of a problem with this analysis, for how does it explain the fact that the contract exists with a collectivity whose members completely alter over time? Has the tribe a legal entity apart from its individual members? No legislation confers legal status on the tribes. No case law discusses whether tribes are legal entities. The case law is even equivocal on the point of whether bands established under the Indian Act are legal entities. If the treaties are contracts with continuing parties, the tribes must have a legal status arising from the indigenous legal systems. This involves some recognition of the original political separation of the tribes. The analysis of treaties as contracts, then, leads to a view that the treaties are between separate legal and political entities.⁸⁵

One obvious advantage of viewing the treaties as contracts is that this opens up an array of familiar legal arguments to challenge the validity of the treaties, or to provide a basis for remedying the breach of Crown obligations.⁸⁶ Modern contract law

will give effect to various pleas relating to extreme procedural and substantive unfairness⁸⁷ and the validity of many treaties could be challenged on this basis.

This analysis has been applied in several cases. In R. v. Batisse⁸⁸ the court applied the provisions of a post-Confederation treaty as a defence to a charge under provincial legislation, and in the course of the decision the judge discussed the potential defects in the treaty when measured against the standards of contract law:

When Treaty No. 9 was negotiated, the parties to the Agreement were on grossly unequal footings. Highly skilled negotiators were dealing with an illiterate people, who, though fearful of losing their way of life, placed great faith in the fairness of His Majesty, as represented by federal authorities. As a matter of fact, a careful reading of the Commissioners' Reports makes it fairly obvious that the Indians thought they were dealing with the King's personal representatives and were relying on the word of His Majesty rather than officials of Government. They agreed to give up their interest in their land for a few reserves (carefully chosen by the Government to be far away from any potential source of hydro power) and a few dollars per year per family. As a result, approximately 90,000 square miles of resource-rich land was acquired by the Crown, free of any beneficial Indian interest, for an absurdly low consideration (even for that time). It is still not clear whether Indian treaties are to be considered basically as private contracts or as international agreements. If the former, then the very validity of this treaty might very well be questioned on the basis of undue influence as well as other grounds.⁸⁹

Two significant consequences flow from the contract analysis of treaties. First, the validity of a particular treaty might be challenged on the basis of duress, undue influence, unconscionability and other recognized contract law doctrines.⁹⁰ If one of these arguments is successful, however, it is unclear what result would follow. In the context of a case involving s. 25 of the Charter, a challenge to the validity of a treaty might have the effect of resurrecting a pre-existing and, in view of the legal defects in the treaty, un-extinguished aboriginal right, which could then be applied as a prism through which the substantive Charter right could be viewed.⁹¹ In other

circumstances the result of a successful attack upon the validity of a treaty might be to diminish the rights enjoyed by aboriginal people.⁹²

The second consequence of viewing treaties as contracts is that breaches of treaty obligations would give rise to legal causes of action, subject to the relevant statutes of limitation and other bars.⁹³ The usual remedial devices for breach of contract, including damages and/or specific performance, would then become available.

Closely related to the contract analysis of treaties is the concept that these agreements are mere declarations of moral obligation, enforceable, if at all, only in the political realm. One example of this reasoning is R. v. Wesley,⁹⁴ in which the Robinson Annuities⁹⁵ case was relied on as authority for the proposition that "In Canada the Indian treaties appear to have been judicially interpreted as being mere promises and agreements."⁹⁶ The Court continued, perhaps too optimistically:

Assuming as I do that our treaties with Indians are on no higher plane than other formal agreements yet this in no wise makes it less the duty and obligation of the Crown to carry out the promises contained in those treaties with the exactness which honour and good conscience dictate and it is not to be thought that the Crown has departed from those equitable principles which ... uniformly governed the British Crown in its dealings with the aborigines.⁹⁷

As this view of the status of treaties does not prevail today, it will not be discussed further.

Several authors have suggested that treaties should be viewed as analogous to subordinate legislation, which takes effect by virtue of the Royal Proclamation of 1763.⁹⁸ There are several difficulties with this interpretation, including its failure to explain the status of pre-1763 treaties, and its failure to correspond to the intent of

the government in entering into the post-Confederation treaties. The final and most telling argument against this theory is that it has not been adopted by any court.

This discussion reveals the diverse array of analytical possibilities as to the nature and status of Indian treaties, and the absence of an accepted legal definition of their status in Canadian law. Recently the Supreme Court of Canada has provided some guidance in this area, in Simon v. The Queen.⁹⁹ This case concerned a pre-Confederation Maritime treaty, and in the course of the judgment Chief Justice Dickson stated "(a)n Indian treaty is unique; it is an agreement sui generis ..."100 This is perhaps the most accurate and helpful view which Canadian law can adopt on this matter. The treaties are unique, and the legal labels which have been previously discussed are, at best, useful by way of analogy, so that relevant principles of interpretation can be drawn from other areas of the law. The fact that the treaties are placed in a category by themselves does not detract from their legal status or enforceability. It does, however, force anyone concerned with the interpretation or application of the treaties to confront the unique problems associated with these agreements, and to create new principles to deal with these difficulties. It is to this process that I now turn, and it is here that the analogies previously discussed are most useful.

(b) Defining the Terms

Many of the treaties were recorded by representatives of the Crown in written form, and there is a considerable written record of the negotiation and treaty-making process as well.¹⁰¹ The actual written terms of the treaty are obviously the starting point for any attempt to interpret or apply the treaty obligations. Until recently, however, it has been unclear whether, and to what extent, one could move beyond these written terms.

The purpose for considering other oral or written evidence relating to the terms of a treaty would be either to explain or clarify an ambiguous portion of the written treaty, or to add to or vary those terms. The former purpose has long been accepted in Canadian law;¹⁰² the latter has only recently gained recognition.

In R. v. Taylor and Williams,¹⁰³ the Ontario Court of Appeal gave effect to a defence to a charge of taking bullfrogs during the closed season contrary to Regulations passed pursuant to the Game and Fish Act,¹⁰⁴ based on an 1818 treaty between the Crown and six tribes of the Chippewa Nation. The written terms of the treaty name the parties, describe the area of land to be ceded, comprising 1,951,000 acres, and stipulate the monetary payments to be made "as a full consideration for the lands hereby sold and conveyed ..."¹⁰⁵ The terms of the land surrender are absolute, and the written terms do not contain any reference to hunting or fishing rights. However, the written record of a Council Meeting between the Crown representative and the Tribal chiefs disclosed that the Indians were deeply concerned about preserving their traditional harvesting rights, as the following exchange indicates:

Buckquaquet, Principal Chief addressing the Dept. Supt.
General said

...

Father. We hope that we shall not be prevented from the right
of fishing, the use of the Waters & Hunting where we can find
game

...

To which the Supt. General replied

...

The Rivers are open to all & you have an equal right to fish &
hunt on them ...¹⁰⁶

It was agreed by both parties that this constituted a term of the treaty,¹⁰⁷ and the dispute centred on the proper interpretation of these words.

From this case it is clear that the written terms of the treaty as recorded by the Crown representatives are not the only source for treaty obligations. The significance of this is plainly revealed in the Taylor and Williams case, and this is reinforced by the clear evidence which has been accumulated concerning the divergence between the oral promises made to Indians at the time of entry into certain treaties and the written terms of these treaties.¹⁰⁸ Courts may draw assistance in this respect from analogous principles in contract law, which permit the introduction of parol evidence in certain circumstances to supplement the written terms of an agreement.¹⁰⁹ Therefore the process of defining the terms of a particular treaty will be as much an archival as an interpretive one.

(c) Interpreting Ambiguities

The problem created by ambiguities and uncertain phrases in written agreements are familiar to all lawyers. These problems are compounded when the written record was prepared and understood solely by one party, often not at the time of entry into it, e.g. either long before or long after the actual treaty negotiation, and when it did not comprise a complete memorial of the relevant terms. These special difficulties which pertain to the interpretation of the treaties have caused courts to create a special body of interpretive principles.

The most significant of these principles was recently re-stated by Chief Justice Dickson:

Such an interpretation accords with the generally accepted view that Indian treaties should be given a fair, large and liberal construction in favour of the Indians. This principle of interpretation was most recently affirmed by this Court in Nowegijick v. The Queen, [1983] 1 S.C.R. 29. I had occasion to say the following at p. 36:

It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians ... In Jones v. Meehan, 175 U.S. 1 (1899), it was held that Indian treaties 'must ... be construed, not according to the technical meaning of [their] words ... but in the sense in which they would naturally be understood by the Indians.'¹¹⁰

The Ontario Court of Appeal indicated the breadth of this principle in R. v. Taylor and Williams: "... if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible ..."¹¹¹ Two justifications can be offered for such an approach: the need to maintain the integrity of the Crown,¹¹² and the inequality between the parties.¹¹³

The scope of this principle reflects the importance of viewing the treaties as unique legal constructs, and of applying the rules from other legal categories by way of analogy only. The principle under review here extends well beyond any currently accepted doctrine of contract law, although it is closely analogous to several concepts which are intended to protect weaker parties from unfair transactions.¹¹⁴

In R. v. Taylor and Williams¹¹⁵ the Court of Appeal applied another important principle concerning the interpretation of treaties. The Court accepted that the historical record was relevant to the interpretation of the treaty. MacKinnon, A.C.J.O. stated: "Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect."¹¹⁶ This led to the formulation of the following principle of interpretation: "if there is evidence by conduct or otherwise

as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms."¹¹⁷

This principle has been applied in several cases,¹¹⁸ and it may be illustrated by reference to the judicial interpretation of the meaning of the "medicine chest" clause of a post-Confederation treaty. In 1876 the Dominion of Canada signed a treaty with Cree Indians, which became known as Treaty No. 6. The treaty includes a clause which states:

That a Medicine Chest shall be kept at the house of the Indian Agent for the use and benefit of the Indians, at the discretion of such agent.¹¹⁹

There is evidence to support the argument that a similar clause was understood by the Indians to be included in other prairie treaties,¹²⁰ and in view of the current rules governing the inclusion of oral terms as part of a treaty the interpretation of this clause takes on added significance.

This clause is not ambiguous on its face. A comparison of the clause and the oral representations made by Crown representatives, however, reveals a divergence which indicates an ambiguity in the written terms of the treaty. Judicial interpretation of the ambit of this clause has varied. In Dreaver v. The King,¹²¹ Angers J. of the Exchequer Court relied upon the oral testimony of a witness to the treaty negotiations in support of the conclusion that:

[Although] (t)he clause might unquestionably be more explicit ... I take it to mean that all medicines, drugs or medical supplies which might be required by the Indians of the Mistawasis Band were to be supplied to them free of charge.¹²²

In the later case, R. v. Johnston,¹²³ which involved a defence to a charge of failing to pay a tax levied pursuant to the Saskatchewan Hospitalization Act,¹²⁴ based upon this clause in Treaty 6, the magistrate hearing the case stated:

... I can only conclude that the "medicine chest" clause and the "pestilence" clause in Treaty No. 6 should properly be interpreted to mean that the Indians are entitled to receive all medical services, including medicines, drugs, medical supplies and hospital care free of charge.¹²⁵

On appeal the Court of Appeal reversed this decision stating, after a review of the record of the treaty negotiations: "... on the plain reading of the "medicine chest" clause, it means no more than the words clearly convey: an undertaking by the Crown to keep at the house of the Indian agent a medicine chest for the use and benefit of the Indians at the discretion of the agent ... I can find nothing historically, or in any dictionary definition, or in any legal pronouncement, that would justify the conclusion that the Indians, in seeking and accepting the Crown's obligation to provide a "medicine chest" had in contemplation provision of all medical services, including hospital care."¹²⁶

A careful review of the historical record indicates that this conclusion is open to challenge,¹²⁷ although it has been followed by later decisions.¹²⁸ The point can be taken to be open until this evidence is expressly considered by a court. There are similar problems respecting many other treaty obligations,¹²⁹ and it is submitted that a satisfactory resolution of these ambiguities requires careful analysis of all relevant historical documents and sources, not just the written treaty itself. This approach may lead to the re-interpretation of a written term, or the addition of oral terms to the written treaty, but in either case it will ensure that a just and equitable interpretation of the treaties, as understood and intended by both parties, will be applied.

(d) Extinguishment of Treaty Obligations

In principle treaty rights can be extinguished voluntarily, or by means of

legislation enacted by the appropriate legislative authority. Voluntary termination of treaty rights can be by means of enfranchisement,¹³⁰ (for personal rights) and surrender of treaty reserve lands, (for land entitlements).¹³¹ In practice, however, virtually all of the important terminations of treaty obligations have been involuntary, in the form of legislative enactments.

The uncertain status of Indian treaties in Canadian law has been reflected in the various means by which courts have allowed treaty obligations to be terminated. Until the enactment of the Constitution Act, 1982 the dominant question was which jurisdiction (federal or provincial) had authority to abrogate treaty rights, rather than whether these rights could be terminated at all. These are both vital questions in the context of s. 25.¹³²

The matter of termination of treaty rights has usually arisen with respect to laws concerning hunting and fishing which purport to reduce or terminate rights guaranteed by the treaties. In considering this matter it is important to distinguish between treaty obligations which are stated in absolute terms, and those which are expressly made subject to future governmental regulation.¹³³ In the latter instance it may be argued that any regulatory statute is not, in fact, in breach of the treaty obligation at all. This argument has been considered, and rejected, in R. v. Sikyea.¹³⁴ At issue in the case were the clauses of Treaty 11 which guaranteed hunting, trapping and fishing rights "subject to such regulations as may from time to time be made by the Government of the Country acting under the authority of His Majesty ..." ¹³⁵ This article was interpreted in the following restricted manner by Johnson J.A.:

From these treaties and from the negotiations preceding the signing of these treaties ... it is, I think, obvious that while the government hoped that the Indians would ultimately take up the white man's way of life, until they did, they were expected to continue their previous mode of life with only such regulations and restrictions as would assure that a supply of game for their

own needs would be maintained. The regulations that "the Government of the Country" were entitled to make under the clause of the treaty which I have quoted were, I think, limited to this kind of regulation.¹³⁶

This interpretation is in accordance with the understanding of the Crown representatives who negotiated the treaty, according to Johnson J.A., as the report of the commissioners who negotiated Treaty 8 demonstrates. In this report the Indian concern to maintain their hunting and fishing rights was referred to, and the commissioners state that "... we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it."¹³⁷

The government had not complied with this obligation, however, and the Migratory Birds Convention between Great Britain (on behalf of Canada) and the United States and Mexico and the legislation implementing it,¹³⁸ substantially restricted the treaty rights. Despite his obvious incredulity about this "breach of faith", Johnson J.A. gave effect to the federal law. As if compelled to apologize for the government's action, he stated:

I cannot believe that the government of Canada realized that in implementing the Convention they were at the same time breaching the treaties that they had made with the Indians. It is much more likely that these obligations under the treaties were overlooked - a case of the left hand having forgotten what the right hand had done.¹³⁹

This case established that federal law could supersede treaty rights, and it has since been followed in other similar cases.¹⁴⁰ It should be emphasized that the treaty question in Sikyea expressly contemplated future regulatory laws, and it might be

argued that the decision cannot apply to "absolute" treaty guarantees.¹⁴¹ This argument has not yet been accepted in any decision.

Since the decision in R. v. White and Bob¹⁴² it has been settled that provincial law cannot over-ride the terms of a treaty. Section 88 of the Indian Act, as it has been interpreted,¹⁴³ confirms this. In R. v. White and Bob, Davey J.A. suggested, in obiter, that even absent s. 88 of the Indian Act provincial law could not impair treaty rights because:

Legislation that abrogates or abridges the hunting rights reserved to Indians under the treaties and agreements by which they sold their ancient territories to the Crown and to the Hudson's Bay Company for white settlement is, in my respectful opinion, legislation in relation to Indians because it deals with rights peculiar to them.¹⁴⁴

This obiter has not been adopted by later decisions.¹⁴⁵

One matter which these decisions do not address is whether the termination of treaty rights must be done expressly, or whether it may be accomplished simply by passing laws which are incompatible with the treaty guarantees. Strong arguments can be advanced in favour of the view that treaty rights should not be altered or removed except by an express declaration to that effect.¹⁴⁶ Support can also be drawn from the statement by Chief Justice Dickson in Simon v. The Queen, that "(g)iven the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises. As Douglas J. said in United States v. Santa Fe Pacific R. Co. [314 U.S. 339 (1941)], at p. 354, " 'extinguishment cannot lightly be implied' ".¹⁴⁷

(iii) Significance of Entrenchment

It is not strictly accurate to say that s. 25 does not guarantee treaty rights,¹⁴⁸ because to the extent that this section shields these rights from diminution by other Charter rights and freedoms, it is a form of guarantee. It is more accurate to say that s. 25 is not an independently enforceable guarantee of rights. In this respect it differs from s. 35 of the Constitution Act, 1982. If this distinction as to enforceability is remembered, it becomes obvious that the identical terms in these provisions should be interpreted in the same way, subject to the impact of the addition of the word "existing" in s. 35, which is discussed in the next Chapter.

What, then, is the significance of the inclusion of treaty rights in s. 25? The rules concerning liberal interpretation of treaties in favour of the interests of the Indians have evolved independently of any such constitutional provision. Section 25 does not clarify the legal status of the treaties, although it may be argued that s. 35 establishes a new status in law for the treaties, and that s. 25 should be interpreted in a like manner. A similar argument with respect to s. 25 could be advanced along the following lines. If the purpose of s. 25 is to shield aboriginal treaty rights from abrogation by the operation of other Charter provisions, the treaty obligations should be liberally construed to the benefit of the Indian signatories and their descendants, because a restrictive interpretation would have the effect of narrowing the scope of a remedial constitutional guarantee. In this respect, the inclusion of treaty rights in s. 25 may have the effect of bolstering an existing method of interpreting treaties.

Basically, however, the inclusion of treaty rights in s. 25 is properly viewed, in the context of the section as a whole, as a necessary part of the prism designed to ensure that the unique rights that pertain to aboriginal peoples are not obliterated or diminished by the operation of other Charter provisions. The treaties have been recognized by successive governments as solemn obligations, and they form a vital

part of the legal structure for the protection of the rights of aboriginal peoples. Though s. 25 does little to clarify the difficult problems connected with these treaties, it does offer a means by which the treaty obligations can continue to be made meaningful for their intended beneficiaries.

2. Rights or Freedoms Recognized By the Royal Proclamation, 1763

In P. v. Secretary of State for Foreign and Commonwealth Affairs, Lord Denning described the Royal Proclamation in the following way:

The royal proclamation of 1763 had great impact throughout Canada. It was regarded as of high constitutional importance. It was ranked by the Indian peoples as their Bill of Rights, equivalent to our own Bill of Rights in England 80 years before ...

To my mind the royal proclamation of 1763 was equivalent to an entrenched provision of the colonies in North America. It was binding on the Crown 'so long as the sun rises and the river flows.' I find myself in agreement with what was said a few years ago in the Supreme Court of Canada in Calder v. A-G of British Columbia (1973), 34 D.L.R. (3d) 145 at 203, in a judgment in which Laskin J. concurred with Hall J. [who] said:

'This Proclamation was an Executive Order having the force and effect of an Act of Parliament and was described by Gwynne, J. ... as the "Indian Bill of Rights" ...

Its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories ... In respect of this Proclamation, it can be said that when other exploring nations were showing a ruthless disregard of native rights England adopted a remarkably enlightened attitude towards the Indians of North America. The Proclamation must be regarded as a fundamental document upon which any just determination of original rights rests.'

The 1763 proclamation governed the position of the Indian peoples for the next hundred years at least. It still governs

their position throughout Canada, except in those cases when it has been supplemented or superseded by a treaty with the Indians ... But I must say that the proclamation is most difficult to apply so as to enable anyone to say what lands are reserved to the Indians and what are not. It contains general statements which are wanting in particularity. In this respect it is like other Bills of Rights.¹⁴⁹

This passage reveals both the reason for the inclusion of the specific reference to the Royal Proclamation in paragraph 25(a), and also the difficulties associated with it.

The reference to the rights or freedoms recognized by the Royal Proclamation, 1763, is not intended to limit the scope of rights described in the opening paragraph as "aboriginal, treaty or other rights or freedoms". The use of the word "including" in the opening paragraph makes it clear that the specific sub-categories mentioned in paragraphs (a) and (b) are merely specific examples of the previously mentioned genus of rights.

This does not, however, define the "rights or freedoms that have been recognized by the Royal Proclamation, 1763", nor does it explain their continuing relevance in Canada. As the passage quoted earlier indicates, the Proclamation is of great symbolic importance to aboriginal peoples.¹⁵⁰ It has been described as the "Indian Bill of Rights",¹⁵¹ and while one cannot deny the symbolic importance of the inclusion of a specific reference to the Proclamation in the Charter, it is submitted that it is of practical importance as well.

In the 1926 case of R. v. Lady McMaster Maclean J. stated, "The proclamation of 1763 ... has the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed."¹⁵² This has been affirmed in several recent decisions,¹⁵³ and thus the relevance of the Proclamation derives from its continuing vitality. Until the enactment of s. 25 it could have been argued that the federal government was constitutionally empowered, at least after the Statute of

Westminster, 1931, to amend or repeal the Proclamation insofar as it applies within Canada, but this is no longer possible.¹⁵⁴ The reference in s. 25 is, in the context of that section, meant to preserve these rights only from possible reduction by other Charter rights, and the Proclamation is not included in Schedule I of the Constitution Act, 1982 so the amending formula in the Constitution Act, 1982 does not apply to amendments to it. Nevertheless, it is submitted that legislative abrogation of the rights recognized by the Royal Proclamation would amount to an amendment of s. 25 not in accordance with the amending formula specified in the Constitution Act.

The Royal Proclamation is the traditional starting-point for analysis of aboriginal title to ancestral lands. Although the view that the Proclamation is the sole source for the aboriginal interest in land¹⁵⁵ is no longer accepted in Canadian law,¹⁵⁶ it is still accepted as an authoritative statement of the rules concerning this interest. The effect of the portions of the Proclamation that pertain to aboriginal peoples has been summarized by Brian Slattery in this way:

The Proclamation is one of those legal instruments that does simple things in complicated ways. The central idea of its Indian provisions is very simple: to ensure that no Indian lands in America are taken by British subjects without native consent. This objective is secured by three main measures: colonial governments are forbidden to grant any unceded Indian lands, British subjects to settle on them, and private individuals to purchase them, with a system of public purchases adopted as the official mode of extinguishing Indian title ...

In brief, the Proclamation recognized that lands possessed by Indians throughout British territories in America were reserved for their exclusive use, unless previously ceded to the Crown. Prior to a public cession of such lands, they could not be granted away or settled.¹⁵⁷

Thus, at a minimum, the Proclamation affirmed the right of aboriginal people to undisturbed possession of their ancestral lands until they agreed to a voluntary surrender of these lands to the Crown. If the Proclamation is not the sole source of

these rights, it is at least the best available indicator of them. The Proclamation also established the model of extinguishing aboriginal title by treaty, which was followed from 1763 onwards, and which still subsists, with slight variations, today.

Two particular difficulties associated with the mention of the Proclamation in s. 25 were alluded to by Lord Denning in the passage quoted earlier: the precise area covered, and the scope of the rights recognized.¹⁵⁸ The question of the geographical extent of the Proclamation has been analyzed in great detail elsewhere, and this will not be repeated.¹⁵⁹ The scope of the rights recognized by the Proclamation is a matter which has not yet received a great deal of attention, but it is obviously vital to an understanding of the importance of paragraph 25(a) of the Charter. By the terms of the relevant Proclamation provisions, the document protects rights relating to land use, but it may also preserve other rights.

Support for a broad interpretation of the rights recognized in the Proclamation derives from the text itself, and the legal and logical imperatives from which it was derived. In this document the King asserts ultimate sovereignty over the Indians and their lands, but also acknowledges their "semi-autonomous status" in the description of them as "Nations or Tribes with whom We are connected, and who live under Our Protection."¹⁶⁰ This, when viewed in the context of the legal framework of the day, has been alleged to support such principles as the recognition of the aboriginal peoples as nations, the necessity of mutual consent to the alteration of the relationship established by the Proclamation, and an implied right to Indian self-government within lands not "ceded to or purchased" by the Crown.¹⁶¹

The merit of the argument in favour of an expansive interpretation of the rights recognized by the Royal Proclamation must ultimately be resolved by administrators and courts. Paragraph 25(a) will not bolster this view, save to the extent that a broad interpretation can be favoured because it will, in turn, expand the scope of a remedial

constitutional guarantee.¹⁶² As a purely legal matter, this question must be resolved by reference to historical and legal documents dating back to the eighteenth century, and though the resolution of the matter is undoubtedly vital to a proper understanding of paragraph 25(a), such a task is beyond the scope of this thesis.

3. Rights or Freedoms Acquired By Way of Land Claims Agreements

Paragraph 25(b) is one of the few provisions contained in the Constitution Act, 1982, which have since been amended. In its original form it referred to "any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement." The amended version, which is now in force,¹⁶³ refers to "any rights or freedoms that now exist by way of land claims agreements or may be so acquired." The changes relate to the description of the origin of these rights, changed from "land claims settlement" to "land claims agreements", and to the temporal limitation, changed from "may be acquired" to "now exist ... or may be so acquired."

The latter amendment renders moot a controversy which had arisen among academic scholars concerning the question of whether rights or freedoms acquired under land claims settlements prior to 1982 were to be included within paragraph 25(b) in its original form.¹⁶⁴ The paragraph as amended is explicit on this point, and so it need not be discussed further.

The change from "land claims settlement" to "land claims agreements" does not quell another debate, concerning the question of whether paragraph 25(b) protects only rights or freedoms acquired by what are currently called "comprehensive claims", or whether it also extends to "specific claims" agreements.¹⁶⁵ This terminology derives from recent statements of federal government policy concerning aboriginal land claims.¹⁶⁶ According to these statements:

Comprehensive land claims relate to the traditional use and occupancy and the special relationships that Native people have had with the land since time immemorial.¹⁶⁷

The term "comprehensive claims" is used to designate claims which are based on traditional Native use or occupancy of land. Such claims normally involve a group of bands or Native communities within a geographic area and are comprehensive in their scope, including, for example, land, hunting, fishing and trapping rights and other economic and social benefits ... The term "specific claims" ... refers to those claims which relate to the administration of land and other Indian assets and to the fulfillment of treaties.¹⁶⁸

Professor Lysyk (as he then was) advanced the view that paragraph 25(b) referred solely to comprehensive claims, because current usage indicated that only this sort of agreement would properly be labelled as a "land claims settlement".¹⁶⁹ Professor Sanders disputes this argument, claiming that the relevant words should include "specific claims" agreements that relate to land, as distinct from those that relate to treaty annuity payments or the administration of trust funds.¹⁷⁰

A comparison of the original and amended versions of paragraph 25(b) does little to clarify the matter, because the arguments outlined above apply as easily to "land claims agreements" as to "land claims settlement(s)". If one focuses on the current version, a literal reading of the words used would indicate that both comprehensive and specific claims settlements should be included, as "agreements" respecting "land". On the other hand, it is undoubtedly correct that current usage of the phrase more easily lends itself to comprehensive than to specific claims.¹⁷¹

At this juncture the non-exclusive nature of paragraphs (a) and (b) in s. 25 assumes an added importance, because even if specific claims agreements are not subsumed within paragraph 25(b), it is submitted that any rights or freedoms acquired pursuant to such agreements are shielded by the general phrase "aboriginal, treaty or other rights or freedoms" in s. 25. The exclusion of specific claims agreements from

paragraph 25(b) does not, therefore, render such agreements vulnerable to constitutional challenge. All original and consequential agreements between the Crown and aboriginal peoples concerning, inter alia, aboriginal title are, therefore, shielded from other Charter provisions by s. 25.

4. Other Rights or Freedoms That Pertain to the Aboriginal Peoples

The opening part of s. 25 refers to three distinct categories of rights or freedoms that pertain to the aboriginal peoples of Canada: "aboriginal", "treaty" and "other". The mention of "other" rights or freedoms is a major difference between s. 25 of the Charter and s. 35 of the Constitution Act, 1982. Although it is impossible to catalogue all of the rights or freedoms this word may refer to, several general observations can be offered.

These unidentified "other" rights must, according to the terms of the section, pertain to the aboriginal peoples. The reference only makes sense if it is understood to mean that these rights pertain to aboriginal peoples qua aboriginal peoples, and not as citizens of Canada, or residents of a particular province or territory. The statutory context, the marginal note, and common sense all support this interpretation.

The special or unique rights which are protected by this reference in s. 25 can be divided into two broad categories: constitutional and statutory or common law. Among the constitutional rights or freedoms that pertain to the aboriginal peoples, reference will be made here only to the Natural Resource Transfer Agreements,¹⁷² which were confirmed by the British North America Act, 1930.¹⁷³ In each of these agreements an identical paragraph recognizing Indian hunting, fishing and trapping rights was inserted:

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and

subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them of hunting, trapping and fishing game for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.¹⁷⁴

The Supreme Court of Canada has on three occasions declared that the overall purpose of these paragraphs was to effect a "merger and consolidation" of the treaty rights of the Indians.¹⁷⁵ The significance of the inclusion of these rights within s. 25 is therefore that they extend beyond the guarantees contained in the original treaties with prairie Indians,¹⁷⁶ and yet might not be described as "aboriginal rights" because they are exercised in some areas which are not ancestral lands, and in any event the aboriginal title to the area has been surrendered by way of treaty. Although the Natural Resources Transfer Agreements were previously given Constitutional status, inclusion of these rights is significant as a guarantee against their abrogation by any provision in the Charter.

Various statutory or common law rights or freedoms that pertain to aboriginal peoples naturally fall within the scope of the phrase "other rights or freedoms" in s. 25. The most important statutory source of these rights is the Indian Act,¹⁷⁷ although other examples of unique statutory rights pertaining to aboriginal people are easily found.¹⁷⁸ As Professor Sanders has pointed out, the Indian Act membership system concerns "rights", and these rights "pertain to" the aboriginal peoples.¹⁷⁹ Therefore this structure might be shielded from challenge under the Charter provisions, specifically ss. 15 and 28.

Does s. 25 therefore "freeze" all existing statutory and common law rules respecting aboriginal peoples which can be described as "rights" or "freedoms"? The answer is uncertain. An argument similar to that advanced earlier with respect to the

Royal Proclamation, 1763, can be made that any restriction on these existing rights or freedoms is prohibited, by implication, by s. 25. On the other hand, it can be argued that the section would meet its designated purpose if it merely prevents the diminution by the operation of other Charter rights of whatever special rights pertaining to aboriginal peoples exist from time to time. If this argument is accepted, governments would be free to amend legislation or modify common law rules respecting aboriginal peoples, and s. 25 would attach to whatever special rights or freedoms existed at any given point in time. The obvious problem with such an interpretation is that the scope of a remedial Charter provision is then subject to modification by ordinary legislation. This is an undesirable and anomalous result, which may be contrasted with the situation which prevails with respect to other Charter rights, which can be subject to reasonable limits according to s. 1, but the scope of the substantive guarantees cannot be affected by ordinary statute.

IV. The Use of Section 25 as an Interpretive Prism

Section 25 of the Charter is an interpretive prism, which will modify the scope or application of other Charter rights in order to preserve aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada. The arguments presented in this Chapter will be applied to three concrete situations which have arisen in decided cases, in order to illustrate its significance. This will be preceded by general observations on the use of s. 25.

In order to trigger s. 25 of the Charter several prerequisites must be satisfied. The case must involve another right or freedom guaranteed by the Charter. The case must also be such that the enforcement of this other Charter right has the potential to abrogate or derogate from one or more of the rights pertaining to the aboriginal peoples mentioned in s. 25. Section 25 should then be applied as an interpretive prism,

which will modify the usual definition or scope of the substantive guarantee, so as to preserve and protect the particular aboriginal, treaty or other rights or freedoms which would otherwise be impinged upon. Only then should a court consider whether the limit on the right or freedom as modified by s. 25, is reasonable and demonstrably justified in a free and democratic society, in accordance with s. 1.

This analysis can be illustrated by reference to three cases. The first, R. v. Rocher,¹⁸⁰ involved a challenge by a white man to an exemption from the licencing requirements granted by s. 22 of the Northwest Territories Fishery Regulations¹⁸¹ to "an Indian, Inuk or person of mixed blood" who is fishing for food by traditional methods. The accused, Rocher, is a white man who gains his livelihood by, inter alia, hunting, fishing and trapping, and who was arrested while fishing for food for his dogs. He alleged that s. 22 contravened the guarantee of "equality before the law" in s. 1(b) of the Canadian Bill of Rights.¹⁸² For the purposes of this discussion the case will be treated as involving s. 15 of the Charter.¹⁸³

This case would involve a Charter claim based on s. 15, which would have the effect, if successful, of diminishing a statutory right provided to aboriginal peoples. It would abrogate or derogate from a right that pertains to the aboriginal peoples, and therefore s. 25 is triggered. The equality right in s. 15 must be viewed through the prism of s. 25 in order to prevent the s. 15 guarantee from obliterating the protection of aboriginal rights. If this is done in the context of this particular case, it becomes clear that the racial criterion employed in the exemption does not offend s. 15 as modified by s. 25. The guarantee of equality in s. 15 does not preclude such a provision with respect to aboriginal peoples, although it might do so in respect of other racial groups, because the operation of s. 25 precludes such a finding. Equality in a society which respects and protects the unique rights and freedoms of aboriginal peoples does not require "colour-blind" treatment. It is not "equality as sameness".

Instead s. 15, as modified by s. 25, requires merely that legislation which affects the rights of aboriginal peoples not be judged according to the standard which would otherwise apply. Equality in this sense is still a meaningful guarantee, because it prevents the enforcement of unnecessary or irrational distinctions not related to the basic need to preserve the unique rights of aboriginal peoples,¹⁸⁴ while at the same time it does not render nugatory these fundamental rights. This mirrors the actual result in the Rocher case, but it is submitted that s. 25 provides a surer guide for this analysis than has heretofore existed, and it ensures that the appropriate factors are considered.

Another situation in which the application of s. 25 can be illustrated concerns s. 98(1) of the Criminal Code,¹⁸⁵ which requires a court in certain circumstances to make an order, in addition to other punishment, prohibiting the accused "from having in his possession any firearm or any ammunition ... for any period of time specified in the order ..." In several cases where this provision has been invoked against aboriginal persons, it has been challenged as "cruel and unusual treatment or punishment" contrary to s. 12 of the Charter.¹⁸⁶

In the ordinary course of events, it is submitted that s. 12 would have no application to s. 98(1), because it is neither "cruel" nor "unusual" to impose such a sentence upon persons who have been convicted of crimes involving violence. When s. 98(1) is applied in respect of an aboriginal person who pursues a traditional lifestyle, and who gains a livelihood by hunting or trapping, however, s. 12 is triggered. In this instance the Charter right is not being raised in a manner which abrogates or derogates from the rights of aboriginal peoples; rather it is the effect of the limited scope of the traditional definition of the Charter right which accomplishes this result. Any other interpretation of s. 12 in this situation would, it is submitted, involve construing a Charter guarantee so as to abrogate or derogate from a right that

pertains to aboriginal peoples, and therefore contrary to the mandatory command of s. 25.

Section 12 should be viewed through the prism of s. 25, which will alter the usual meaning of the relevant words. The effect of this will be that s. 98(1) may be found to be contrary to s. 12, if it has the effect of depriving an individual of the right to pursue the traditional pursuits protected by "aboriginal, treaty or other rights" and if it cannot then be justified under s. 1. All of this depends upon the particular facts of each case; s. 25 merely offers an avenue by which these issues can be raised and analyzed.¹⁸⁷

The final illustrative case is Jack and Charlie v. The Queen,¹⁸⁸ in which the accused raised a defence based, inter alia, on freedom of religion, to a charge of hunting deer out of season, contrary to the British Columbia Wildlife Act.¹⁸⁹ It was admitted at trial that the two accused had shot a deer out of season, but they testified that they did so only for the purpose of obtaining meat required for a religious ceremony. Mr. Justice Beetz wrote the judgment of the unanimous Court, and he rejected the defence because he accepted the two arguments of the Crown on this point:

- (a) the hunting itself was not a religious practice,
- (b) the intended use of the deer meat in a religious ceremony amounts merely to "motive" and is therefore irrelevant to legal culpability.¹⁹⁰

The application of s. 25 as a prism through which the guarantee of freedom of religion in s. 2(a) of the Charter can be viewed on these facts does not dictate a different result in this case. Section 25 would ensure that aboriginal religious practices received protection under s. 2(a) which is comparable to that afforded to other religions, but in the light of the conclusions of the trial judge that the killing of the

deer was not part of the actual religious ceremony, it is difficult to conclude that ss. 2(a) and 25 would provide a defence to the charge arising from this act. Section 25 would, however, prevent a court from adopting a restrictive interpretation of s. 2(a) which would exclude traditional aboriginal ceremonial practices from the ambit of "freedom of religion" under the Charter.

This is how s. 25 should operate in a Charter case. It is an interpretive prism, and the refraction which it provides will protect the rights and freedoms of the aboriginal peoples of Canada.

CHAPTER 5 ENDNOTES

1. See also: s. 26 - preserving rights and freedoms not expressly guaranteed in the Charter; s. 27 - preserving multiculturalism; s. 28 - preserving gender equality in the interpretation of Charter rights; s. 29 - preserving constitutional rights of "denominational, separate or dissentient schools". See also K. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada" in The Canadian Charter of Rights and Freedoms: Commentary (W.S. Tarnopolsky and G.A. Beaudoin Eds.), Toronto: Carswell, 1982, 467.
2. On the use of headings to interpret the Charter see: Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357.
3. See, for example: Lysyk, supra, note 1; D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983), 61 Can. Bar Rev. 315; Slattery, infra, note 62; K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 Sup. Ct. L. Rev. 255.
4. Lavell v. A.-G. Canada, [1974] S.C.R. 1349.
5. R.S.C. 1970, c. I-6.
6. For tentative appraisals, see: M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982), 4 Sup. Ct. L. Rev. 131; A. Bayefsky and M. Eberts eds., Equality Rights and the Canadian Charter of Rights and Freedoms, Toronto: Carswell, 1985.
7. Section 25 states that the guarantee of certain rights "shall" not be construed so as to diminish aboriginal, treaty or other rights.
8. (1984), 48 O.R. (2d) 395 (C.A.).
9. R.S.O. 1980, c. 453.

10. Supra note 8, at pp. 426-27.
11. [1985] 3 W.W.R. 481 (S.C.C.). See also R. v. Keegstra (1984), 19 C.C.C. (3d) 254 (Alta. Q.B.).
12. R.S.C. 1970, c. L-13.
13. Supra note 11, at p. 519. See, to the same effect, R. v. W.H. Smith Ltd., [1983] 5 W.W.R. 235 (Alta. Prov. Ct.).
14. Reference re Education Act of Ontario and Minority Language Education Rights (1984), 47 O.R. (2d) 1 (C.A.).
15. Ibid., at p. 39.
16. Ibid., at p. 44 et seq.
17. Ibid., at p. 49.
18. (1986), 53 O.R. (2d) 513 (C.A.).
19. Zuber, Cory and Tarnopolsky, J.J.A.
20. Howland C.J.O. and Robins J.A.
21. For example, the Canadian Bill of Rights; see Singh v. Minister of Employment and Immigration (1985), 17 D.L.R. (4th) 422 (S.C.C.), per Beetz J.
22. This analytical structure for Charter cases is accepted in many cases; see: Re Federal Republic of Germany and Rauca (1983), 41 O.R. (2d) 224 (C.A.).
23. See, especially: A.-G. Que. v. Que. Protestant School Boards, [1984] 2 S.C.R. 66; R. v. Big M Drug Mart, [1985] 3 W.W.R. 481 (S.C.C.).

24. Constitutional Law of Canada (2nd ed.), Toronto: Carswell, 1985, at p. 682.
25. The other important aspect of s. 1, which concerns onus of proof, is not relevant to this discussion. See Hogg, ibid., note 24, at pp. 678-82.
26. R. v. Oakes, [1986] 1 S.C.R. 103 at p. 136 per Dickson J.
27. See, on this point: Re Klein and Law Society of Upper Canada (1985), 50 O.R. (2d) 118 (Div. Ct.); S. Braun, "Should Commercial Speech Be Accorded Prima Facie Constitutional Recognition Under the Canadian Charter of Rights and Freedoms?" (1986), 18 Ottawa L. Rev. 37.
28. Section 1 states that "only" limits which satisfy its stringent standards will be acceptable.
29. See, for example, Hogg, supra note 24. See, for Charter cases to the same effect: Re Mia and Medical Services Commission (1985), 17 D.L.R. (4th) 385 (B.C.S.C.); Re Section 94(2) of the Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486; Dubois v. The Queen, [1985] 2 S.C.R. 350.
30. The substantive content of these provisions will be discussed in Part (iii) of this Chapter, and in the following Chapter. The present discussion deals only with aspects of comparison which illuminate the meaning and function of s. 25.
31. Supra note 24, at p. 567.
32. The other key words are "abrogate" and "derogate", but these have been discussed earlier in this Chapter.
33. The meaning and status of "aboriginal" rights is discussed in detail in the following Chapter, and so it was viewed as unnecessary to repeat this analysis here.

34. And, by inference, s. 35 as well. The significance of the addition in s. 35 of the word "existing" will be discussed in the next Chapter.
35. See M.W. La Forest, "Native Fishing and Hunting Rights in New Brunswick" (1980), 29 U.N.B.L.J. 111, at pp. 117-120. There are at least 19 of these treaties which related to what is now Canadian territory.
36. D.E. Sanders, "Indian Hunting and Fishing Rights" (1973-74), 38 Sask. L. Rev. 45, at p. 52.
37. G. Brown and R. Maguire, Indian Treaties in Historical Perspective, Ottawa: D.I.A.N.D., 1979, at p. 10. This view has been challenged recently: R.L. Barsh and J.Y. Henderson, "Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and 'Constitutional Renewal' " (1982), 17 J. Can. Studies 55, at pp. 62-65.
38. See Indian Treaties and Surrenders, 3 vols., Ottawa: D.I.A.N.D.; A. Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories (1880), reprinted in Coles Canadiana Collection. See also, B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 Am. J. Comp. L. 361.
39. [1929] 1 D.L.R. 307 (N.S. Co. Ct.).
40. S.N.S. 1936, c. 4.
41. Supra note 39, at pp. 313-14.
42. S.C. 1951, c. 29.
43. R. v. Simon, [1985] 2 S.C.R. 387, at p. 399.
44. (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193 (B.C.C.A.); aff'd. (1966), 52 D.L.R. (2d) 481 (S.C.C.).

45. R.S.B.C. 1960, c. 160.
46. See P. Cumming and N. Mickenberg, Native Rights in Canada, (2nd ed.), Toronto: General Publishing Co., 1972, at p. 66 (hereinafter Cumming and Mickenberg, Native Rights in Canada).
47. Quoted in the judgment of Davey J.A., supra note 44, at p. 615 (D.L.R.). The relevant portion of the clause states "... it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly."
48. Quoted in the judgment of Davey J.A., ibid., at p. 616.
49. Ibid., at pp. 648-49.
50. R. v. Simon, supra note 43.
51. R.S.N.S. 1967, c. 163.
52. Supra note 50, at p. 401.
53. Ibid., at p. 410.
54. (1965), 50 D.L.R. (2d) 613, at p. 649; 52 W.W.R. 193, at p. 232 (B.C.C.A.).
55. This question is probably of more significance with respect to s. 35 than s. 25, because it is difficult to conceive of the need to shield such a provision from diminution by the application of another Charter right. In s. 35, on the other hand, an affirmative answer to the question posed would add an entirely new dimension to the constitutional recognition and affirmation of treaty rights. Since this question is not considered in the following Chapter, it will be dealt with at some length here.

56. Quoted in L.C. Green, "Legal Significance of Treaties Affecting Canada's Indians" (1972), 1 Anglo-Am. L. Rev. 119, at p. 130.
57. [1956] S.C.R. 618.
58. Ibid., at p. 631, per Kellock J. (Abbott J. concurring).
59. Professor Lysyk (as he then was) argues that "a more generous interpretation" is appropriate: see "The Rights and Freedoms of the Aboriginal Peoples of Canada" in The Canadian Charter of Rights and Freedoms: Commentary (W.S. Tarnopolsky and G.A. Beaudoin eds.), Toronto: Carswell, 1982, 467, at p. 485.
60. Article 2(1), in (1969), 8 Int'l Legal Materials 679.
61. It has been suggested that s. 88 of the Indian Act itself is implementing legislation: Cumming and Mickenberg, Native Rights in Canada, supra note 46, at p. 55, note 21.
62. Obviously a different argument obtains in respect of s. 35, but it is submitted that the reference in it to "treaty" rights should be similarly extended in view of the principles of interpretation which apply to the interpretation of a constitution. See Lysyk, supra note 59; and B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 Queen's L.J. 232, at p. 243, note 15.
63. "Prior Claims: Aboriginal People in the Constitution of Canada" in Canada and the New Constitution: The Unfinished Agenda (S.M. Beck and I. Bernier eds.), Montreal: Institute for Research on Public Policy, 1983, Vol. 1, 225, at p. 247.
64. Quoted earlier, supra note 60.
65. Supra note 56, at p. 122. See also Cumming and Mickenberg, Native Rights in Canada, supra note 61, at p. 54.

66. Reprinted in R.S.C. 1970, Appendices, p. 125.
67. "The Governor and Company of Connecticut and Mohegan Indians" (1769), quoted in Barsh and Henderson, supra note 37, at p. 65.
68. The First Nations: Indian Government and the Canadian Confederation, Federation of Saskatchewan Indians, 1980, Chapter 2.
69. Ibid., at pp. 9-10.
70. Ibid., at p. 13. The doctrine of discovery is discussed more thoroughly in Chapter 6.
71. Supra note 56.
72. See text accompanying note 39 et seq. Some of the relevant Treaty provisions are reproduced in Cumming and Mickenberg, Native Rights in Canada, Appendix III; see also B. Morse ed., Aboriginal Peoples and the Law, Ottawa: Carleton University Press, 1985, Chapter 4, by Bruce Wildsmith.
73. See Barsh and Henderson, supra note 37, at p. 65.
74. See, for example, R. v. Syliboy, supra note 39, and Francis v. The Queen, supra note 57.
75. See Cumming and Mickenberg, Native Rights in Canada, supra note 61, at p. 55, note 21.
76. See, for example, N.A.M. MacKenzie, "Indians and Treaties in Law" (1929), 7 Can. Bar Rev. 561.
77. [1985] 2 S.C.R. 387, at p. 404.
78. A.-G. Can. v. A.-G. Ont.; A.-G. Que. v. A.-G. Ont., [1897] A.C. 199.

79. Ibid., at p. 213.
80. Loc cit.
81. (1980), 102 D.L.R. (3d) 602, at p. 607 (Fed. Ct., T.D.). See also R. v. Batisse (1978), 19 O.R. (2d) 145 (Dist. Ct.); Town of Hay River v. The Queen (1980), 101 D.L.R. (3d) 184, at p. 186; R. v. Tennisco, [1981] 4 C.N.L.R. 138, at p. 148 (Ont. S.C.).
82. In a speech given in Vancouver in 1969 Prime Minister Trudeau pledged that the government "... will recognize treaty rights. We will recognize forms of contract which have been made with the Indian people by the Crown ...", reprinted in Cumming and Mickenberg, Native Rights in Canada, Appendix VI, at p. 331.
83. Statement of the Government of Canada on Indian Policy (1969).
84. See S. Weaver, Making Canadian Indian Policy: The Hidden Agenda 1968-1970, Toronto: University of Toronto Press, 1981.
85. "Prior Claims: Aboriginal People in the Constitution of Canada", supra note 63, at p. 248. This problem has also arisen with respect to collective agreements.
86. Subject to limitations on recovery and rights of action against the Crown.
87. See A. Leff, "Thomist Unconscionability" (1979-80), 4 Can. Bus. L.J. 424; P. Atiyah, "Contract and Fair Exchange" (1985), 35 U.T.L.J. 1.
88. (1978), 19 O.R. (2d) 145.
89. Ibid., at p. 151.
90. See S. Waddams, The Law of Contracts (2nd ed.), Toronto: Canada Law Book, 1984; G.H. Treitel, The Law of Contract (6th ed.), London: Stevens & Sons, 1983.

Such an argument was advanced in Pawis v. The Queen (1979), 102 D.L.R. (3d) 602; and in Re Paulette (No. 2) (1973) 42 D.L.R. (3d) 8 (N.W.T.S.C.); rev'd on other grounds (1975) 63 D.L.R. (3d) 1, aff'd [1977] 2 S.C.R. 628.

91. This argument is discussed more fully in the following Chapter, in the discussion of the word "existing".
92. So, for example, a defence to a charge under provincial conservation legislation, which could be raised on the basis of s. 88 of the Indian Act, would no longer be open if the treaty is not valid.
93. For example, laches, acquiescence and waiver. As well there are several difficulties inherent in the conception of treaties as contracts with the Crown: see supra note 90.
94. [1932] 4 D.L.R. 774, 2 W.W.R. 337 (Alta. S.C., App. Div.).
95. Supra note 78.
96. Supra note 94, at p. 788 (D.L.R.).
97. Ibid., at p. 788 (D.L.R.).
98. See Cumming and Mickenberg, Native Rights in Canada, at pp. 57-58. See also D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada", supra note 63, at p. 248.
99. [1985] 2 S.C.R. 387.
100. Ibid., at p. 404.
101. See, for example, Indian Treaties and Surrenders, supra note 38; Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories, supra note 38; see also the texts infra note 108.

102. See the cases quoted in Cumming and Mickenberg, Native Rights in Canada, at p. 62, note 65. This is discussed in the next section of this Chapter.
103. (1981), 62 C.C.C. (2d) 227; 34 O.R. (2d) 360. Leave to appeal to the Supreme Court of Canada denied: [1981] 2 S.C.R. xi.
104. R.S.O. 1970, c. 186 [now R.S.O. 1980, c. 182], O. Reg. 576, 1976.
105. Supra note 103, at p. 230 (C.C.C.).
106. Ibid., at p. 232.
107. The authority of the case on this point is not reduced, it is submitted, by the fact that this evidence was considered by consent of both counsel, who "agreed that the minutes of this council meeting recorded the oral portion of the 1818 treaty and are as much a part of that treaty as the written articles of the provisional agreement.", ibid., at pp. 230-31.
108. See, for example, R.A. Price ed., The Spirit of the Alberta Indian Treaties, Montreal: Institute for Research on Public Policy, 1979; R. Fumoleau, As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939, Toronto: McClelland and Stewart, 1975; D. Opekokew, The First Nations: Indian Government and the Canadian Confederation, supra note 68; I.A. Getty and D.B. Smith, One Century Later: Western Canadian Reserve Indians Since Treaty 7, Vancouver: University of British Columbia Press, 1978.
109. See, for example, Waddams, supra note 90; Gallen v. Allstate (1984), 9 D.L.R. (4th) 496 (B.C.C.A.).
110. Simon v. The Queen, [1985] 2 S.C.R. 387, at p. 402. See also R. v. White and Bob (1965), 50 D.L.R. (2d) 613, at p. 652, where Norris J.A. adopted a rule from an American case that "(t)he language used in treaties with the Indians should never be construed to their prejudice."

111. (1981), 62 C.C.C. (2d) 227; 34 O.R. (2d) 360, at pp. 235-36 (C.C.C.), citing R. v. White and Bob, ibid., as authority for this proposition.
112. This was emphasized by Cartwright J., in dissent, in R. v. George, [1966] S.C.R. 267, at p. 279: "We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such a manner that the honour of the sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty." This principle was re-affirmed in R. v. Taylor and Williams, supra note 111, at p. 235 (C.C.C.).
113. The inequality was linguistic, cultural, social and legal. The treaties were, after all, drafted in a language and form unfamiliar to the Indians who "signed" them, and they have since been interpreted in courts where aboriginal people were often not represented. As well, the translation of the treaties was not always in accord with the oral explanations given to the signatories.
114. Thus, for example, the rules concerning capacity to contract, the plea of non est factum, and in Ontario the rule from Tilden Rent-a-Car v. Clendenning (1978), 83 D.L.R. (3d) 400 (Ont.C.A.), are all broadly analogous to this principle. See Treitel, supra note 109, and Waddams, supra note 109.
115. Supra note 111.
116. Ibid., at p. 232.
117. Ibid., at p. 236. See also R. v. Napoleon, [1986] 1 C.N.L.R. 86 (B.C.C.A.).
118. See, for example, R. v. Bartleman (1984), 12 D.L.R. (4th) 73 (B.C.C.A.). See also A.-G. Ontario v. Francis, [1870-1890] 2 C.N.L.C. 6 (Ont. H.C., Ch. D.), in which the Indian definition of treaty terms was given effect to.

119. A. Morris, The Treaties of Canada With the Indians of Manitoba and the North-West Territories, Toronto: Belford, Clarke & Co., 1880 (Coles reprint, 1970), at p. 355.
120. See Cumming and Mickenberg, Native Rights in Canada, at pp. 128-29.
121. (1935), unreported, cited in R. v. Johnston (1966), 56 D.L.R. (2d) 749 (Sask. C.A.), at p. 754. An edited version of this decision is reproduced in Morse, Aboriginal Peoples and the Law, supra note 72, at p. 399
122. Ibid., at p. 754.
123. (1966), 56 D.L.R. (2d) 749 (Sask. C.A.).
124. R.S.S. 1953, c. 232.
125. Supra note 123, at p. 751.
126. Ibid., at p. 753 (emphasis in the original).
127. See Price, supra note 108; and see P.A. Barkwell, "The Medicine Chest Clause in Treaty No. 6", [1981] 4 C.N.L.R. 1.
128. Manitoba Hospital Commission v. Klein and Spence (1969), 67 W.W.R. 440; 4 D.L.R. (3d) 522 (Q.B.); R. v. Swimmer, [1971] 1 W.W.R. 756 (Sask. C.A.).
129. See, for example, K. McNeil, Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada, University of Saskatchewan Native Law Centre, 1983, Chapter 3.
130. See the current Indian Act, R.S.C. 1970, c. I-6, ss. 109-113, and the previous versions of these provisions.
131. Indian Act, R.S.C. 1970, c. I-6, ss. 37-41.

132. This discussion is also relevant to the interpretation of s. 35, and it is continued in the analysis of the significance of the word "existing" in that section, in the following Chapter.
133. See, for example, Treaty Number 3 of 1873, reprinted in Morris, supra note 101, at p. 320, in which the guarantee of hunting and fishing rights is stated in qualified form: "subject to such regulations as may from time to time be made by her Government of her Dominion of Canada." Kent McNeil notes that Treaties 3 to 8 and Treaty 11 all contain similar provisions; supra note 129, at p. 9.
134. (1964), 46 W.W.R. 65 (N.W.T.C.A.), *aff'd.* [1964] S.C.R. 642; (1964), 49 W.W.R. 306 (S.C.C.).
135. Ibid., at p. 67.
136. Ibid., at p. 68.
137. Ibid., at p. 68.
138. Migratory Birds Convention Act, R.S.C. 1952, c. 179.
139. Supra note 134, at p. 74.
140. See R. v. George, [1969] S.C.R. 267; Daniels v. The Queen (1968), 2 D.L.R. (3d) 1 (S.C.C.); R. v. Moosehunter, [1981] 1 S.C.R. 282.
141. See D. Knoll, "Treaty and Aboriginal Hunting Rights", [1979] 1 C.N.L.R. 1, at p. 7.
142. (1966), 52 D.L.R. (2d) 481 (S.C.C.); *affirming* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.).
143. R. v. George, [1966] S.C.R. 267.

144. (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), at p. 618.
145. R. v. Taylor and Williams (1981), 34 O.R. (2d) 360 (C.A.); See Sanders, infra note 146.
146. See D. Sanders, "Indian Hunting and Fishing Rights" (1973-74), 38 Sask. L. Rev. 45, at p. 46; L.C. Green, "Legal Significance of Treaties Affecting Canada's Indians" (1972), 1 Anglo-Am. L. Rev. 119, at p. 134.
147. [1985] 2 S.C.R. 387, at pp. 405-6.
148. See, for example, B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 Queen's L.J. 232, at p. 240.
149. R. v. Secretary of State for Foreign and Commonwealth Affairs, [1982] 2 All E.R. 118 (C.A.), at pp. 124-25, per Lord Denning, M.R. The quote from Gwynne J. is taken from St. Catharine's Milling & Lumber Co. v. The Queen (1887), 13 S.C.R. 577, at p. 652.
150. Ibid. See also K. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada" in The Canadian Charter of Rights and Freedoms: Commentary (W.S. Tarnopolsky and G.A. Beaudoin eds.), Toronto: Carswell, 1982, 467, at p. 475.
151. See above, note 149.
152. [1926] Ex. C.R. 68, at p. 72. See also Campbell v. Hall, [1555-1774] All E.R. 252.
153. For example, R. v. Secretary of State for Foreign and Commonwealth Affairs, supra note 149; Calder v. A.-G. B.C. (1973), 34 D.L.R. (3d) 145 (S.C.C.); Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development (1979), 107 D.L.R. (3d) 513 (F.C., T.D.).

154. See B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 Am. J. Comp. L. 361, at p. 369; B. Slattery, The Land Rights of Indigenous Canadian Peoples as Affected By The Crown's Acquisition of Their Territories, D. Phil. Thesis, Oxford, 1979, at pp. 315-19.
155. As expressed, for example, in St. Catharine's Milling & Lumber Co. v. The Queen (1888), 14 App. Cas. 46, at pp. 54-55 (P.C.).
156. See Calder v. A.-G. B.C., supra note 153; and Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development, supra note 153, at p. 541; A.-G. Ontario v. Bear Island Foundation (1984), 15 D.L.R. (4th) 321 (H.C.J.).
157. "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 Am. J. Comp. L. 361, at pp. 369-71.
158. Supra text at note 149.
159. See J. Stagg, Anglo-Indian Relations in North America to 1763 and An Analysis of the Royal Proclamation of 7 October, 1763, Research Branch, D.I.A.N.D., Ottawa, 1981; B. Slattery, The Land Rights of Indigenous Canadian Peoples as Affected by the Crown's Acquisition of Their Territories, D. Phil. Thesis, Oxon., 1979 (reprinted by the Canadian Native Law Centre); G.S. Lester, The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument, J.D. Thesis, Osgoode Hall Law School, 1981; K. Narvey, "The Royal Proclamation of 7 October 1763, The Common Law and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company" (1973-74), 38 Sask. L. Rev. 123. See also Calder v. A.-G. B.C., supra note 153, and Sigeareak v. The Queen, [1966] S.C.R. 645.
160. Slattery, supra note 157, at p. 370.
161. See Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons, 1980, Issue No. 16, at pp. 13-16.

162. See, for a similar argument with respect to treaty rights, supra, at p. 38.
163. By virtue of the Constitution Amendment Proclamation, 1983: SI 84/102.
164. See, for example: Lysyk, supra note 150, at p. 475; Slattery, supra note 148, at p. 239; D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983), 61 Can. Bar Rev. 314, at p. 326.
165. See Lysyk, ibid., at p. 476; and see Sanders, ibid., at p. 328.
166. See In All Fairness: A Native Claims Policy, Comprehensive Claims, Ottawa: D.I.A.N.D., 1981; Outstanding Business: A Native Claims Policy, Specific Claims, Ottawa: D.I.A.N.D., 1981.
167. In All Fairness: A Native Claims Policy, Comprehensive Claims, ibid., at p. 7.
168. Outstanding Business: A Native Claims Policy, Specific Claims, ibid., at p. 7.
169. Supra note 150, at p. 476.
170. Supra note 164, at p. 328.
171. The amendment of s. 35, which adds the following sub-section, seems to support this view:

(3) For greater certainty, in sub-section (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

If the settlement of a "specific claim" resulted in the recognition of new treaty rights, surely the settlement would, itself, then be called simply a "treaty right." If this is accepted, the addition of s. 35(3) would indicate that comprehensive rather than specific claims agreements needed specific inclusion in paragraph 25(b).

172. By which the federal government transferred ownership of land and natural resources to the governments of Manitoba, Saskatchewan and Alberta.
173. R.S.C. 1970, App. II, No. 25, since re-named Constitution Act, 1930. This is included in Schedule I to the Constitution Act, 1982.
174. Paragraph 12 of the Agreement with Manitoba; paragraph 13 of the Alberta and Saskatchewan Agreements.
175. Frank v. The Queen, [1978] 1 S.C.R. 95, at p. 100; R. v. Sutherland, [1980] 2 S.C.R. 451, at p. 461; Moosehunter v. The Queen, [1981] 1 S.C.R. 282, at p. 285.
176. Which are now referred to as merely of historical interest; see R. v. Sutherland, ibid.; see, generally, K. McNeil, Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada, University of Saskatchewan Native Law Centre, 1983, Chapter 5.
177. R.S.C. 1970, c. I-6.
178. See, for example, the provision in the Northwest Territories Fishing Regulations, C.R.C. 1978, c. 847, which permits unlicensed fishing by "an Indian, Inuk or person of mixed blood"; discussed in R. v. Rocher (1984), 14 D.L.R. (4th) 210 (N.W.T.C.A.). An example of a common law right that pertains to aboriginal people is the recognition of customary marriage and adoption; see B. Morse, "Indian and Inuit Family Law and the Canadian Legal System" (1980), 8 Am. Indian L. Rev. 199; N. Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases", [1984] 4 C.N.L.R. 1; Re Tagornak Adoption Petition, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.).
179. Supra note 164, at p. 327.
180. (1984), 14 D.L.R. (4th) 210 (N.W.T.C.A.).
181. C.R.C. 1978, c. 847.

182. R.S.C. 1970, App. III.
183. It is a nice question whether s. 25 would apply to the Canadian Bill of Rights, by virtue of the guarantee of its continued existence in s. 26 of the Charter. This question will likely remain of only theoretical interest for the foreseeable future.
184. For example, a "second" preference for males, added to the existing s. 22 exemption, would not be justified by s. 25 of the Charter.
185. R.S.C. 1970, c. C-34, as am.
186. See, for example, R. v. Tobac (1985), 20 C.C.C. (3d) 49 (N.W.T.C.A.); R. v. Weyallon, [1985] 4 C.N.L.R. 184 (N.W.T.C.A.); R. v. Herman, [1986] 1 C.N.L.R. 72 (Sask. Prov. Ct.); R. v. Ratt, [1986] 1 C.N.L.R. 123 (Sask. Prov. Ct.).
187. Note the differing results reached in the cases listed in the preceding note.
188. [1985] 2 S.C.R. 332. See A. Hayward, "R. v. Jack and Charlie and the Constitution Act, 1982: Religious Freedom and Aboriginal Rights in Canada" (1984), 10 Queen's L.J. 165.
189. R.S.B.C. 1979, c. 433.
190. Supra note 188, at p. 343.

CHAPTER 6

SECTION 35: THE SUBSTANTIVE GUARANTEE

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

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

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

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "Constitution Act, 1867", to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

Introduction

Section 35¹ is a substantive guarantee of the aboriginal and treaty rights of the aboriginal peoples of Canada. Since its original enactment in 1982, this provision has

been amended, and a new s. 35.1 has been added.² The amendments clarify the meaning of the original in certain respects, but also add new concepts to it. In this Chapter, the constituent elements of ss. 35 and 35.1 will be discussed. Particular emphasis will be placed upon the key part of the guarantee, contained in s. 35(1).

I. Section 35(1)

i. Overview

Section 35 is contained in Part II of the Constitution Act, 1982, which is headed "Rights of the Aboriginal Peoples of Canada." It is not part of the Charter of Rights and Freedoms. This has several implications, the most obvious of which are that while s. 35 does not benefit from the explicit "guarantee" of rights in s. 1, nor is it enforceable by way of s. 24(1), neither is it subject to the limitations clause in s. 1 or the legislative over-ride provided for in s. 33. This leaves the status and enforceability of s. 35 uncertain.

The legislative history of s. 35 is not useful as an aid to understanding these matters, as was pointed out in an earlier chapter.³ The status of s. 35, and by implication its enforceability, must be determined by an examination of its key words and phrases: "recognized and affirmed"; "existing"; and "aboriginal and treaty rights".

2. The Meaning of the Words

(i) Recognized and Affirmed

Section 35 states that the existing aboriginal and treaty rights of the aboriginal peoples of Canada "are hereby recognized and affirmed." ("sont reconnus et confirmes"). This language may be contrasted with that of the Charter of Rights and Freedoms, in which the rights and freedoms are "guaranteed" (s. 1, s. 24(1)). A

comparison of these sections indicates a possibility that s. 35 will be interpreted so as to be less effective protection for the rights included in it than the Charter.

Brian Slattery states the alternate meanings in this way:

Two alternate meanings seem possible in the context of section 35. Either the provision means that the rights referred to are 'hereby acknowledged as valid,' or it affirms only that the rights are 'hereby taken note of'.⁴

The narrow reading of s. 35 seems plausible on a bare reading of the words in s. 35. After all, there must be some difference between a guarantee of rights and a mere "recognition" and "affirmation" of these rights.

As Slattery points out, however, this argument is inconsistent with current dictionary definitions of these words,⁵ and does not correspond to the meaning of the French version of the section,⁶ which is equally authoritative with the English.⁷ All of these sources support the stronger interpretation of the relevant words, which Slattery has described as meaning that the rights "are formally acknowledged as valid in law and rendered sure and unavoidable."⁸

Further support for this analysis can be drawn from subs. 35(4), which states:

Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons (emphasis added).

The use of the word "guaranteed" indicates that the rights referred to in s. 35 are not merely taken note of.

The final, and perhaps most telling, argument derives from the logic of entrenchment itself. If these rights were merely to be taken notice of, without being accorded increased legal status or made enforceable, a positive statement such as that in s. 35 was not required.⁹ Instead a mere statutory enactment, or mention in the

preamble would have sufficed. The purpose for including a statement of rights in a constitution must surely be to ensure that the rights so included are given a higher status than they enjoyed previously, and to protect them from encroachment by other laws or practices. If this is true, the words "recognized and affirmed" must be given the broader meaning which Professor Slattery has identified. The rights are "recognized" by s. 35, and in that sense it is correct to state that they are taken notice of; but they are also "affirmed", and this must mean their validity is acknowledged. That this is done in the constitution means that these rights are secure from alteration or diminution, except by the prescribed amendment procedures.

As mentioned earlier, s. 35 is contained in Part II of the Constitution Act, 1982, and therefore it is not enforceable by way of s. 24 of the Charter. Section 52 of the Constitution Act provides a means by which s. 35 can be given effect to. It states:

The Constitution of Canada [which includes s. 35] is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This section states explicitly that inconsistent laws (statutory or common) cannot be given effect to in the face of a constitutional guarantee, and thus s. 35 may be enforced by means of an application to a court pursuant to s. 52.¹⁰

(ii) Existing

The original version of s. 35 [then numbered s. 34] did not include the word "existing." It was added to the patriation Accord agreed upon by the First Ministers on 5 November 1981. After intense lobbying by aboriginal organizations s. 35 was reinstated into the constitutional amendment package.¹¹ It is generally agreed that the word existing was added to the section at the insistence of Premier

Lougheed of Alberta, as the price for his support for the re-insertion of the section into the Constitutional reform package.¹² In announcing the new version, the Minister of Justice stated the view of the federal government that the addition of the word "existing" did not alter its substance, but merely made explicit what was already implicit in the statement.¹³

The reassurance of the Minister of Justice notwithstanding, it is necessary to review the significance of the word "existing" in s. 35 if for no other reason than that the courts are obliged to give the word some meaning. Furthermore, a cursory examination of the legislative history of s. 35 makes it clear that the insertion of the word was not a mere "housekeeping" matter; it was done for some purpose, and it is this which the courts must ascertain. The range of possible meanings that can be attributed to the word is revealed by an examination of scholarly comment and the few cases which have interpreted s. 35.

(a) The Authors

There are as many views on the meaning and significance of s. 35 as there are authors who have written about this matter. Broadly speaking one may divide the commentators into two groups: one group asserts that the word adds nothing of importance to the section in respect of the current legal status of these rights; the other group suggests that the word has implications both for the current and future legal status of the rights set out in s. 35.

Before entering upon an examination of this body of opinion, it should be pointed out that there is one matter upon which all of the authors agree: that the word "existing" is to be read as qualifying both aboriginal and treaty rights.¹⁴ Indeed, a plain reading of the section does not admit of any other view.

Turning now to the two schools of thought on the meaning of the word "existing", it is necessary to outline in a summary fashion, the scholarship on this point. Professor Sanders is undoubtedly the foremost exponent of the view that the current status of the rights mentioned in s. 35 was not altered by the addition of this word. In his view:

[T]he earlier wording of the section (without the word 'existing') was never intended to revive rights which had been lawfully ended. The treaties, in general, are understood to have extinguished at least some of the aboriginal rights of the Indian populations who signed them. The earlier wording of section 35 would not have been interpreted to restore aboriginal rights which had been ended by treaty...

Under either version of section 35 aboriginal rights were recognized and affirmed only if they existed.¹⁵

This is not a wholesale endorsement of the federal government's position mentioned earlier,¹⁶ because Professor Sanders does state that the addition of the word existing precludes arguments challenging the validity of prior abrogations of treaty rights without the consent of the aboriginal signatories, which the prior version of the section might have supported.¹⁷ In his view, therefore, the addition of the word existing had only a limited impact on the scope of s. 35, because either version of the section had "no substantive impact on aboriginal and treaty rights".¹⁸

A similar opinion has been proffered by Professor Lysyk (as he then was).¹⁹ Although his article is somewhat equivocal on this point, Lysyk does point out that s. 35 "speaks of rights which are thereby 'recognized', which implies the prior existence of such rights".²⁰ An examination of the application of s. 35 in respect of treaty rights confirms this author's view that the addition of the word existing precludes a s. 35 challenge to limits on treaty rights that existed when the section was enacted, i.e. 1982. A refinement of this argument is suggested, in these terms:

It might be suggested that subs. 35(1) is satisfied if it is shown that a particular kind of right (e.g., hunting right) is recognized to exist in law, without importing the legal limitations presently dictated by the jurisprudence concerning the scope of that right (i.e., the narrowing of the hunting right by federal statutes pre-dating the Constitution Act).²¹

This refinement is also suggested by Norman Zlotkin, who concludes that a satisfactory interpretation of the word "existing" would "limit the recognition of aboriginal and treaty rights to the kinds or categories of rights recognized by Canadian jurisprudence up to 17 April 1982".²² He contrasts this approach with the narrow view that the word existing in s. 35 freezes the status of aboriginal and treaty rights as they were in 1982, so that what was entrenched by s. 35 were aboriginal and treaty rights subject to legislative over-ride. Like other authors who have discussed and rejected this argument,²³ Zlotkin finds this view unsatisfactory because it would effectively give these rights no constitutional protection at all, and it would create a complex patchwork of rights that would vary from province to province.²⁴

Perhaps the most powerful explication of the view that the word existing in s. 35 affects both the current and future status of aboriginal and treaty rights has been provided by Professor Brian Slattery.²⁵ The impact of the word "existing", in his view, must be measured by reference to the status and content of the rights on 17 April 1982, when the section came into force, and after that date. Each of these aspects of the argument will be discussed.

With respect to the content of the rights as of 1982, Slattery concludes that the word "existing" indicates that only un-extinguished aboriginal and treaty rights gained constitutional protection by s. 35. Any treaty obligations which had been previously fulfilled or lawfully terminated were not revived by the enactment of this section, nor were aboriginal rights to occupancy of land which had previously been extinguished, save insofar as no compensation was paid for the expropriation of these rights.²⁶ The

legal status of these rights was altered in three significant ways, according to this author:

First, insofar as there remained any doubts regarding the soundness of the doctrine of aboriginal title in Canadian law, or the validity of the Indian treaties as a class, those doubts are now dissipated. It can no longer be questioned, in the face of section 35 that aboriginal land rights and treaty rights are legal entities, and not mere political or moral rights, or claims on the Crown's favour. Second, to the extent that aboriginal land rights or treaty rights were precarious rights, revocable at the Crown's pleasure, they are now indefeasible... Third, where procedural barriers existed to the assertion of aboriginal or treaty rights those obstacles are now removed.²⁷

The second proposition stated by Slattery relates to the impact of the word "existing" on the future content and status of the rights. The current form of s. 35 makes it clear that the rights guaranteed are those that exist "from time to time", rather than those that existed on the date of proclamation of the Act. This was a tenable argument in relation to the original version of s. 35.²⁸ It is bolstered by the amendments added in 1983, which include sub-section 35(3):

For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

As Professor Slattery correctly points out, this provision is presented "not as an exception to the rule laid down in sec. 35(1), but as a clarification of that rule, enacted only 'for greater certainty' ".²⁹ This amendment, together with the general principle of statutory interpretation that a statute shall be considered as always speaking,³⁰ is conclusive on this point. The implication of this is that aboriginal peoples are free to modify or extinguish their aboriginal and treaty rights by means of consensual agreements, without the necessity of a formal constitutional amendment under s. 38 of the Constitution Act, 1982.

The latter aspect of Slattery's argument seems incontrovertible. The ambiguity of the original s. 35 has been clarified by the addition of subs. 35(3). A variant of his argument concerning the content and status of the rights up to 1982 has been presented by Kent McNeil.³¹ In his view there is a distinction between rights which have been extinguished and those which are merely suspended or in abeyance due to an inconsistent statute or regulation. The word existing in s. 35 does not prevent, in McNeil's opinion, the latter category of aboriginal and treaty rights from being constitutionally protected. He states:

While it may be conceded that section 35(1) probably does not revive rights previously abrogated by legislation, it is suggested that different considerations apply to rights that were merely restricted but not extinguished. Thus, where aboriginal title to land had been extinguished by legislation, that title would no longer have been in existence on April 17, 1982, and therefore would not have been revived by section 35(1). Aboriginal or treaty rights to hunt, trap and fish that have been limited by federal or provincial legislation, on the other hand, continue to exist even though their exercise has been restricted.³²

Another author makes the same point, only more graphically: "In simple language, Section 34[now s. 35] protects "sleeping" rights, but does not revive "dead" rights."³³

A test to determine whether the rights are "sleeping" or "dead" is suggested by McNeil:

A workable test... would be to ask whether the right would be restored if the legislation affecting it was repealed. If the answer is no, then the right must have been extinguished; if yes, it must still exist and therefore is entitled to constitutional protection under section 35(1).³⁴

It is submitted that the argument of Kent McNeil, outlined above, comes closest to the mark. A less refined view of the meaning of the word existing in s. 35 is unacceptable because it fails to accord the word any meaning at all, which is plainly contrary to the intention of the drafters. On any view of what that intent might be, it

surely cannot be argued that the word is not meaningful, especially when a sensible interpretation of it, which accords with principle and is a plausible means of giving effect to the drafters' intention, is readily available.

The argument that the word "existing" means "not extinguished", rather than "not subject to any restriction", finds support in the general principles which apply to other rights guarantees. Freedom of expression in the Charter does not disappear simply because, on a certain occasion or for a certain purpose, it was or is limited. As a matter of principle, if aboriginal and treaty rights are to be viewed as on a par with the other rights contained in the Constitution Act, 1982, there is no reason to interpret the word "existing" so as to preclude constitutional protection of the rights even though they may not be, at any given point in time, capable of being freely exercised or asserted.

In order to comprehend this argument one may usefully contrast the concepts of extinguishment and regulation. Extinguishment implies final termination, with no possibility of revival. Regulation, on the other hand, imports a temporary and limited abrogation of a right, which in no way impairs the ultimate existence of the right. All that is affected is the current exercise of the right, and that is curtailed only to the extent of the terms of the regulation.

If this is applied to the specific rights mentioned in s. 35, concrete examples are easily found. Hunting rights, which may derive either from aboriginal or treaty rights, are subject to all manner of conservation regulations by provincial laws. Indeed, some of the treaties contemplate this sort of curtailment by their very terms.³⁵ These regulations, therefore, cannot be taken to mean that the rights did not "exist" on 17 April 1982. Instead it is more appropriate to recognize that the regulatory laws either diminished or, in the case of certain treaties, implemented, the rights of the aboriginal peoples.

Section 35, therefore, is a constitutional guarantee of aboriginal and treaty rights which protects these rights from future (post-1982) restriction or abrogation, unless by consent of the beneficiaries of these rights. It also ensures the continued vitality of rights which were, in 1982, restricted but not extinguished. This section is enforceable by means of an application pursuant to s. 52 of the Constitution Act, 1982.

(c) The Cases

Virtually all of the handful of cases which have interpreted or applied s. 35 have focussed on the word "existing".³⁶ Most of these cases have involved a challenge to a conviction, or defence to a charge, pursuant to a law which restricts an aboriginal or treaty right. In no case to date has s. 35 been utilized to strike down such a law.

The leading case appears to be R. v. Eninew.³⁷ The accused was charged with unlawfully hunting migratory game birds, contrary to regulations³⁸ made pursuant to the Migratory Birds Convention Act.³⁹ A defence to this charge was based upon the argument that "the effect of s. 35 of the Constitution Act, 1982, is to restore to the Indians, and more particularly the [accused], the unfettered right to hunt as set out in Treaty No. 10".⁴⁰

This argument was rejected by Gerein J., who offered the following analysis of s. 35 (which is quoted in extenso because it has so often been relied upon in other cases):

To begin, the word "existing" must relate to the entire phrase "aboriginal and treaty rights" and not, as submitted on behalf of the appellant, only the word "aboriginal". Section 35 deals with the rights of the aboriginal peoples of Canada. The whole reason for the section is to safeguard certain rights. However, the section is not intended to safeguard any and all rights whatsoever of the aboriginal peoples but only certain rights, namely, aboriginal rights and treaty rights. The word "rights", as used in the section is qualified by the word "aboriginal" and "treaty". To divorce the word "aboriginal" from the word "rights" would bring about a nonsensical result. One would be left with the question — aboriginal what? Thus,

the words "aboriginal and treaty rights" must be viewed as one phrase in which the prime word is "rights" as qualified and described by the words "aboriginal and treaty". This being so, the word "existing" must relate to the entire phrase as a whole. In fact, in my mind, the word "existing" has reference to the word "rights", albeit as qualified by the words "aboriginal" and "treaty".

What then is the effect of the word "existing"? In my opinion, it circumscribes the rights of the aboriginal peoples of Canada. It limits the rights of those peoples to those rights which were in being or which were in actuality at the time when the Constitution Act, 1982 came into effect, namely, April 17, 1982. Were it to be otherwise, Parliament would have used the word "original" or some like word or would have utilized some other device such as a date.

As of April 17, 1982, and more particularly as of April 29, 1982, when the offence was committed, Indians did not enjoy an unrestricted right to hunt. As stated earlier, this treaty right had been abridged by a regulation of Parliament acting within its authority. The Constitution Act, 1982 did not have the effect of repealing the regulation or rendering it invalid. Rather the Constitution Act, 1982 only recognized and secured the status quo.⁴¹

On appeal this decision was affirmed; Hall J.A. stated that the Migratory Birds Regulations did not abridge the treaty rights relied on in the case, because by the terms of the treaty itself these rights were subject to regulation by the government.⁴² On this view of the matter, s. 35 was not relevant to the decision.

In two other cases provincial Courts of Appeal have dealt with similar fact situations, and in both cases s. 35 was found not to overcome the restrictions on treaty rights. In R. v. Hare and Debassige,⁴³ the Ontario Court of Appeal reversed the trial decision, and adopted the reasoning of Peter Hogg,⁴⁴ that s. 35 did not revive previously extinguished rights. In Horse v. The Queen,⁴⁵ the Saskatchewan Court of Appeal concluded that the relevant treaty rights were merged and consolidated in the Natural Resources Transfer Agreement, 1930,⁴⁶ which became part of the Constitution and therefore, according to Vancise J.A.:

Section 35(1) must be read subject to the game laws paragraph of the Constitution which provides for Indian hunting, fishing and trapping. The treaty rights to hunt and fish, which were consolidated in s. 12 of the Agreement as at 17th April 1982, existed only to the extent that they had not been modified by that paragraph.⁴⁷

Of the lower court decisions which have discussed s. 35, only R. v. Martin⁴⁸ merits attention, because it departs from the prevailing view exemplified by the judgments quoted above. The accused in this case were charged with unlawfully fishing with a net without a proper licence or permit. Section 25 of the Charter and s. 35 of the Constitution Act were raised as a defence to the charge. Godin J. adopted the opinion of Peter Hogg,⁴⁹ and the trial decision in R. v. Eninew,⁵⁰ in support of the following conclusion:

It is the view of this court that the proper interpretation to be given to s. 35 of the Constitution Act is that aboriginal and treaty rights which existed on April 17, 1982, cannot now be changed and shall continue to be legally effective until such time as the Constitution of the Country is itself amended. Alterations or extinguishments of these rights which came into effect prior to the Constitution Act of 1982 were not affected by the Act and continue to be legally effective.⁵¹

The reference to "alteration" as well as "extinguishment" is intriguing. It is respectfully submitted that it is also incorrect, for reasons which were discussed earlier.

The deliberate insertion of the word "existing" into s. 35 has generally been taken to indicate a desire by the drafters to freeze the status of aboriginal and treaty rights as of 17 April 1982.⁵²

As this summary of the cases indicates, courts have thus far been primarily concerned with the effect of s. 35 on restrictions on aboriginal and treaty rights that were in force when the Constitution Act, 1982 was enacted. The judges have not yet

pronounced upon the argument advanced earlier that s. 35 may protect aboriginal and treaty rights which are merely restricted but not extinguished. In truth, the actual argument may not have been presented to the courts, and this may explain the absence of commentary upon it. The comment in R. v. Martin that s. 35 does not apply to rights which have been "altered" is not necessary to the decision, and is not based upon careful analysis of this specific point.

As well, judges have not finally resolved the question of whether s. 35 restricts legislatures from passing new laws restricting aboriginal and treaty rights, although there is a clear consensus in the cases that it does so.⁵³

II. Aboriginal Rights

1. Overview

Aboriginal rights in Canada have traditionally been equated with aboriginal title, which is the interest of aboriginal peoples in their ancestral lands. The term "aboriginal rights" is often equated with "aboriginal title", in the cases as well as in the literature.⁵⁴ Another view of the scope and meaning of aboriginal rights has long existed in this country; it emerged most clearly during the debates and conferences surrounding the patriation process.

A proper understanding of the meaning of this term in the Constitution Act, 1982, requires a principled analysis, which is firmly rooted in a larger theory of aboriginal rights as collective rights. Such a theory was developed in Chapter 3; it remains to apply it in the context of s. 35. This analysis will begin by reviewing the settled content of aboriginal rights, and then move to an exploration of their outer limits.

2. Minimum Content: Aboriginal Title

Although I think it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means...⁵⁵

By these words in the Calder case, which involved an assertion by Nishga Indians of their aboriginal title to their ancestral lands, Mr. Justice Judson summarized the concept of aboriginal title in a manner which has yet to be seriously challenged. In an earlier case the title of Indians residing upon lands within the territory covered by the Royal Proclamation had been described as analogous to "a personal and usufructuary right, dependent upon the good will of the Sovereign".⁵⁶ The aboriginal interest in these lands is difficult to classify beyond the simple notion of a usufruct,⁵⁷ which is, in truth, conceptually inadequate since it signifies an individual interest which terminates upon death, whereas aboriginal title is a communal interest which continues (so the theory goes) forever.

Despite these theoretical problems the usufruct terminology has been cited often by Canadian courts. It is perhaps best to think of the title as analogous to a usufruct, in that it guarantees absolute use and enjoyment of the lands, and co-exists with the ultimate title of the Crown in the lands, which title endures until it is perfected by the extinguishment of the native title.

In two recent cases the Supreme Court of Canada has discussed the nature of aboriginal title, and its relationship to other doctrines of property law. In Smith v. The Queen,⁵⁸ the federal government brought an action on behalf of a band of Indians in New Brunswick, for possession of part of a reserve which was claimed by a non-Indian under the doctrine of adverse possession. The lands in question had been surrendered by the band to the Crown, to be sold and the proceeds held for the benefit

of the band. The federal government's claim rested on its assertion that upon surrender the beneficial interest in the land did not transfer to the province by reason of s. 109 of the Constitution Act, 1867, but remained with the federal government by virtue of s. 91(24) of that Act. The Court rejected this argument. In the judgment by Estey J. the nature of the aboriginal title in the reserved land was discussed. After noting that it has been described as a "personal and usufructuary right", he referred to the following definition of usufruct:

Usufruct

1. Law: The right of temporary possession, use, or enjoyment of the advantages of property belonging to another, so far as may be had without causing damage or prejudice to it.
2. Use, enjoyment, or profitable possession (of something).⁵⁹

This definition lead Mr. Justice Estey to conclude:

The release, therefore, is of a personal right which by law must disappear upon surrender by the person holding it; such an ephemeral right cannot be transferred to a grantee... The right disappears in the process of the release...⁶⁰

In the second case, Guerin v. The Queen,⁶¹ which also involved a surrender of reserve lands, Dickson J. (as he then was) described the Indian interest in the lands in the following terms:

Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true... that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians... The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an

obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.⁶²

While both of these cases involve Indian interest in reserve lands, it is submitted that the general statements in each, concerning the nature of aboriginal title, are equally applicable to the interest in ancestral lands. Indeed, in Guerin, Dickson J. specifically equates the two situations:

It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases.⁶³

The second half of the St. Catharine's Milling formula quoted above stipulates that the aboriginal tenure is "dependent upon the goodwill of the Sovereign".⁶⁴ This case confirms the rule which is also implicit in the Royal Proclamation, that the Sovereign possesses the absolute and exclusive power to extinguish aboriginal title. The effect of extinguishing the native interest is to remove the burden of the usufruct from the Crown's ultimate title. In the words of Lord Watson in the St. Catharine's Milling case:

It appears... to be sufficient for the purposes of this case that there has all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.⁶⁵

This must be distinguished from merely diminishing or derogating from certain incidents of aboriginal title, for example by regulating hunting and fishing through a system of licencing and closed seasons. The extinguishment of aboriginal title is a

final termination which can only occur once. The native interest, once extinguished, can never be revived.

This brief review of the concept of native title is meant only to introduce the relevant rules; critical analysis of the various aspects of this doctrine will follow later in this chapter.

(a) The Origins of Aboriginal Title

Canadian law is heir to two separate legal traditions in respect of aboriginal title: the early American cases are generally regarded as the classic statements of the doctrine, while the more recent Commonwealth authorities offer an illuminating contrast.

(i) The American Doctrine: "Marshall C.J. — Pragmatic Genius"

The American law of aboriginal title was formulated primarily by Chief Justice Marshall of the United States Supreme Court in a series of cases beginning in 1810 with Fletcher v. Peck.⁶⁶ In this case Marshall C.J. laid the foundation for his later decisions by recognizing tribal tenure upon ancestral lands as valid until it was extinguished, and by providing that it was not repugnant to the underlying title of the state. This theory was given fuller expression in two later cases: Johnson v. M'Intosh,⁶⁷ and Worcester v. Georgia.⁶⁸

Before discussing the Marshall doctrine it is useful to explore the doctrinal origins of the American law for, as the American scholar Felix Cohen explains:

Our concepts of Indian title derive only in part from common law feudal concepts. In the main, they are to be traced to Spanish origins, and particularly to doctrines developed by Francisco de Vitoria, the real founder of modern international law.⁶⁹

The opinion of de Vitoria, like that of Batholome de las Casas,⁷⁰ was contrary to the argument "that Indians stood in the way of civilization and that progress demanded that they be pushed from the lands they claimed, [which] fell as lightly from the lips of 16th century pirates and conquistadores as it does from those of the 20th century."⁷¹ Vitoria asserted that all people, whatever their religion or creed or perceived level of civilization (or lack thereof), were entitled, by virtue of their humanity, to respect for their possessions; hence "the barbarians in question cannot be barred from being true owners, alike in public and in private law, by reason of the sin of nonbelief or any other mortal sin, nor does such sin entitle Christians to seize their goods and lands".⁷²

The doctrine enunciated by Vitoria was given Papal support in 1537 by the Bull *Sublimis Deus*, and became the guiding principle of Spain's Law of the Indies (1594).⁷³ It also expanded beyond its foundations in moral principle, to become part of international law founded on the work of leading international law scholars.⁷⁴ This basis in international law has re-surfaced recently, and today the problems of aboriginal peoples occupy an important place on the agenda of the world community.⁷⁵

Another source upon which Marshall C.J. relied in formulating his doctrine is British commonwealth practice. This practice was refined by the Royal Proclamation of 1763, which affirmed the rights of aboriginal nations to undisturbed possession of their lands.⁷⁶ William Blackstone, in his Commentaries on the Laws of England, introduced a distinction that has since proved to be vital in the development of the concept of aboriginal title:

Plantations, or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties.⁷⁷

From these doctrinal sources Chief Justice Marshall moulded a concept of aboriginal title that is still relevant in American law, and which continues to influence Canadian law.⁷⁸

The first decision in which the Supreme Court attempted to formulate its views on the legal and historical relation of the Indian tribes to the land was Johnson v. M'Intosh.⁷⁹ At issue in the case was the validity of a grant of land from the Indians to the plaintiff. The defendant claimed the same lands under a grant from the United States government, which was made following a cession of the lands by treaty. Marshall C.J. proceeded on the understanding that "discovery gave title to the governments by whose subjects, or by whose authority, it was made, against all other European governments which title might be consummated by possession".⁸⁰ The judgment goes on to note that this rule did not invalidate native claims to land since

(the original inhabitants) were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but... their 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 made it.⁸¹

In this decision Marshall C.J. rationalized native occupancy with the underlying title of the federal government upon which existing grants of Indian land were based, so that neither title was invalidated.

The next important decisions of Marshall C.J. arose from the attempts of the state of Georgia to extinguish the Indian title of the Cherokee nation. In the first of these cases, Cherokee Nation v. Georgia,⁸² Marshall C.J. accepted that the Cherokee nation had established that it was a "state", defined as "a distinct political society separated from others, capable of managing its own affairs and governing itself".⁸³ This recognition of tribal sovereignty was immediately qualified:

Though the Indians are acknowledged to have an unquestionable, and, heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile, they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian.⁸⁴

The second case which arose from the Cherokee dispute with Georgia is Worcester v. Georgia.⁸⁵ In this case Georgia was denied authority to maintain a criminal action against Worcester, a white missionary who lived amongst the Cherokee Indians on their tribal lands. The Georgia law which required a licence for such residence was declared unconstitutional as "repugnant to the constitution, treaties and laws of the United States".⁸⁶ As in Johnson v. M'Intosh, Chief Justice Marshall looked to the theory of discovery, and he noted that this rule gave the discoverer "the sole right of acquiring the soil and of making settlements on it".⁸⁷ He re-stated the caveat that the rule could not

annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among European discoverers; but could not affect the rights of those already in possession either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.⁸⁸

These two decisions are the classic statements of the American law of aboriginal title. The policy of respecting native title and occupancy, and of extinguishing that title by treaty and purchase, was clearly supported by Marshall C.J. In contrast to this seemingly inviolate native title, Marshall's theory accorded extensive powers to

the discoverer. A renowned student of American Indian affairs summarizes the doctrine in this way:

(W)hile the sovereign could extinguish Indian title by treaty or by war, Indian title would not be extinguished by a grant to private parties and ... such a grantee would take the land subject to Indian possessory rights.⁸⁹

Thus while aboriginal title is upheld as against private purchasers, it is at the same time subject to extinguishment by the government.

The approach which is taken to the extinguishment of aboriginal title is necessarily connected to the view one adopts toward that title. The American cases illustrate this idea. Indian title was originally conceived of as a guarantee of absolute use and enjoyment, good against all the world except the sovereign. As the Supreme Court noted in a case involving an aboriginal title claim: "For all practical purposes, the tribe owned the land ... The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee".⁹⁰ Accepting for the moment that native title under this theory was no less valuable than title in fee, it is clear that the native interest was much less secure.

The legal authority of the United States to extinguish aboriginal title has never been questioned by a court. This power is vested in the federal Congress,⁹¹ although an extinguishment by Presidential order will be valid if it was both authorized and ratified by Congress.⁹² Extinguishment is regarded as an absolute, final termination of the native interest.⁹³ The apparent untrammelled authority of Congress in this area is illuminated in the following passage:

Extinguishment of Indian title based upon aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues ... And whether it be done by treaty, by the sword, by purchase, by the

exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts.⁹⁴

Indeed, it has been stated that extinguishment may be accomplished "by any means convenient to the Sovereign".⁹⁵

This unrestricted power must be balanced against several presumptions employed by the courts to restrain abuse by the government. The Supreme Court in Beecher v. Wetherby said of extinguishment: "It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race".⁹⁶ A modern (and less pompous) formulation of this rule is to be found in Lipan Apache Tribe v. United States:

While the selection of a means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous. In the absence of a 'clear and plain indication' in the public records that the sovereign 'intended to extinguish all of (the claimants') rights' in their property, Indian title continues.⁹⁷

The courts explain their reluctance to imply a casual extinguishment of aboriginal title by reference to the "avowed solicitude of the federal government for the welfare of its Indian wards".⁹⁸ Thus a theory of aboriginal title which protects Indian use and occupancy of their ancestral lands is mirrored by the judicial presumption against casual extinguishment of that title. What actions will suffice to extinguish the native title?

In the appropriate circumstances, cession by treaty will be effective to extinguish the title,⁹⁹ although this is subject to the Indian Non-Intercourse Act¹⁰⁰ requirement that the transfer be to the federal government. Similarly, the creation of a reservation with Indian consent, followed by their actual settlement on the reserve,

may suffice to extinguish title.¹⁰¹ Mere acts of preparation for non-Indian settlement of Indian lands, such as surveying lands or forming a land district, will not generally extinguish aboriginal title.¹⁰² Another means by which termination may be accomplished is actual settlement under a lawful conveyance or patent, if these instruments evidence the necessary Congressional intention.¹⁰³ Finally, an express provision in a statute will extinguish aboriginal title. Examples of such provisions may be found in the Alaska Native Claims Settlement Act¹⁰⁴ and the California Land Claims Act.¹⁰⁵

To summarize, extinguishment of aboriginal title will not be lightly implied; a "clear and plain indication" of an intention to extinguish the title will be required by the courts. Once such an intention is manifest, however, the wisdom or fairness of the action will not concern the court. The following explanation of this approach is helpful:

The judicial policy against casual extinguishment of Indian title ... was not used to challenge Congress' power to arbitrarily extinguish, with or without compensation, all land claims based on aboriginal title, but merely reinforced the policy behind close congressional supervision of tribal land matters to avoid the conflagration of frontier wars.¹⁰⁶

This untrammelled authority to extinguish aboriginal title originated in the judgments of Chief Justice Marshall. Several shortcomings in this theory were alluded to earlier, and these will now be explored.

The most glaring flaw in the classic American doctrine of aboriginal title, which has been pointed out by Geoffery Lester, is that it is rooted in a theory of acquisition of territory by peaceful settlement which simply did not exist at the time this event occurred. Lester puts it this way:

(The) European powers were all agreed on one thing: in terms of constitutional law their acquisitions in North America had been won by conquest. In this context, discovery was irrelevant. And herein lies the fundamental objection to the explanation contained in these early decisions on aboriginal rights. For legal logic simply forced the conclusion that since the New World had not been acquired by inheritance it must have been acquired by conquest.¹⁰⁷

In theory different consequences should flow from the manner in which a territory is acquired. For example, in a territory gained by conquest there is only a presumption that the existing lex loci survives the conquest, and the Sovereign is granted virtually limitless prerogative powers.¹⁰⁸ Following the discovery of the New World and its partial settlement by European colonizers, the theory of "peaceful settlement" was evolved to restrain the Sovereign's prerogative, and under this doctrine the existing lex loci continues after the acquisition as a matter of law. This is especially important in relation to the pre-existing system of tenure, which will continue after settlement, if it is of such a type as can be presumed to survive the assertion of territorial sovereignty by the European power.

What has all of this to do with the law of extinguishment? Under the "pure" theory of settlement, the rights of the original inhabitants were inviolate until ceded, by consent, to the new sovereign. Under Chief Justice Marshall's version of the theory, the sovereign acquired title by discovery and possession. Nothing more was required. From this it followed

that when the King made a grant of land under a charter, this was not an original assertion of title but a reassertion of title which had been acquired by discovery. These grants were however subject to what he dubbed an 'Indian right of occupancy.' And so when he talks about acquiring title by conquest from the Indians, he really means that it is this 'mere right of occupancy' which is being obtained ... Furthermore, the sovereign had an 'absolute right to extinguish' this right of occupancy in the aboriginal inhabitants.¹⁰⁹

A theory that was originally conceived so as to limit prerogative power was exploited by Chief Justice Marshall to justify absolute discretionary authority over Indian lands.

This turnabout was rationalized on the basis that the country simply had to be settled. Marshall C.J. noted that "the character and habits of the people whose rights have been wrested from them" required the European powers either to abandon the country and relinquish their "pompous" claims to it, or to conquer these "fierce savages, whose occupation was war".¹¹⁰ Marshall opted for a different approach, which required the evolution of a new theory. This was unquestionably simpler than the alternatives which he identified, but it was not, in the end, significantly more just.

Another criticism of the American law of aboriginal title is that it is not today what it once was, which is to say that the classic doctrine has been mis-interpreted by later cases, to the detriment of the Indians. Youngblood Henderson has identified a radical break from the "classic paradigm" of native title in the recent cases. He argues that

(i)n M'Intosh, the Court established the principle that discovery created an entitlement in the discovering nations to extinguish tribal title. Discovery did not convey or vest a perfect title as too often is alleged, but rather it merely was an entitlement to extinguish tribal title.¹¹¹

The shift in the Supreme Court's approach to aboriginal title was signalled in the Tee-Hit-Ton¹¹² case, in which tribal title was equated with mere possession, and this interest was found to be compensable under the Fifth Amendment only if it had been "recognized" by the government. This decision must be viewed as primarily concerned with the Fifth Amendment of the U.S. Constitution. When this is combined with the previous decisions that validated government grants of Indian land, as Henderson puts it, the derivative title held by the native people is "the equivalent of owning a dream".¹¹³

These criticisms must be balanced against an awareness of the context in which Chief Justice Marshall worked. As one author puts it:

The Indian title concept was born in an era of America's development when the Supreme Court was politically constrained to respect the power of the other branches of Government and to recognize the national imperative to clear the young nation's vast lands of adverse titles which threatened to impede westward expansion.¹¹⁴

This fact in no way insulates the theory from criticism, but an adequate appraisal of Marshall's theory is impossible without an understanding of the institutional context in which it was formulated. Chief Justice Marshall may have reinterpreted history and legal doctrine in order to develop a theory of aboriginal title that ultimately leaves the interest to the whims of the sovereign, but one must acknowledge that he did not (as well he might have) sanction its destruction by any means whatever, nor did he ignore the Indian interest altogether. Marshall was a pragmatic genius, whose decisions established firmly the Supreme Court's central role in the United States. His theory of aboriginal title was a part of that process, and it need not be rejected outright. Rather, this theory should be analyzed in light of modern historical understanding, so that its useful elements may be salvaged.

(ii) The Commonwealth Doctrine: "The Privy Council and the Burden of Empire"

The second legal tradition in the area of aboriginal title to which Canadian law is heir is that of the British Commonwealth. Like the American cases, these authorities must be treated with caution; one cannot "argue blindly from Africa to Canada"¹¹⁵ because of the widely disparate historical and constitutional traditions in the various parts of the British empire. The Privy Council precedents ought to be mentioned,

however, if for no other reason than the traditional deference of Canadian courts to the pronouncements of that institution.

One of the leading Commonwealth authorities is The Queen v. Symonds (1847), a New Zealand case in which Mr. Justice Chapman clearly affirmed the concept of aboriginal title, in the following manner:

The practice of extinguishing Native titles by fair purchases is certainly more than two centuries old. It has long been adopted by the Government in our American colonies, and by that of the United States. It is now part of the law of the land... Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, and that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers.¹¹⁶

Although New Zealand was acquired by peaceful settlement, Mr. Justice Chapman states that the requirement of extinguishment by fair purchase, with the free consent of the native occupiers, is part of the law of the land. None of this is contingent upon the recognition by the sovereign, because the title does not derive from the sovereign, but from occupancy from time immemorial. For many people who are sympathetic to the claim of aboriginal peoples that their title must be fairly dealt with, this judgment represents the single most authoritative analysis of the law.

This doctrine was approved by the Privy Council in Nireaha Tamaki v. Baker.¹¹⁷ In this case the Marshall decisions were placed before the Board, but they were rejected as "being given under different circumstances ...".¹¹⁸

Two more recent Privy Council decisions illustrate the Commonwealth doctrine very well. The first of these, In re Southern Rhodesia,¹¹⁹ involved a dispute between a British mining company and the elected Council of Southern Rhodesia over the

ownership of unalienated land in the region. Aboriginal title was asserted by tribal inhabitants of the disputed lands, who were governed (after a fashion) by a paramount chief named Lobengula. The relatively undeveloped nature of the tribal organization did not automatically disqualify the natives from possessing legal rights in their lands, according to the Privy Council. Lord Sumner, speaking for the Board, expressed the point in this way:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low on the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions and legal ideas of civilized society. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them ... On the other hand, there are indigenous people whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law.¹²⁰

Is this, as has been argued recently, the product of the "condescension all too prevalent at (that) time," and does Lord Sumner "wholly ... misconstrue the doctrine of native title"?¹²¹ His reference to the necessity to "transmute" native title into "transferable rights of property as we know them" is undoubtedly unfortunate. Against this, however, one must balance the factual situation then before the Board, in which loose tribal groupings sought to assert title, good against both the Crown and third parties. In this context, Lord Sumner's statement may be taken to be a limitation on the sorts of property concepts which the common law will recognize, to those which are of such a nature as can be presumed to survive the assertion of sovereignty. In short, the law requires that aboriginal title concepts be provable in a court of law. This is necessary, as the judgment states, so that the native system may be "reconciled with" the institutions of the non-native society.

This point is well illustrated by a statement in Amodu Tijani v. The Secretary, Southern Nigeria,¹²² a case involving a dispute over compensation for the taking of aboriginal lands by the government of the colony. Viscount Haldane premised his judgment with the following statement:

(I)n interpreting the native title to land, not only in Southern Nigeria but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms that are appropriate only to systems which have grown up under English law.¹²³

The Board went on to state that the native title, whatever its label, need not be less protected simply because it is not comparable to English notions of tenure.

Lord Denning echoed these views when he declared that on the compulsory acquisition of native lands "the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law".¹²⁴

The most unfortunate anomaly in the Commonwealth precedents is the case of Millirpum v. Nabalco Property Ltd.,¹²⁵ which is the first major Australian case to have considered aboriginal title. This case arose out of the opposition of the Gove Peninsula Aborigines to the granting of a mineral lease over their ancestral lands to a bauxite mining conglomerate. The case turned on whether the aboriginal title was an "interest in land" within the ambit of s. 5(1) of the Lands Acquisition Act. Mr. Justice Blackburn solemnly intoned that the Privy Council's warning against conceptually transforming native title into English title was "ringing in his ears," but he nevertheless proceeded to do exactly what Viscount Haldane had forbidden. The following statement is illustrative:

I think this problem has to be solved by considering the substance of proprietary interests rather than their outward indicia. I think that property, in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate.¹²⁶

Despite the fact that the complex aboriginal social system and concepts of property were proven in evidence in such a manner as to make plain that they are of such a type as could be presumed to survive the assertion of sovereignty by a European power, Mr. Justice Blackburn refused to recognize the aboriginal title as a legal right, or, more particularly, as an "interest in land".

This decision has been roundly criticized, and in light of the following passage from the judgment of Mr. Justice Hall on its relevance in Canada, it need not detain us:

The essence of (the Millirpum decision) lies in his acceptance of the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer. That proposition is wholly wrong as the mass of authorities previously cited ... establishes.¹²⁷

The prevailing Commonwealth view of aboriginal title is that it may be, depending on the circumstances, a legally enforceable right which will survive the assertion of sovereignty by a colonizing power. To quote Viscount Haldane in the Tijani case:

(T)he real character of the title to land occupied by a native community ... is prima facie based, not on such individual ownership as English law has made familiar, but on a communal usufructuary occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference ... The original native right was a communal right, and it must be presumed to have continued unless the contrary is established by the context or circumstances.¹²⁸

(b) Aboriginal Title in Canadian Law

As previously quoted, Mr. Justice Judson stated, in Calder v. A.G.B.C.:

Although I think it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means ... ¹²⁹

An attentive reading of this passage reveals that it contains the vital elements in the current Canadian doctrine of aboriginal title, and it also provides a basis for properly evaluating the scope of aboriginal rights in Canada, as will be demonstrated below.

The few significant cases on aboriginal title in Canadian law provide ample support for the assertion by Dickson J. (as he then was), in Kruger and Manuel v. The Queen, that:

Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis.¹³⁰

No attempt will be made in this thesis, therefore, to analyze the aboriginal title of any particular group. Instead the general principles in respect of this concept in Canadian law will be explained.

It is now generally accepted that aboriginal title in Canadian law derives from historic occupation and possession of ancestral lands, and does not depend on any treaty, executive order or legislative enactment including the Royal Proclamation of 1763.¹³¹ The traditional description of the aboriginal interest in ancestral lands is as a "personal and usufructuary right".¹³² The difficulties with the usufruct analogy have been discussed previously;¹³³ the "personal" aspect of this right was explained in the

Star Chrome case to mean that the interest was inalienable except to the Crown.¹³⁴ More recent interpretations of this expression have departed from this view. In Smith v. The Queen,¹³⁵ Estey J. concluded that if aboriginal title is a personal and therefore "ephemeral" right, it cannot survive the process of a legal transfer.¹³⁶ This view is extended by Dickson J. in Guerin v. The Queen,¹³⁷ in which the Smith decision is relied upon in support of the proposition that aboriginal title, as a personal right, is not a property interest sufficient to constitute the res of a trust imposed on the Crown in respect of surrendered lands.¹³⁸ These extensions of the implications of the description of aboriginal title are incorrect, it is submitted, because they are not supported by the authorities, and do not accord with a principled view of aboriginal title.¹³⁹

According to a recent decision, in order to prove the existence of aboriginal title, the following four elements must be satisfied:

1. That they and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England.¹⁴⁰

The precise attributes of aboriginal title remain uncertain. Some courts have restricted it to traditional land use and harvesting activities,¹⁴¹ while others have recognized that this right, like all other rights, has the capacity to evolve over time.¹⁴² The latter argument is appropriate in the context of s. 35, because the constitutional guarantee of these rights is to be interpreted in a forward-looking manner which ensures their continued vitality.¹⁴³ As well, as a matter of principle, if

aboriginal title is respected in Canadian law because it derives from organized and social aboriginal use of lands, there is no reason to freeze aboriginal society to patterns of life that have long since been abandoned by non-aboriginal society. These arguments are developed more extensively later in this Chapter.

(c) Extinguishment in Canadian Law

The tradition of recognizing aboriginal title, and the policy of extinguishing it by treaty originates in early British practice in North America, and it was formalized in the Royal Proclamation in 1763. The practice continued into the 20th century.¹⁴⁴ Canadian law on the issue of extinguishment is today largely a matter for speculation. In much of the country the issue is taken to be settled, the aboriginal title having long ago been ceded by treaty.¹⁴⁵ For the aboriginal peoples who are still in occupancy of their ancestral lands, the question of extinguishment is a matter of grave concern. Although the future policy of federal government may soon change, so that land claims agreements will not involve the absolute extinguishment of aboriginal title,¹⁴⁶ the problem of prior termination of these rights remains. It is equally of concern in respect of s. 35 of the Constitution Act, in view of the current judicial and academic interpretation of the word "existing".¹⁴⁷ An examination of this issue necessarily involves two considerations: who is constitutionally competent to extinguish aboriginal title, and how may this be done?

(i) Constitutional Competence

In an article published in 1980, William Henderson makes the following startling statement:

Although the federal power to extinguish Indian title has never been questioned, it is, surprisingly, still open to argue that this

power is not exclusive. Statements to the contrary, with one exception, are strictly obiter dicta.¹⁴⁸

Exclusive federal competence to extinguish (as opposed to diminish) native title has generally been assumed, with little thought being given to the justification for this view. In light of the notoriously unfavourable attitude of some provincial governments towards aboriginal title and the recent judicial decision which affirms provincial competence,¹⁴⁹ Henderson's proposition is frightening for the aboriginal peoples. Although the matter is not without some difficulty, I would argue that federal authority to extinguish aboriginal title is exclusive, for reasons which I shall now attempt to explain.

The difficult question which lies at the heart of this problem concerns the proper meaning of the phrase "lands reserved for the Indians" in head 24 of s. 91 of the Constitution Act, 1867. The first attempt to define the ambit of this provision is the case of St. Catharine's Milling Co. v. The Queen.¹⁵⁰ Some hint of the present difficulties can be gleaned from the disagreement among the judges in the various courts which heard this case as to competence to extinguish aboriginal title. For example, Burton J.A. in the Court of Appeal concluded that the proper authority to extinguish aboriginal rights by treaty was the Lieutenant-Governor of the province, by virtue of provincial jurisdiction over public lands.¹⁵¹ In this Mr. Justice Burton disagreed with Chief Justice Hagarty, who had opted in favour of exclusive federal competence.¹⁵² To complete the confusion, in the Supreme Court the only judge to consider the matter expressly, grounded his decision that federal power was exclusive in the first part of the s. 91(24) jurisdiction, "Indians", rather than "lands reserved for the Indians".¹⁵³ This judge was in dissent at the Supreme Court, and on appeal the Privy Council left the matter open.

Considering this history, one can only admire the confidence of the observer who, soon after the Privy Council decision, stated:

It is left undecided whether a province could of its own motion and power extinguish the Indian rights. But apparently it could not. To permit that would be to permit an interference with the direct powers of legislation granted to the Dominion parliament.¹⁵⁴

Later Privy Council decisions did not entirely resolve the confusion, although several statements in these cases are suggestive of exclusive federal jurisdiction. In three instances the Privy Council affirmed that s. 91(24) had vested in the federal government responsibility for the administration and control of Indian affairs in the Dominion.¹⁵⁵ The clearest statement of the position was made by Lord Loreburn in a case in which the federal government sought to recover from the province of Ontario a portion of certain treaty annuities paid to the Indians. He stated:

The Dominion Government were indeed, on behalf of the Crown, guardians of the Indian interest and empowered to take a surrender of it and to give equivalents in return ...¹⁵⁶

In the final analysis, however, these cases cannot disprove Henderson's assertion that exclusive federal competence is still open to challenge.

More recent precedents offer an interesting, and confusing array of opinions on the matter, but none of these can be said to be authoritative since they are all lower court decisions. The issue did not arise in Calder v. A.G. B.C. because counsel in that case agreed to argue the matter on the basis that extinguishment had not occurred since British Columbia's entry into Confederation.¹⁵⁷ In a more recent case involving aboriginal title, the following is baldly asserted: "Since the admission of Rupert's Land to Canada, it has been within the legislative competence of the Parliament of Canada to extinguish (the Inuit aboriginal title)".¹⁵⁸

In the final decision which addresses this matter, A.G. Ontario v. Bear Island Foundation,¹⁵⁹ Mr. Justice Steele concludes, after an analysis of the precedents, that "Ontario had the legislative competence to enact otherwise valid, general legislation which, in effect, extinguished the defendant's aboriginal rights".¹⁶⁰ This opinion is supported by alternate sources; Steele J. reasons from the St. Catharine's Milling case and its progeny, and from cases interpreting s. 88 of the Indian Act.¹⁶¹

My argument against provincial competence to extinguish aboriginal title will proceed in this way: the relevant legislative provisions will be examined, followed by a discussion of the court decisions on the issue. Finally, an argument from principle and policy will be advanced in support of exclusive federal power to extinguish aboriginal title.

Section 109 of the Constitution Act, 1867 is the most relevant legislative provision on this point. The result of the decisions of the Privy Council culminating in the Dominion of Canada v. Province of Ontario¹⁶² case was that the Dominion was required to extinguish native title at its own expense, only to benefit the province in which the lands were situate, since by virtue of the interpretation of s. 109 of the Constitution Act, 1867 in the St. Catharine's Milling case, "upon the extinguishment of that title by surrender the province acquired the full beneficial interest in the land subject only to such qualified privilege of hunting and fishing as was reserved by the Indians in the treaty".¹⁶³ The Dominion sought to remedy this unfortunate situation within the province of Quebec when it passed legislation authorizing the extension of the provincial boundaries. The federal government delegated its responsibility for extinguishment to Quebec in the following terms:

(The) province of Quebec will recognize the rights of the Indian inhabitants in the territory ... and will obtain surrenders of such rights in the same manner as the Government of Canada has heretofore recognized such rights and has obtained

surrender thereof, and the said province shall bear and satisfy all charges and expenditures in connection with or arising out of such surrenders.¹⁶⁴

Although this delegation is of questionable constitutionality in the light of the Nova Scotia Inter-Delegation case,¹⁶⁵ the provision is one of several indications that the federal government thought it possessed exclusive authority over this matter.¹⁶⁶

Aboriginal title has been determined to be "an interest other than that of the province" in s. 109,¹⁶⁷ and this interpretation is strong evidence in favour of exclusive federal competence. A contrary argument would not adequately give substance to this phrase in s. 109, because if the provinces are competent to extinguish an interest in land which is not vested in them, aboriginal title and all other titles which fall within this aspect of s. 109 are vulnerable to termination.

A similar conclusion is evidenced by s. 37 of the Indian Act¹⁶⁸ which prohibits the sale, lease, or other disposition of Indian reserve lands until they are surrendered to the federal Crown. Considering the judicial decisions which have recognized an aboriginal usufructuary interest in reserve lands which is indistinguishable from that recognized in the St. Catharine's Milling case, this provision would seem to be indicative of the federal view that its powers are exclusive.¹⁶⁹ Finally, it should be noted that the federal government has entered into agreements with several provinces to facilitate future purchases of aboriginal title and establishment of reserves, which would have been totally unnecessary had federal and provincial competence in the field been regarded as co-extensive.¹⁷⁰

In recognition of the objection which may be raised that these enactments can in no way serve as authoritative determinations of jurisdiction, an examination of the cases on the issue will be undertaken. In several cases exclusive federal competence

has simply been asserted, without explanation.¹⁷¹ Other judges have employed somewhat more ingenious reasoning to uphold exclusive federal competence.

In R. v. Dennis and Dennis,¹⁷² the accused were treaty Indians charged with unlawfully killing a moose during closed season without a permit, contrary to a provincial statute. Since they were not descendants of signatories to the treaty that applied where the moose was killed, they relied upon a defence of aboriginal hunting rights which, they argued, the province was not constitutionally competent to extinguish. In upholding this defence the court noted that head 24 of s. 91 of the Constitution Act, 1867 was an express recognition of the unique position of native people within Canada, and in light of this expressed the view that uniform national competence to extinguish aboriginal title was a "most desirable social objective".¹⁷³ The court concluded that legislation which extinguishes aboriginal rights is legislation in relation to Indians, because it deals with rights that are peculiar to them.¹⁷⁴ The provincial law was therefore inapplicable to the accused.

At the risk of unduly complicating this discussion, s. 88 of the Indian Act should be considered, since its interpretation may shed some light on the question at hand. Section 88 states:

Subject to the terms of any treaty, and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act ...

This provision has provided a fruitful source for litigation,¹⁷⁵ and it has generated an active academic debate,¹⁷⁶ but for our purposes it will suffice to note several illuminating decisions concerning it.

In the case of R. v. White and Bob,¹⁷⁷ treaty rights to hunt were protected against the application of provincial laws by virtue of the opening phrase of s. 88 (then

s. 87) which makes such laws "subject to the terms of any treaty". This case can be contrasted with Kruger and Manuel v. The Queen,¹⁷⁸ in which non-treaty aboriginal hunting rights were not shielded from provincial game laws, on the basis that:

(h)owever abundant the right of Indians to hunt and to fish, there can be no doubt that such right is subject to regulation and curtailment by the appropriate legislative authority.¹⁷⁹

The interesting portion of this latter judgment for our purposes is the discussion by Mr. Justice Dickson of the indicia by which laws "of general application" within the ambit of s. 88 are to be judged. He notes that an examination of the effects of the legislation is required, and that the mere fact that an Act has graver consequences for one person than for another does not suffice to make it not a law of general application. The crucial passage in his analysis is the following:

The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group.¹⁸⁰

If this analysis is viewed in light of the question of constitutional competence to extinguish (rather than merely regulate or diminish) aboriginal title, one can see that the argument in favour of exclusive federal power is considerably strengthened by Mr. Justice Dickson's approach. At the very least, s. 88 re-states the constitutional rule that a provincial law of general application will apply to federal "persons" unless it is construed to be, in reality, in relation to a federal matter. Following the analysis of Mr. Justice Dickson, a provincial law extinguishing aboriginal title has more than merely graver consequences for the Indians; it will have results that are in fact unique to them. To put it simply, if the absolute termination of a group's unique claim to land does not impair its "status or capacity" one is hard pressed to think of something that would constitute such an interference.

A similar conclusion was reached in the Dennis case, referred to earlier, in which legislation that extinguished aboriginal rights was found to be legislation qua Indians,¹⁸¹ and thus an invasion of an exclusive federal domain. In this context it is useful to recall the distinction between the act of extinguishing aboriginal title, which is the exercise of prerogative vested in the sovereign to terminate that title, from the act of abrogation or regulation of an incident of that title (such as the right to hunt on certain lands), which may be accomplished by either jurisdiction. Although the title may be rendered virtually worthless by a piecemeal abrogation of its incidents,¹⁸² this should not cause us to ignore the important distinction between extinguishment and abrogation of an incident of aboriginal title. As well, abrogation is now outlawed by s. 35 of the Constitution Act, 1982, at least insofar as laws enacted after 1982 are concerned.

The Supreme Court of Canada has recently expanded upon the analysis of s. 88 in the Kruger and Manuel case, in a case involving the application of the British Columbia Wildlife Act¹⁸³ to a non-treaty Indian hunting for food in his band's traditional hunting territory.¹⁸⁴ The Supreme Court of Canada reversed the decision of the Court of Appeal that the Wildlife Act impaired Indian status or capacities, and was therefore not a law of general application. Writing the judgment for a unanimous Court, Beetz J. distinguished between provincial laws which so impair the status of Indians qua Indians that they cannot apply ex proprio vigore, and provincial laws of general application which derive their validity from s. 88 of the Indian Act. The latter category of laws are to be judged according to the standards established in the Kruger and Manuel case, which Beetz J. describes in the following terms:

[W]hat Dickson J., as he then was, referred to in Kruger when he mentioned laws which had crossed the line of general application were laws which, either overtly or colourably, single out Indians for special treatment and impair their status as

Indians. Effect and intent are both relevant. Effect can evidence intent. But in order to determine whether a law is not one of general application, the intent, purpose or policy of the legislation can certainly not be ignored: they form an essential ingredient of a law which discriminates between various classes of persons, as opposed to a law of general application.¹⁸⁵

It is submitted that this clarification of the test under s. 88 does not diminish the strength of the argument advanced earlier that the existence and operation of s. 88 bolsters the argument in favour of exclusive federal competence to extinguish aboriginal title. The case merely explains the extent of provincial authority pursuant to s. 88.

Before this examination of constitutional competence is completed, the arguments in favour of provincial jurisdiction should be set out. The most obvious point in support of provincial jurisdiction is that by virtue of heads 5 and 13 of s. 92 of the Constitution Act, 1867, the provinces have power over "lands" and "property" within the province. As well, by s. 109 of that same Act the original four provinces (Ontario, Quebec, New Brunswick and Nova Scotia) own all public lands, subject to "any interest other than that of the Province" in these lands. Pursuant to this and related provisions,¹⁸⁶ and in view of the divided Crown in Canada,¹⁸⁷ might not a province seek to exercise its sovereign power to extinguish the native interest, for example by entering into a treaty? It is clear that any lands that fall within the scope of the Royal Proclamation, or had otherwise been set aside for the Indians, would be exempt from provincial jurisdiction by virtue of head 24 of s. 91.¹⁸⁸ The precise geographical scope of the Proclamation remains a disputed point, but it seems likely that in future some areas of the country will be found to lie outside of its reach.¹⁸⁹ Unless it is accepted that all lands which are subject to aboriginal title are "lands reserved for the Indians," provincial competence to extinguish that title in areas lying outside of the reserved lands cannot be challenged by reference to s. 91(24).¹⁹⁰

This view was applied in A.-G. Ontario v. Bear Island Foundation¹⁹¹ in support of an argument in favour of provincial competence to extinguish aboriginal title. Mr. Justice Steele analyzed the St. Catharine's Milling case, and concluded that the decision of the Privy Council did not preclude provincial competence to disencumber its beneficial interest in lands from the burden of aboriginal title, so long as this was accomplished by legislation or administrative action which is otherwise constitutionally valid under a head of s. 92 of the Constitution Act, 1867.¹⁹²

This argument, it is respectfully submitted, is inconsistent with the structure of ss. 91(24) and 109, and with British colonial and post-Confederation practice. It fails to deal with the distinction which has been emphasized earlier between the diminution or regulation of an incident of aboriginal title, and the termination of that title. Extinguishment of the unique legal interest of aboriginal peoples in their ancestral lands must fall within federal jurisdiction under s. 91(24), because it requires legislative action which concerns Indians qua Indians; these rights are uniquely those of the aboriginal peoples, and the extinguishment of these rights must therefore necessarily impair their status or capacity.

Another argument in favour of provincial power (not actual constitutional competence) to extinguish aboriginal title could be founded upon the wording of s. 88 of the Indian Act. This view interprets s. 88 as an exercise of the federal constitutional competence to extinguish aboriginal title, which is triggered by the passage of a provincial law of general application. The section would make this law applicable to Indians within the province, thereby effectively transferring jurisdiction to extinguish native title to the provinces through the mechanism of referential incorporation. As this is a novel argument which has not, to my knowledge, been advanced elsewhere, I will attempt to demonstrate the point with an example.

Suppose Ontario passes a law establishing a game preserve and provincial park in an area which is subject to aboriginal title. The law is of general application, and does not single out Indians for any different treatment than is generally applied. Both cottage owners and Indians are asked to leave the area, and are forbidden to use it without a permit. An argument could be advanced that this effects an extinguishment of the aboriginal title by implication, which is constitutionally valid since it falls within s. 88. The extinguishment would have no independent constitutional validity, but it would gain life through referential incorporation by s. 88, and the title would, in effect, then be extinguished by the federal government.

The argument against this view is that such a law cannot be effective to extinguish the title at all, because the act of extinguishment is in relation to "Indian lands" within s. 91(24) of the Constitution Act, 1867, while s. 88 falls under the head "Indians" within this section.¹⁹³ On this view of the matter, s. 88 could not be effective to "trigger" extinguishment of aboriginal title.

My argument in support of exclusive federal competence will conclude with a policy analysis of the implications of this theory. From the earliest days of Canada's existence, responsibility for the administration of native affairs has been centralized in the federal government. Provincial involvement, to the limited extent that it existed, in the treaty-making process was founded upon express statutory provisions or agreements designed to facilitate the creation of Indian reserves following the conclusion of the treaty.¹⁹⁴ None of these agreements would have been required if both jurisdictions had shared competence in this matter. The existing policy of central administration of aboriginal lands, and the policy of regulating interaction between native people and non-natives, especially with regard to land transactions, was clearly enunciated in the Royal Proclamation. In view of the respect accorded to possession

of ancestral lands, in official policy and law if not always in practice, it would seem inappropriate now to decide that this occupancy may be forever extinguished by all of the provincial governments as well as by federal authorities. The theory of aboriginal title has been criticized because it relegates aboriginal title to the precarious status of a right enjoyed at the whim of the sovereign. Let us not now expand that to subject this right to the whims of ten other sovereigns.

The extinguishment of aboriginal title, by treaty or by legislation, is an exercise of jurisdiction peculiar to native peoples. Two alternative lines of reasoning could be employed to protect this title from extinguishment by the provinces. First, an argument could be made that the termination of aboriginal title affects the unique "status and capacities" of native people and is thus legislation in relation to Indians under s. 91(24). Alternatively, one could argue that all lands which are subject to aboriginal title are "lands reserved for the Indians" within head 24 of s. 91. Whichever argument is successful, the result will be that federal competence to extinguish aboriginal title is exclusive.

(ii) Canadian Law on the Manner of Extinguishment

The sovereign power to extinguish aboriginal title, first enunciated in Canada in the St. Catharine's Milling case, where Indian title was said to be "dependent upon the good will of the Sovereign" is today firmly established. Professor (now Mr. Justice) Lysyk identifies the three most important modes of extinguishing aboriginal title as: (1) purchase (treaty); (2) conquest; (3) legislation.¹⁹⁵ The treaty process has been described already,¹⁹⁶ and although it is today the basis of the federal comprehensive claims policy, for our purposes this method of termination of aboriginal title is of limited importance, except to the extent that some incidents of the title, having been preserved by treaty, continue to be regarded as a "kind of residue of the native title

which remained fastened to the land in spite of the Crown's extinguishment of the rest of their title".¹⁹⁷ This point is mentioned merely to illustrate that in certain circumstances the issue of aboriginal title is not entirely foreclosed by the existence of a treaty.

Extinguishment by military conquest probably does not apply in Canada, since we have no history of Indian wars comparable to that of the United States.¹⁹⁸ The theory of conquest is not wholly irrelevant in Canada, however, since the doctrine of peaceful settlement developed by Chief Justice Marshall, though conceptually distinct from that of conquest, has been interpreted to grant virtually identical powers to the sovereign as it receives under the conquest rule. This has important implications for Canada which will be explored later.

The final method of extinguishing aboriginal title is by legislation. This is the most important aspect of this problem for our purposes, because as the recent cases illustrate, aboriginal title is today very often affected by legislation which is said to extinguish the title by implication. This is the basis for virtually all of the cases involving s. 35 which have arisen thus far, and therefore it is vital to a proper understanding of that section.

Judges in Canada have evolved several different tests to determine whether extinguishment has occurred. The least onerous of these was propounded by Mr. Justice Judson in the Calder case when, after a review of the history of British Columbia's dealings with the Nishga Indians, he concluded:

In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.¹⁹⁹

This test requires only that the sovereign have made alienations "that are inconsistent with the existence of an aboriginal title".²⁰⁰

A more rigorous standard was applied by Mr. Justice Hall in the Calder case to determine whether legislative extinguishment had occurred. In his judgment, he adopted the following passage from Amodu Tijani v. The Secretary, Southern Nigeria:²⁰¹

The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances.²⁰²

He then went on to quote the American test which requires a "clear and plain indication" of an intention to extinguish native title.²⁰³ The test which Hall J. ultimately provided is the following:

It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on (the Crown) and that intention must be 'clear and plain'.²⁰⁴

On the evidence before the Court, Mr. Justice Hall could find no such proof.

The third test developed by a Canadian judge to determine whether aboriginal title has been extinguished is contained in Hamlet of Baker Lake v. Minister of Indian Affairs.²⁰⁵ In this case the matter is complicated by the fact that the history of the region had to be considered both before and after the admission of Rupert's Land into Canada. Mr. Justice Mahoney examined the period prior to entry into Confederation, and concluded that the Royal Charter granting the region to the Hudson's Bay Company was not, of itself, sufficient to extinguish the native title, because of the time-honoured rule that the title can co-exist with the radical title of the Crown.²⁰⁶

He then went on to interpret the Calder rules of extinguishment, to arrive at this startling conclusion:

To say that the necessary result of legislation is adverse to any right of aboriginal occupancy is tantamount to saying that the legislator has expressed a clear and plain intention to extinguish that right of occupancy. Justices Hall and Judson were, I think, in agreement on the law, if not on its application in the particular circumstances.²⁰⁷

This conclusion follows logically from Mr. Justice Mahoney's assertion that since incidents of aboriginal title may be regulated by general legislation "making no express mention of any intention to deal with aboriginal title ..." there was no requirement that the intention to extinguish that title must be set forth explicitly in the legislation.²⁰⁸

The test which he ultimately applied requires that "extinguishment must be effected by Parliament itself enacting legislation inconsistent with the continued existence of an aboriginal title ...".²⁰⁹ Although Mahoney J. was not prepared to invalidate laws such as the Territorial Lands Act²¹⁰ or the Public Land Grants Act²¹¹ simply because they diminished incidents of aboriginal title, he did declare that the Inuit title to the Baker Lake region had not been extinguished.

This test was adopted by Steele J. in A.-G. Ontario v. Bear Island Foundation,²¹² in which the aboriginal title was found to have been extinguished by treaty, and by legislation and administrative action which opened the territory for settlement. In contrast to this, it should be noted that the requirement of a specific indication that extinguishment was intended, adopted by Hall J. in Calder, was foreshadowed by R. v. White and Bob,²¹³ and has since been applied in several decisions involving aboriginal rights claims.²¹⁴

Justice Mahoney's statement that aboriginal rights can be abridged without being extinguished mirrors the following assertion by Dickson J.:

However abundant the right of Indians to hunt and to fish, there can be no doubt that such right is subject to regulation and curtailment by the appropriate legislative authority ... (the) title, as any other, is subject to regulations imposed by validly enacted federal laws ... 215

The critical evaluation which follows makes no pretense of being exhaustive. Rather, several of the more obvious difficulties will be presented in order to provide a framework for the alternative approach to the problem which will be suggested later. To begin with Mr. Justice Judson's test, it is difficult to understand precisely what he meant by the assertion that the province, by opening lands for settlement, exercised complete dominion over the lands adverse to the Indian right of occupancy, especially in light of his observation that

(t)he Crown in right of the Province has made certain grants in this territory, some in fee simple; in other cases of pre-emption, mineral and mining rights, petroleum permits, forestry rights and titles and tree farm licences. However, the vast bulk of the area remains still unalienated.²¹⁶

By his acceptance of the trial judge's statement that the various legislative enactments considered "reveal a unity of intention to exercise ... absolute sovereignty ... inconsistent with any conflicting interest, including one as to 'aboriginal title' ..." ²¹⁷ Judson J. appears to misunderstand the nature of aboriginal title, which has often been found capable of co-existing with the ultimate title of the Crown.²¹⁸

How could such an interest survive the assertion of sovereignty by a discovering power, only to be terminated by a mere assertion of an intention to open the lands to settlement, such as is found in the British Columbia legislation? One need not go so

far as to require an express indication of an intention to extinguish the title in order to come to a different conclusion from Judson J. on the facts of this case. Might not one require more than a mere intention to open lands for settlement, especially where this was not followed by any alienation or settlement of the bulk of the territory, as Judson admits to be the case here? No answer to this question is contained in the reasoning of Mr. Justice Judson, nor does he explain how this legislation was inconsistent with the Indian occupancy which had, in fact, continued long after the statutes were enacted.

The alternative theory proposed in the Calder case by Mr. Justice Hall is much more solicitous of native interests, but it too is not without its faults. The first problem in this reasoning is that the actual test employed by Hall J. was not a direct translation of the American rule, and no basis for the change was provided. Mr. Justice Hall stated that the American test requires a "clear and plain indication" of an intention to extinguish the title. He then states, in the following paragraph, that a "clear and plain intention" is all that is required in Canada. The important consequence of this change is that Justice Hall's test could possibly be used to validate extinguishment by implication, whereas the American rule would appear to require a legislative expression of such an intention. Although this objection may appear to be trivial, in light of the unsettled area of the law, and subsequent interpretation of Hall J.'s test, precision of expression by that learned judge would have been appreciated.

In the Calder case Hall J. did state that the Indian title was a legal right that could only be extinguished by specific legislation.²¹⁹ This aspect of his decision is unobjectionable, and is securely grounded in the judicial precedents. Although other aspects of this decision may justifiably be criticized, in general Mr. Justice Hall's theory of extinguishment accords to native title the respect and protection which our legal heritage, dating from the Royal Proclamation, would seem to require.

The third test considered here is that of Mr. Justice Mahoney in the Baker Lake case, which was adopted in the Bear Island decision. At best, this is a brave attempt: there are many flaws in the reasoning employed in the case. I shall limit this critique to two problems evident in the judgment. The first concerns the actual form of words used by Mr. Justice Mahoney in expressing his test. By formulating a test which requires that the legislation be inconsistent with the continued existence of aboriginal title, Mahoney J. ensured that extinguishment by implication would be upheld. In this it is submitted that he mis-read the Hall test, and departed from that adopted by Judson as well. In formulating his own rule, he departed radically from the established precedents.

The second, and equally damning, criticism of Justice Mahoney's reasoning is that he equates the diminution of an incident of aboriginal title with the extinguishment of that title, in order to justify his acceptance of abrogation by implication. Once again the learned judge has mixed two distinct concepts in an effort to derive a unique test. Justice Mahoney rejects the argument that Hall J. went so far as to require that "Parliament's intention to extinguish an aboriginal title must be set forth explicitly in the pertinent legislation".²²⁰ This conclusion is plainly wrong; to quote Mr. Justice Hall:

It (native title) being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation.²²¹

An argument too elaborate to be included here would be required to explore fully the limitations of this decision. The crux of the problem is, however, simply that instead of refusing to follow earlier precedents on the basis of reasoned objection or because of policy considerations, Mr. Justice Mahoney re-worked them into an unrecognizable, and somewhat unpalatable, form

(iii) An Alternative Approach

Assuming that the criticisms offered here are regarded as valid, there are today, it seems to me, two possible avenues for the legal system to follow in any future consideration of extinguishment of aboriginal title. One is to follow the path illuminated by Geoffery Lester, which basically involves a full-scale frontal attack upon the received doctrine of aboriginal title.²²² While not wishing to deny the validity of this assault, as it has been fully explained by Lester I do not wish to pursue this approach. Instead I shall offer several suggestions for improving the present rules relating to extinguishment. In this I am conscious of the futility of repairing an irretrievably wrong-headed theory, but I am equally conscious of the pressing weight of stare decisis. There is a chance that by pursuing short-term, limited changes in the theory, some improvement in the whole may be accomplished over time.

This analysis will proceed upon the assumption that aboriginal title will continue to be regarded as an important interest which merits such protection as can be mustered for it within the bounds of the general theory. Section 35 of the Constitution Act, 1982 must at least ensure this. A fundamental postulate of that theory is the unbridled power of the sovereign to extinguish aboriginal title before 1982. This will not be questioned for it is today too deeply ingrained into the common law to be simply discarded. Instead, I suggest that the courts employ several long-standing presumptions used in other areas of the law to temper the exercise and possible abuse of this absolute authority.

The first presumption which should be applied is that documents drafted in relationships of unequal power shall be construed against the stronger in case of ambiguity.²²³ In this context, this rule would be applied so that legislation, treaties and other documents relating to the native peoples ought to be interpreted in their favour in case of ambiguity. This approach has been adopted in several recent

decisions of the Supreme Court of Canada as a recognition of the unequal bargaining positions of the parties, and also "so as to avoid bringing dishonour to the Government and through them, to the Crown".²²⁴

The second presumption which merits attention requires express language to interfere with vested rights or interests. This would translate into a presumption against extinguishment by implication, in order to protect native title from termination by oversight. One of the consequences of accepting extinguishment by implication will be that the law will be confused and confusing for a very long time, until all of the various and sundry methods of indirect extinguishment have been explored. Such an unhappy result is not pre-ordained simply from our acceptance of the sovereign power to extinguish native title. Today it is a commonplace that courts will be reluctant to interfere with "vested rights" unless specifically required to do so. A similar presumption ought to be applied to protect the rights of aboriginal peoples, rights which have been enjoyed from time immemorial.

The final presumption is that anything not expressly taken away by legislation shall continue. This would mean that any residue of aboriginal title which is not specifically terminated would continue in force. In the Baker Lake case Mr. Justice Mahoney concluded that aboriginal title had been diminished by various legislative enactments, but that it had not been extinguished. His distinction between derogation and extinguishment is one of the few defensible aspects of his reasoning. Accepting for the moment that the incidents of aboriginal title may be diminished by competent legislation, the presumption here advanced would preserve all such incidents which have not been affected by the legislation, and would ensure that when the offending legislation was repealed, the dormant aboriginal title would revive.

This argument would then support the proposition that a diminished aboriginal title, even one rendered virtually meaningless by regulation, is still an "existing"

aboriginal right within the meaning of s. 35 of the Constitution Act, 1982, which can no longer be extinguished. We have thus come full circle. Extinguishment of aboriginal title was identified as a problem of great importance today in light of this constitutional provision. This analysis of the American, Commonwealth and Canadian law in the area is intended to show that the existing rules are far from perfect, and to suggest an alternative approach which would do justice to our legal tradition and, equally important, to the native peoples.

3. Aboriginal Rights: Exploring the Limits

An examination of the outer limits of the concept of aboriginal rights in Canada today invariably involves a move from legal to political matters, and this aspect of the issue is beyond the scope of this thesis. Instead the basic contours of an expanded understanding of the term "aboriginal rights" in s. 35 will be charted.

The "political" nature of the concept of aboriginal rights today derives from, and is reflected by, the ongoing process of discussion and negotiation in the context of constitutional conferences which have been going on since 1982. Part of the original constitutional reform package enacted in that year was a provision requiring a constitutional conference to be convened within one year of the proclamation of the Constitution Act. Subsection 37(2) specifically required that the conference agenda include "an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item".

After intensive preliminary negotiations, the conference required by s. 37 was held on 15 and 16 March, 1983.²²⁵ The most tangible result of this conference was an

agreement on an ongoing process for the discussion of "constitutional matters that directly affect the aboriginal peoples of Canada". (s. 37.1(2)). A political agreement was reached to hold another conference in 1984, and a provision concerning similar conferences to be held in 1985 and 1987 was added to the Constitution Act, to replace the original section 37 which expired on April 17, 1982.²²⁶ The wide ranging discussion at the 1983, 1984 and 1985 conferences is the best evidence of the "political" nature of the scope of the concept of aboriginal rights.

An idea of the possible scope of aboriginal rights can be gleaned from several modern sources,²²⁷ but it is submitted that the key to a principled understanding of this concept is an awareness of the original basis upon which aboriginal-European relations were conducted. In order fully to comprehend the scope of the term aboriginal rights it is necessary to recall the theoretical and historical basis for the concept in our law. The statement by Mr. Justice Judson in Calder is an excellent expression of this: "... when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries".²²⁸ As Doug Sanders states:

Aboriginal rights claims are often thought to be limited to land claims or the right to use particular lands for hunting and fishing. The claims to land are, logically, a claim to the recognition of a set of legal rights established under Indian and Inuit customary law, a law that has validity because Indian and Inuit communities had their own governments.²²⁹

Most Canadian cases concerning aboriginal customary law relate to family matters such as marriage or adoption.²³⁰ An example of the importance of the concept of aboriginal rights to the legal status of aboriginal customary laws is the Quebec case of Connolly v. Woolrich.²³¹ In this case a marriage entered into according to Cree customary law was upheld, even though the white husband later

entered into a Christian marriage with another woman in a ceremony recognized by Quebec law. The latter wife argued that the earlier marriage had no legal effect, because the introduction of English common law automatically invalidated the customary law. The judge stated:

... will it be contended that the territorial rights, political organization such as it was, or the laws and usages of the Indian tribes, were abrogated — that they ceased to exist when these two European nations began to trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not — that so far from being abolished, they were left in full force, and were not even modified in the slightest degree in regard to the civil rights of the natives.²³²

More recently, customary rules governing adoption have been enforced by Canadian courts, and this may be expected to continue under s. 35(1).²³³

A major part of the recent debate concerning the scope of aboriginal rights has focussed on aboriginal self-government. A vigorous and effective campaign in favour of expanded self-government by aboriginal peoples has been waged by these peoples and others, and the recent report of a Parliamentary Committee²³⁴ which has been incorporated into federal government policy,²³⁵ has given further impetus to this initiative.

Self-government is a broad and ill-defined concept.²³⁶ It has some foundation in the Constitution Act, 1982²³⁷ but it is as much rooted in political as legal arguments. Rather than exploring the various viewpoints on the meaning and merits of self-government, I shall offer a different version of this aspect of aboriginal rights, which is not rooted in any particular self-government proposal.

Aboriginal rights are collective rights; they derive their existence from the common law's recognition of prior social organization. Although these rights cannot ensure that aboriginal peoples will be immune from the external influences that have

influenced their societies since the time of contact, it is submitted that the recognition of aboriginal rights must mean that these peoples can control the way in which this change will occur. This is a proposal which comprehends much more than most current self-government proposals. If aboriginal rights, as collective rights, ensure that the group can preserve its "different-ness", they must include this concept of self-direction for the group. Otherwise the group itself, and its purpose for existence, may not survive intact. That would be contrary to the very concept of collective rights, and as assimilation and termination is something which the aboriginal peoples of Canada have successfully resisted for three centuries, it should not now be accepted as an appropriate consequence of the guarantee of aboriginal rights in the Constitution Act, 1982.

The concept of self-direction is derived from the theory of aboriginal rights enunciated earlier. As has been pointed out in this Chapter, the precise rights of any particular aboriginal group must be determined by an examination of the specific historical and legal context. In the absence of such a detailed study, it is impossible to state definitively that a particular group actually enjoys the aboriginal rights discussed here. In this section, therefore, I will describe my conception of what aboriginal rights might be; the task of defining what the rights of a specific group actually are is beyond the scope of this thesis.

The concept of self-direction is primarily concerned with protecting an aboriginal group's capacity to control change. The traditional legal definition of aboriginal rights already recognizes and protects land use and customary family law rules and practices. Logically this recognition should extend to other manifestations of group life, such as membership, heredity and leadership rules, and customary punishments for violation of the group's rules. If s. 35(1) requires courts to give effect to these sorts of practices, it will be partially successful in achieving the protection of

the group's "different-ness", which must be the basic function of any constitutional recognition of collective rights.

Interpreted in this fashion, s. 35 will ensure that the conditions which are essential for the continuance of the group, namely land base and control over membership decisions, will be preserved. This view of aboriginal rights preserves the group itself, and ensures that the group can continue to follow its traditions. An essential aspect of this is control over membership decisions. If this is taken from the group, a possible influx of new members may diminish or obliterate the group as a distinct cultural entity. This is a familiar problem for aboriginal peoples in Canada, which has been brought out in the debates concerning s. 12(1)(b) of the Indian Act.²³⁸

A related aspect of this conception of aboriginal rights is group control over internal matters such as education, marriage, divorce and adoption. Respect for aboriginal rights in law must mean more than recognition of land use and harvesting activities. Other group activities and practices which were part of the pre-existing social structure should be included within the concept of aboriginal rights because these activities are vital reflection and embodiment of the group's different-ness. Protection of the group's existence will be meaningless unless it is accompanied by protection of the group's activities and institutional structures and capacity for maintaining these by practice and education.

All aboriginal societies had institutional structures governing sustenance, culture, family and leadership, although the complexity of these rules differed between societies. These structures are part of the concept of aboriginal rights.

Self-direction for aboriginal peoples moves beyond the above-mentioned categories in that it is concerned mainly with group responses to, and control of, change. Change has been an unrelenting theme in aboriginal history in this country from the time of contact with Europeans. The pace of this change has intensified, and

control of the external influences which affect aboriginal societies must be taken to be a vital element in the survival of these cultures.

Aboriginal rights do not encompass immunity from external influence, and no current model of aboriginal self-government proposes such an impossibility. Despite this fact, it is submitted that the power to make choices about how and when external influences, such as resource development, will affect an aboriginal society must be left in the hands of the group itself, if aboriginal rights are to be a meaningful guarantee. Aboriginal societies have constantly adapted to external influences, and this process continues. A meaningful recognition of aboriginal rights must be cognizant of this fact, and protect the group's capacity to control and direct such adaptation. This, it is submitted, is the consequence of a principled approach to aboriginal rights. The collectivity must control itself and adapt itself to new conditions, and thus preserve its different-ness. Aboriginal societies have been intimately involved in this process for three centuries. The guarantee of aboriginal rights in sections 25 and 35 of the Constitution Act, 1982 can now be utilized to modify the current legal conception of that term so that it corresponds to this reality.

CHAPTER 6 ENDNOTES

1. All further references to s. 35 are to sub-section 35(1).
2. Constitution Amendment Proclamation, 1983, 51/84-102.
3. Chapter 1, supra.
4. "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 Queen's L.J. 232, at p. 249. See also K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 Sup. Ct. L. Rev. 255, at p. 256.
5. Ibid., at pp. 248-49.
6. Ibid., at pp. 250-51.
7. Section 57 of the Constitution Act, 1982.
8. Supra note 4, at p. 252.
9. Submissions on this point by aboriginal organizations to the Special Joint Committee of the Senate and House of Commons may be a helpful reference, to the extent that they help to explain why a positive statement such as that in s. 35 was inserted into the Constitution: see Chapter 1 supra.
10. Subject to the appropriate procedural requirements. These are not relevant to this discussion; see R. McLeod et al., The Canadian Charter of Rights and Freedoms: The Prosecution and Defence of Criminal and Other Statutory Offences, Toronto: Carswell, 1983 (as updated), Part IV.
11. See D. Sanders, "The Indian Lobby", in And No One Cheered: Federalism, Democracy and the Constitution Act (K. Banting and R. Simeon eds.), Toronto: Methuen, 1983, 301, at pp. 319-21 (hereinafter Sanders, "The Indian Lobby"); P.

Jull, "A Necessary Victory — a perspective on the Aboriginal Rights Coalition and the restoration of constitutional aboriginal rights in Canada, November, 1981", unpublished, December 1981.

12. Sanders, "The Indian Lobby", p. 321; D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983), 61 Can. Bar Rev. 315, at p. 330.
13. Hon. Jean Chretien, Canada, Proceedings of the House of Commons (Hansard), Tuesday 24 November 1981, Vol. 124, No. 262, 1st sess. 32nd Parliament, pp. 13203-13204.
14. Surprisingly only Professor Lysyk (as he then was) makes this point explicitly: "The Rights and Freedoms of the Aboriginal Peoples of Canada" in The Canadian Charter of Rights and Freedoms: Commentary, (W.S. Tarnopolsky and G.A. Beaudoin eds.), Toronto: Carswell, 1982, 467 at p. 477. See also R. v. Eninew (1983), 1 D.L.R. (4th) 595 (Sask.Q.B.), at p. 598.
15. Sanders, "The Rights of the Aboriginal Peoples of Canada", supra note 12, at p. 331.
16. Supra note 13.
17. Supra note 15, at p. 331.
18. Loc. cit.
19. Supra note 14, at p. 478.
20. Loc. cit.
21. Loc. cit.
22. Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference, Kingston: Queen's Institute of Intergovernmental Relations, 1983, at p. 43.

23. K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 Sup. Ct. L. Rev. 255, at pp. 256-57; B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 Queen's L.J. 232, at p. 257.
24. Supra note 22, at pp. 42-43.
25. Supra note 23, and "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 Am. J. Comp. L. 361. See also J. O'Reilly, "La loi constitutionnelle de 1982: droit des autochtones" (1984), 25 C. de D. 124, at pp. 138-39.
26. Ibid., at pp. 262-65.
27. Ibid., at p. 254.
28. See Slattery, supra note 23.
29. Supra note 25, "The Hidden Constitution", at p. 378.
30. As reflected in s. 10 of the federal Interpretation Act, R.S.C. 1970, c. I-23; see Slattery, ibid., at p. 377, footnote 46.
31. "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 Sup. Ct. L. Rev. 255.
32. Ibid., at pp. 257-58.
33. "A Little Closer Look" (1982), 5 Ontario Indian, No. 1, 26, at p. 27, cited in McNeil, ibid., at p. 257, footnote 13.
34. Ibid., at p. 258.
35. See Chapter 5, supra. As to the extinguishment of Treaty obligations, see Chapter 5, and Slattery, "The Hidden Constitution", supra note 25, at pp. 385-86; "The Constitutional Guarantee", supra note 23, at pp. 263-64.

36. The principal cases are: R. v. Steinhauer, [1984] 4 C.N.L.R. 126 (Alta.Prov.Ct.); R. v. Martin et al. (1985), 65 N.B.R. (2d) 21 (N.B.Q.B.); Horse v. The Queen, [1985] 1 W.W.R. 1 (Sask.C.A.); R. v. Hare and Debassige (1985), 20 C.C.C. (3d) 1 (Ont.C.A.); R. v. Eninew (1984), 10 D.L.R. (4th) 137 (Sask.C.A.).
37. (1983), 1 D.L.R. (4th) 595 (Sask.Q.B.); aff'd (1984), 10 D.L.R. (4th) 137 (Sask.C.A.)
38. Migratory Birds Regulations, C.R.C. 1978, c. 1035, s. 5(4).
39. R.S.C. 1970, c. M-12.
40. Supra note 37, 1 D.L.R. (4th), at p. 597. The relevant clause of Treaty No. 10 is cited at p. 597.
41. Ibid., at pp. 598-99.
42. (1984), 10 D.L.R. (4th) 137, at p. 140.
43. (1985), 20 C.C.C. (3d) 1, at p. 16.
44. In Canada Act, 1982 Annotated, Toronto: Carswell, 1982, at p. 83.
45. [1985] 1 W.W.R. 1, at p. 10.
46. R.S.C. 1970, App. II, No. 25.
47. Supra note 45, at p. 10. See also: R. v. Netmaker, [1985] 3 C.N.L.R. 181 (Sask.Prov.Ct.), at p. 185.
48. (1985), 65 N.B.R. (2d) 21 (Q.B.).
49. Supra note 44.
50. Supra note 37.

51. Supra note 48, at pp. 26-27 (emphasis added).
52. See, for example, Steinhauer v. The Queen, [1985] 3 C.N.L.R. 187, at p. 191.
53. All of the comments on this point are obiter dicta, because no case has yet arisen involving this particular situation.
54. See N. Mickenberg, "Aboriginal Rights in Canada and the United States" (1971), 9 Osgoode Hall L.J. 119, at p. 119, note 6.
55. Calder v. A.G.B.C. (1973), 34 D.L.R. (3d) 145 (S.C.C.), at p. 156, per Judson J.
56. St. Catharine's Milling & Lumber Co. v. The Queen (1888), 14 App. Cas. 46, at p. 54 (P.C.).
57. Black's Law Dictionary (5th ed., 1979) gives the following definition of "usufruct": In the civil law, the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing. (at p. 1384)
58. (1983), 147 D.L.R. (3d) 237.
59. Ibid., at p. 249, quoting the Shorter Oxford English Dictionary, 1959.
60. Ibid., at p. 250.
61. [1984] 2 S.C.R. 335; (1984), 13 D.L.R. (4th) 321 (S.C.C.).
62. Ibid., at p. 382 (S.C.R.)
63. Ibid., at p. 379.
64. Supra note 55.

65. Ibid., at p. 55.
66. 10 U.S. 162 (6 Cranch. 48) (1810). For a review of American cases which preceded this decision, see Morse, Indian Tribal Courts in the United States: A Model for Canada?, University of Saskatchewan Native Law Centre, 1980.
67. 21 U.S. 681 (8 Wheat. 543) (1823).
68. 31 U.S. 483 (6 Pet. 515) (1832).
69. "Original Indian Title" (1947), 32 Minn. L. Rev. 28, at pp. 43-44. See also, by the same author, "The Spanish Origins of Indian Rights in the Law of the United States" (1942), 31 Georgia L. Rev. 1.
70. B. De Las Casas, History of the Indies. (A.M. Collard trans.), New York: Harper Torchbooks, 1971.
71. Supra note 69, at p. 44.
72. De Indies et De Jure Belli: Relectiones, s. 1, para. 4-19, quoted in G.I. Bennett, "Aboriginal Title in the Common Law: A Story Path Through Feudal Doctrine" (1978), 27 Buffalo L. Rev. 617, at p. 619.
73. See Cohen, supra note 69, at p. 45; Bennett, ibid., at pp. 619-20.
74. See Cohen, supra note 69; M. Davies, "Aspects of Aboriginal Rights in International Law" in Aboriginal Peoples and the Law: Indian, Inuit and Metis Rights in Canada (B. Morse ed.), Ottawa: Carleton University Press, 1985, 16.
75. See D. Sanders, "The Re-emergence of Indigenous Questions in International Law" (1983), 1 Can. H.R.Y.B. 3; R.L. Barsh, "Indigenous Peoples: An Emerging Object of International Law" (1986), 80 Am. J. Comp. L. 369.
76. R.S.C. 1970, App. I.

77. 1st ed., Oxford: Clarendon Press, 1765, Vol. I, at p. 104, quoted in B. Slattery, Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title, University of Saskatchewan Native Law Centre, 1983, at p. 5.
78. See, for example, Guerin v. The Queen, [1984] 2 S.C.R. 335, at pp. 377-8, where Dickson J. refers to these cases.
79. 21 U.S. 681 (8 Wheat. 543) (1823).
80. Ibid., at p. 688.
81. Ibid., at pp. 688-9.
82. 30 U.S. 1 (5 Pet. 1) (1831).
83. Ibid., at p. 16.
84. Ibid., at p. 17.
85. 31 U.S. 483 (5 Pet. 515) (1832).
86. Ibid., at p. 515.
87. Ibid., at p. 495.
88. Loc. cit.
89. Cohen, "Original Indian Title", supra, note 69, at p. 48. Here Cohen is referring to Johnson v. M'Intosh, but at p. 50 he points out that Worcester v. Georgia affirms the same principle.
90. United States v. Shoshone Tribes, 304 U.S. 111 (1937), at p. 116.

91. United States v. Santa Fe Pacific R.R., 314 U.S. 339, 62 S. Ct. 248 (1944); United States v. Gemmill, 535 F. 2d 1145 (1976), cert. denied 429 U.S. 982. See M.J. Kaplan, "Proof and Extinguishment of Aboriginal Title to Indian Lands" (1979), 41 A.L.R. Fed. 425.
92. Gila River Pima-Maricopa Indians v. United States, 494 F. 2d 1386 (1974), cert. denied 419 U.S. 1021.
93. United States v. Alcea Band of Tillamooks, 329 U.S. 40, 67 S. Ct. 167 (1946).
94. United States v. Santa Fe Pacific R.R., 314 U.S. 339 (1944), at p. 347 (citation omitted); see also Butz v. Northern Pacific R.R., 119 U.S. 55, 7 S. Ct. 100 (1886).
95. The actual words used are "by any means the sovereign may deem appropriate": Miami Tribe of Oklahoma v. United States, 175 F. Supp. 926 (1959), at p. 936.
96. 95 U.S. 517, at p. 525 (1877).
97. 180 Ct. Cl. 487 (1967), at p. 492 (citation omitted).
98. See D.G. Kelly, "Indian Title: The Rights of American Indians in Lands They Have Occupied Since Time Immemorial" (1975), 75 Columbia L. Rev. 655, at p. 661; see also United States v. Santa Fe Pacific R.R., supra note 94, at p. 354.
99. Butz v. Northern Pacific R.R., supra note 94; Kaplan, supra note 91, at p. 458.
100. 25 U.S.C.S., s. 177, See Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527 (1979). This Act has recently been resurrected to support Indian claims in Maine; see Passamaquoddy Tribe v. Morton, 528 F. 2d 370 (1975).
101. Gila River Pima-Maricopa Indians v. United States, supra note 92; and see United States v. Santa Fe Pacific R.R., supra note 94.

102. Gila River Pima-Maricopa Indians, ibid.; Santa Fe Pacific R.R., ibid.; Kaplan, supra note 91, at p. 462.
103. Marsh v. Brooks, 55 U.S. 513 (1853); Kaplan, ibid., at p. 464.
104. 43 U.S.C.S., s. 1601. See United States v. Atlantic Richfield Co., 435 F. Supp. 1009 (1977); and Edwardsen v. Morton, 369 F. Supp. 1359 (1973).
105. Act of March 3, 1851, ch. 4, 9 Stat. 631. See United States v. Gemmill, 535 F. 2d 1143 (1976), cert. denied 429 U.S. 982.
106. Kelly, supra note 98, at p. 662.
107. G. Lester, "Primitivism versus Civilization: A Basic Question in the Law of Aboriginal Rights to Land" in Our Footprints Are Everywhere: Inuit Land Use and Occupancy in Labrador (C. Brice-Bennett ed.), Nain, Labrador: Labrador Inuit Association, 1977, 351, at p. 355. For a fuller explanation of Lester's objections see: The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument, D. Jur. Dissertation, York University, Osgoode Hall Law School, 1981. This thesis is a 1530 page monster; see D.W. Elliott, Book Review (1982), 28 McGill L.J. 165, for a more manageable synopsis, or consult Inuit Territorial Rights in the Canadian Northwest Territories, by G. Lester, Tungavik Federation of Nunavut, 1984. See also Slattery, supra, note 77, at pp. 36-38.
108. Ibid., at pp. 355-58.
109. Ibid., at p. 359.
110. Johnson v. McIntosh, 21 U.S. 681, at p. 692, 8 Wheat. 543, at pp. 589-90.
111. J. Youngblood Henderson, "Unravelling the Riddle of Aboriginal Title" (1977), 5 Am. Indian L. Rev. 75, at p. 90.

112. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1954).
113. Henderson, supra note 111, at p. 119.
114. Kelly, supra note 98, at p. 656.
115. To use Lester's phrase, supra note 107, at p. 364.
116. (1847) N.Z.P.C.C. 397, at p. 390; see also Lester, supra note 107, at pp. 360-65.
See also Slattery, supra note 74, at pp. 39-43.
117. (1901) A.C. 561, at p. 579.
118. Ibid., at p. 580.
119. [1919] A.C. 211 (P.C.).
120. Ibid., at pp. 233-34.
121. G.I. Bennett, "Aboriginal Title in the Common Law: A Stony Path Through Feudal Doctrine" (1978), 27 Buffalo L. Rev. 617, at pp. 622-23.
122. [1921] A.C. 399 (P.C.).
123. Ibid., at pp. 402-3.
124. Ovekan v. Adele (1957), 1 W.L.R. 876, at p. 880.
125. (1971), 17 F.L.R. 141. See also R. v. Wedge (1976), 1 N.S.W.L.R. 581; Coe v. Commonwealth (1979), 24 A.L.R. 118; P. Hanks and B. Keon-Cohen, eds., Aborigines and the Law, Sydney: G. Allen & Unwin, 1984.
126. Ibid., at p. 272.

127. Calder v. A.G.B.C. (1973), 34 D.L.R. (3d) 145, at p. 218. See also Hamlet of Baker Lake v. Minister of Indian Affairs (1979), 107 D.L.R. (3d) 513, at p. 542. For criticism of Millirpum see: G. Lester and G. Parker, "Land Rights: The Australian Aborigines Have Lost a Legal Battle, But ..." (1973), 11 Alta. L. Rev. 189; J. Hookey, "The Gove Land Rights Case: A Judicial Dispensation For the Taking of Aboriginal Lands in Australia?" (1972), 5 Fed. L. Rev. 85; L.J. Priestly, "Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case" (1974), 6 Fed. L. Rev. 150, and Dr. Hookey's reply: "Chief Justice Marshall and the English Oak: A Comment" (1974), 6 Fed. L. Rev. 174.
128. Amodu Tijani v. The Secretary, Southern Nigeria, [1921] A.C. 399, at pp. 409-10.
129. (1973), 34 D.L.R. (3d) 145, at p. 156.
130. [1978] 1 S.C.R. 104, at p. 109. The later cases dealing with aboriginal rights claims amply support this view.
131. Calder v. A.-G.B.C., supra note 127; Guerin v. The Queen, infra note 135.
132. St. Catherine's Milling & Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (P.C.).
133. Supra, text accompanying note 57.
134. A.G. Que. v. A.-G. Can., [1921] A.C. 401, at pp. 410-11.
135. [1983] 1 S.C.R. 554. See J. Hurley, "The Crown's Fiduciary Duty and Indian Title: Guerin v. The Queen" (1985), 30 McGill L.J. 559.
136. Ibid., at p. 569.
137. [1984] 2 S.C.R. 335.

138. Ibid., at pp. 381 and 386.
139. See Hurley, supra note 135; see also K. Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973), 51 Can. Bar Rev. 450.
140. Hamlet of Baker Lake v. Minister of Indian Affairs (1979), 107 D.L.R. (3d) 513, at p. 549, per Mahoney J. (Fed. Ct., T.D.).
141. Hamlet of Baker Lake, ibid.; A.-G. Ontario v. Bear Island Foundation (1984), 15 D.L.R. (4th) 321 (Ont. H.C.J.).
142. See J. Gagne, "The Content of Aboriginal Title at Common Law: A Look at the Nishga Claim" (1982-83), 47 Sask. L. Rev. 309, at pp. 330-9; B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 Am. J. Comp. L. 361, at pp. 373-4.
143. See Chapter 2, supra.
144. P. Cumming and N. Mickenberg, Native Rights in Canada (2nd ed.), Toronto: General Publishing, 1972, at p. 65.
145. Even in treaty areas the issue of extinguishment is relevant for tribes or bands who did not adhere to the treaty, or for groups who allege that the treaty-making process was defective.
146. See Living Treaties: Lasting Agreements, Report of the Task Force to Review Comprehensive Claims Policy, Ottawa, 1985.
147. Discussed supra, Part I, section (2)(ii).
148. W. Henderson, "Indian Reserves: The Usufruct in Our Constitution" (1980), 12 Ottawa L. Rev. 167, at p. 173, note 31. See also M. Patenaude, Le droit provincial et les terres Indiennes, Montreal: Les editions Yvon Blais, 1986.

149. A.-G. Ontario v. Bear Island Foundation (1984), 15 D.L.R. (4th) 321 (Ont. H.C.J.).
150. St. Catharine's Milling & Lumber Co. v. The Queen (1885), 10 O.R. 196 (Ch. Div.); (1885), 13 O.A.R. 148 (C.A.); (1887), 13 S.C.R. 577; (1888), 14 App. Cas. 46 (P.C.). For an excellent review of the various decisions in this case see: R. Pugh, "Are Northern Lands Reserved For the Indians?" (1982), 60 Can. Bar Rev. 36, at pp. 36-46.
151. R. v. St. Catherine's Milling & Lumber Co. (1885), 13 O.A.R. 148, at p. 167.
152. Ibid., at pp. 157-58.
153. St. Catharine's Milling & Lumber Co. v. The Queen (1887), 13 S.C.R. 577, at pp. 615-16.
154. 12 C.L.T. 163, quoted in A.H.F. Lefroy, The Law of Legislative Power in Canada, Toronto: Toronto Law Book and Publishing Co., 1897, at p. 593, note 2.
155. A.G. Canada v. A.G. Ontario, [1897] A.C. 199 (P.C.) (Robinson Annuities case); Dominion of Canada v. Province of Ontario, [1910] A.C. 637 (P.C.) (Treaty 3 Annuities); A.G. Quebec v. A.G. Canada, [1921] 1 A.C. 401 (P.C.) (Star Chrome case).
156. Dominion of Canada v. Province of Ontario, [1910] A.C. 637, at p. 646. His Lordship also stated that in negotiating the treaty the Dominion "acted upon the rights conferred by the Constitution", at p. 644.
157. (1973), 34 D.L.R. (3d) 145, at p. 169, per Hall J.
158. Hamlet of Baker Lake v. Minister of Indian Affairs (1979), 107 D.L.R. (3d) 513, at p. 549, per Mahoney J. (Fed. Ct., Trial Div.).
159. (1984), 15 D.L.R. (4th) 321 (Ont. H.C.J.).

160. Ibid., at p. 442.
161. Ibid., at pp. 437-43.
162. [1910] A.C. 637 (P.C.).
163. Ontario Mining Co. v. Seybold, [1903] A.C. 73, at p. 79 (P.C.).
164. Quebec Boundaries Extension Act, S.C. 1912, c. 45, s. 2(c).
165. A.G.N.S. v. A.G. Canada, [1951] S.C.R. 31. Note that the surrenders are subject to the approval of the federal Governor-in-Council under this Act, s. 2(d). Quaere whether this would suffice to validate this delegation? See generally, P. Hogg, Constitutional Law of Canada (2nd ed.), Toronto: Carswell, 1985, ch. 14.
166. For another such indication, see the federal disallowance of British Columbia legislation which purported to ignore aboriginal title, noted in K. Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973), 51 Can. Bar Rev. 450, at p. 478, note 76.
167. See St. Catharine's Milling & Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (P.C.).
168. R.S.C. 1970, c. I-6.
169. See A.G. Quebec v. A.G. Canada, [1921] 1 A.C. 401 (P.C.); Davey v. Isaac (1974), 5 O.R. (2d) 610. On this point see Henderson, supra note 148.
170. See Cumming and Mickenberg, supra note 144, at p. 235; and K. Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967), 45 Can. Bar Rev. 513, at pp. 517-18. Although equivocal on the question of legislative competence, this article is a classic example of the immeasurable benefits of rigorous thought and precise exposition.

171. See Hamlet of Baker Lake v. Minister of Indian Affairs (1979), 107 D.L.R. (3d) 513, at p. 549; R. v. Kogogolak (1959), 28 W.W.R. 376, at p. 384, per Sissons J. (N.W.T. Terr. Ct.). The examples could be repeated ad nauseum.
172. (1974), 56 D.L.R. (3d) 379 (B.C. Prov. Ct.).
173. Ibid., at p. 390.
174. Ibid., at p. 387.
175. See for example: Francis v. The Queen, [1956] S.C.R. 618; R. v. White and Bob (1965), 52 D.L.R. (2d) 481 (S.C.C.); R. v. Sikeya, [1964] S.C.R. 642; R. v. George, [1966] S.C.R. 267; Kruger and Manuel v. The Queen, [1978] 1 S.C.R. 104.
176. The debate centres on whether s. 88 merely re-states the general constitutional rules, or whether it referentially incorporates provincial laws, thereby subjecting Indians to laws from which they would otherwise be immune. See D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in Canada and the New Constitution (S.M. Beck and I. Bernier eds.), Montreal: Institute for Research on Public Policy, 1983, Vol. 1, 225, at p. 260, for a discussion on this question. The referential incorporation theory has recently been rejected: Dick v. The Queen, [1985] 2 S.C.R. 309.
177. R. v. White and Bob (1964), 52 W.W.R. 193 (B.C.C.A.); aff'd (1965), 52 W.W.R. (2d) 481 (S.C.C.).
178. [1978] 1 S.C.R. 104.
179. Ibid., at pp. 112-13, per Dickson J.
180. Ibid., at p. 110. The analogy to the application of provincial laws to federally-incorporated companies is also mentioned; see Bonanza Creek Gold Mining Co. v. The King, [1916] A.C. 566, at p. 580; see also Dick v. The Queen, [1985] 2 S.C.R. 309.

181. Supra note 172.
182. See J.E. Bickenback, "The Baker Lake Case: A Partial Recognition of Inuit Aboriginal Title" (1980), 38 U.T. Fac. L. Rev. 232, at pp. 246-47. This is no longer permissible, by virtue of s. 35 of the Constitution Act, 1982.
183. R.S.B.C. 1979, c. 433.
184. Dick v. The Queen, [1985] 2 S.C.R. 309.
185. Ibid., at pp. 323-24.
186. See P. Hogg, Constitutional Law of Canada (2nd ed.), Toronto: Carswell, 1985, pp. 475ff for a discussion of provincial jurisdiction over property. The Constitution Act, 1930 and other subsequent laws have given all provinces jurisdiction and ownership of most public lands.
187. See on this point, Hogg, ibid., ch. 10.
188. See St. Catharine's Milling & Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (P.C.), per Lord Watson. In that case "lands reserved for the Indians" was interpreted to include "all lands reserved, upon any terms or conditions, for Indian occupation." (at p. 59)
189. See Sikyey v. The Queen, [1964] S.C.R. 642; Sigeareak El-53 v. The Queen, [1966] S.C.R. 645; R. v. White and Bob (1964), 52 W.W.R. 193 (B.C.C.A.). Note the ongoing debate as to the extent of Royal Proclamation lands; see the theses by Lester and Slattery listed in the bibliography, and compare to K.M. Narvey, "The Royal Proclamation of 7 October 1763, the Common Law, and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company" (1973-74), 38 Sask. L. Rev. 121.
190. See P. Hughes, "Indians and Lands Reserved for the Indians: Off-Limits to the Provinces?" (1983), 21 Osgoode Hall L.J. 82.

191. (1984), 15 D.L.R. (4th) 321, at pp. 437-40.
192. Ibid., at pp. 439-40.
193. See K. Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967), 45 Can. Bar Rev. 513, for a discussion of the implications of the two heads of s. 91(24). See also the cases which have interpreted s. 88 of the Indian Act, discussed previously. See also: Paul v. Paul (1984), 12 D.L.R. (4th) 462 (B.C.C.A.); Natural Parents v. Superintendent of Child Welfare (B.C.), [1976] 2 S.C.R. 751; Hughes, supra note 190.
194. See R. v. Batisse (1978), 19 O.R. (2d) 145, 84 D.L.R. (3d) 377 (Dist. Ct.), where Ontario's involvement was held to have been pursuant to statutory agreement. The province was not a "party" to the treaty. See also Gros-Louis v. La Societe de developpement de la Baie James, [1974] R.P. 38, at p. 76 (Que. S.C.); [1975] C.A. 166, at p. 175.
195. K. Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973), 51 Can. Bar Rev. 450, at p. 475.
196. Supra, Chapter 5. See Cumming and Mickenberg, supra note 144.
197. B. Bilson, "Aboriginal Hunting Rights: Some Issues Raised By the Case of R. v. Frank" (1976), 41 Sask. L. Rev. 101, at p. 112.
198. See Dee Brown, Bury My Heart at Wounded Knee, New York: Holt, Rinehart & Winston, 1970, for a powerful account of this history from the Indian perspective.
199. Calder v. A.G.B.C. (1973), 34 D.L.R. (3d) 145, at p. 167.
200. Ibid., at p. 162. See also Bear Island, supra note 191, at pp. 405-8.
201. [1921] 2 A.C. 399, at p. 410, per Viscount Haldane.

202. Calder, supra note 199, at p. 208.
203. Quoting from Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, at pp. 491-92 (1967).
204. Calder, ibid., at p. 210.
205. (1979), 107 D.L.R. (3d) 513.
206. Ibid., at p. 549.
207. Ibid., at p. 552.
208. Ibid., at p. 551.
209. Ibid., at p. 556.
210. R.S.C. 1970, c. T-6.
211. R.S.C. 1970, c. P-29.
212. (1984), 15 D.L.R. (3d) 321, at pp. 407-8.
213. (1965), 52 W.W.R. (2d) 481 (S.C.C.); see the Court of Appeal decision on this point: (1964), 52 W.W.R. 193.
214. See for example: R. v. Wesley (1975), 62 D.L.R. (3d) 305 (Ont. Dist. Ct.); R. v. Isaac (1976), 13 N.S.R. (2d) 460 (N.S.C.A.); R. v. Taylor and Williams (1981), 34 O.R. (2d) 360 (C.A.).
215. Kruger and Manuel v. The Queen, [1978] 1 S.C.R. 104, at pp. 111-12, 116. See R. v. Curley, [1982] 2 C.N.L.R. 171, at p. 174 (N.W.T. Terr. Ct.), for a recent application of this principle.

216. Calder v. A.G.B.C., supra note 199, at p. 149 (emphasis added).
217. Ibid., at p. 160.
218. This point is clearly expressed by Lord Davey in Tamaki v. Baker in this way: "... the prerogative title of the Crown ... is not attacked, the native title of possession and occupancy not being inconsistent with the seisin fee of the Crown. Indeed, by asserting his native title, the appellant impliedly asserts, and relies on the radical title of the Crown as the basis of his own title of occupancy and possession." [1901] A.C. 561, at p. 574.
219. Calder, supra note 199, at p. 208.
220. Hamlet of Baker Lake, supra note 205, at p. 551. My criticism of Mr. Justice Mahoney on this point is at odds with at least one other discussion of the case; see D.W. Elliott, "Baker Lake and the Concept of Aboriginal Title" (1980), 18 Osgoode Hall L.J. 653, at pp. 658-61.
221. Calder, supra note 199, at p. 208 (emphasis added).
222. See Lester's thesis, supra note 107, and for a shorter version of some of his arguments, see his article, supra note 107.
223. See R. v. Taylor and Williams, supra note 214; Simon v. The Queen, [1985] 2 S.C.R. 387; Nowegijick v. The Queen, [1983] 1 S.C.R. 29.
224. R. v. Batisse (1978), 84 D.L.R. (3d) 377, at p. 384; R. v. Wesley (1975), 62 D.L.R. (3d) 305, at p. 312. See also the cases cited in the preceding note.
225. See N. Zlotkin, Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference, Kingston: Queen's University Institute of Intergovernmental Affairs, 1983.
226. See s. 54 of the Constitution Act, 1982.

227. See, for example, B. Morse, Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada, Ottawa: Carleton University Press, 1985; M. Boldt and J.A. Long, The Quest for Justice: Aboriginal Peoples and Aboriginal Rights, Toronto: University of Toronto Press, 1985.
228. (1973), 34 D.L.R. (3d) 145, at p. 156 (emphasis added).
229. (1981), 19 Alta. L. Rev. 410, at p. 412.
230. See B. Morse, "Indian and Inuit Family Law and the Canadian Legal System" (1980), 8 Am. Ind. L. Rev. 199; N. Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases", [1984] 4 C.N.L.R. 1.
231. (1867), 11 L.C. Jur. 197, reprinted in [1763-1869] 1 C.N.L.C. 70.
232. Ibid., at pp. 204-5.
233. See, supra, note 230.
234. Indian Self-Government in Canada, Report of the Special Committee on Indian Self-Government (the Penner Report), Ottawa, 1983.
235. Response of the Government of Canada, Ottawa, March 5, 1984.
236. For a discussion, see D. Hawkes, Aboriginal Self-Government: What Does it Mean?, Kingston, Queen's University Institute of Intergovernmental Affairs, 1985.
237. See E.M. Morgan, "Self-Government and the Constitution" (1984), 12 Am. Ind. L. Rev. 39; S. Nakatsuru, "A Constitutional Right of Indian Self-Government" (1985), 43 U.T. Fac. L. Rev. 72.
238. See D. Sanders, "Indian Status: A Women's Issue or an Indian Issue?", [1984] 3 C.N.L.R. 30.

BIBLIOGRAPHY

This is a select bibliography of articles, books and other materials used in the preparation of this thesis. Further references are contained in the footnotes.

Articles

Barsh, R. and Henderson, J., "Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and 'Constitutional Renewal' " (1982), 17 J. Can. Stud. 55.

Bartlett, R., "Annual Survey - Indian and Native Law" (1983), 15 Ottawa L. Rev. 431.

Bennett, G., "Aboriginal Title in the Common Law: A Stony Path Through Feudal Doctrine" (1978), 27 Buffalo L. Rev. 617.

Berman, H., "The Concept of Aboriginal Rights in the Early Legal History of the United States" (1978), 27 Buffalo L. Rev. 637.

Bickenbach, J., "The Baker Lake Case: A Partial Recognition of Inuit Aboriginal Title" (1980), 38 U.T. Fac. L. Rev. 232.

Bilson, B., "Aboriginal Hunting Rights: Some Issues Raised by the Case of R. v. Frank" (1976-77), 41 Sask. L. Rev. 101.

Brown, D., "Indian Hunting Rights and Provincial Law: Some Recent Developments" (1981), 39 U.T. Fac. L. Rev. 121.

Brun, H., "Les droits des Indiens sur le territoire du Quebec" (1969), 10 C. de D. 415.

Carignan, P., "De la notion de droit collectif et de son application en matiere scolaire qu Quebec" (1984), 18 R.J. Themis 3.

Cassese, A., "The Self-Determination of Peoples" in The International Bill of Rights: The Covenant on Civil and Political Rights (L. Henkin ed.), New York: Columbia University Press, 1981, 92.

Cohen, F., "Original Indian Title" (1947), 32 Minn. L. Rev. 28.

Cumming, P. and Aalto, K., "Inuit Hunting Rights in the Northwest Territories" (1973), 38 Sask. L. Rev. 251.

Dyck, N., "Indian, Metis, Native: Some Implications of Special Status" (1980), 12 Can. Ethnic Studies 34.

Elliott, D., "Baker Lake and the Concept of Aboriginal Title" (1980), 18 Osgoode Hall L.J. 653.

Emery, G., "Reflexions sur les sens et la portee du Quebec des articles 25, 35 et 37 de la Loi constitutionnelle de 1982" (1984), 25 C. de D. 145.

Gagne, J., "The Content of Aboriginal Title at Common Law: A Look at the Nishga Claim" (1982-83), 47 Sask. L. Rev. 309.

Gormley, D., "Aboriginal Rights as Natural Rights" (1984), 4 Can. J. Native Studies 29.

Green, L., "Legal Significance of Treaties Affecting Canada's Indians" (1972), 1 Anglo-Am. L. Rev. 119.

Harward, A., "R. v. Jack and Charlie and the Constitution Act, 1982: Religious Freedom and Aboriginal Rights in Canada" (1984), 10 Queen's L.J. 165.

Henderson, J., "Unravelling the Riddle of Aboriginal Title" (1977), 5 Am. Indian L. Rev. 75.

Henderson, W., "Canada's Indian Reserves: The Usufruct in Our Constitution" (1980), 12 Ottawa L. Rev. 167.

Hookey, J., "The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?" (1972), 5 Fed. L. Rev. 85.

Hookey, J., "Chief Justice Marshall and the English Oak: A Comment" (1974), 6 Fed. L. Rev. 174.

Hughes, P., "Indians and Lands Reserved for the Indians: Off-Limits to the Provinces?" (1983), 21 Osgoode Hall L.J. 82.

Hurley, J., "Aboriginal Rights, the Constitution and the Marshall Court" (1982-83), 17 R.J.T. 403.

Hurley, J., "The Crown's Fiduciary Duty and Indian Title: *Guerin v. The Queen*" (1985), 30 McGill L.J. 559.

Jackson, M., "The Articulation of Native Rights in Canadian Law" (1984), 18 U.B.C.L. Rev. 255.

Jones, M.J., "Sexual Equality, The Constitution and Indian Status: A Comment on s. 12(1)(b) of the Indian Act" (1984), 4 Windsor Y.B. Access Justice 48.

Jordan, A., "Government, Two-Indians, One" (1978), 16 Osgoode Hall L.J. 709.

Kaplan, M., "Proof and Extinguishment of Aboriginal Title to Indian Lands" (1979), 41 A.L.R. Fed. 425.

Kelly, D., "Indian Title: The Rights of American Indians in Lands They Have Occupied Since Time Immemorial" (1975), 75 Columbia L. Rev. 655.

LaForest, M., "Native Hunting and Fishing Rights in New Brunswick" (1980), 29 U.N.B.L.J. 111.

Lester, G. and Parker, G., "Land Rights: The Australian Aborigines Have Lost a Legal Battle, But ..." (1973), 11 Alta. L. Rev. 189.

Lester, G., "Primitivism versus Civilization: A Basic Question in the Law of Aboriginal Rights to Land" in Our Footprints are Everywhere (C. Brice-Bennett ed.), Labrador: Labrador Inuit Association, 1977, 351.

Lysyk, K., "Indian Hunting Rights: Constitutional Considerations and the Role of Indian Treaties in British Columbia" (1966), 2 U.B.C.L. Rev. 401.

Lysyk, K., "The Unique Constitutional Position of the Canadian Indian" (1967), 45 Can. Bar Rev. 513.

Lysyk, K., "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973), 51 Can. Bar Rev. 450.

Lysyk, K., "Constitutional Developments Relating to Indians and Indian Lands: An Overview", [1978] L.S.U.C. Special Lectures - The Constitution 201.

Lysyk, K., "The Rights and Freedoms of the Aboriginal Peoples of Canada" in The Canadian Charter of Rights and Freedoms: Commentary (W.S. Tarnopolsky and G.A. Beaudoin eds.), Toronto: Carswell, 1982, 467.

Magnet, J., "Collective Rights, Cultural Autonomy and the Canadian State" (1986), 32 McGill L.J. 170.

McConnell, W., "The Calder Case in Historical Perspective" (1974), 38 Sask. L. Rev. 88.

McNeil, K., "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 Sup. Ct. L. Rev. 255.

Mickenberg, N., "Aboriginal Rights in Canada and the United States" (1971), 9 Osgoode Hall L.J. 119.

Morgan, E.M., "Self-Government and the Constitution: A Comparative Look at Native Canadians and American Indians" (1984), 12 Am. Ind. L. Rev. 39.

Morisset, J., "The Aboriginal Nationhood, The Northern Challenge and the Construction of Canadian Unity" (1981), 88 Queen's Q. 237.

Morse, B., "Indian and Inuit Family Law and the Canadian Legal System" (1980), 8 Am. Ind. L. Rev. 19.

Morse, B., "Native Land Rights and the Canadian Constitution" in Aspects of the Constitutional Debate: 1981 (J. Clarke and S. Wise eds.), Carleton University Institute of Canadian Studies, Occasional papers, 1982, 218.

Nakatsuru, S., "A Constitutional Right of Indian Self-Government" (1985), 43 U.T. Fac. L. Rev. 72.

Narvey, K., "The Royal Proclamation of 7 October 1763, the Common Law, and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company" (1973), 38 Sask. L. Rev. 123.

- Newton, N., "At the Whim of the Sovereign: Aboriginal Title Reconsidered" (1980), 31 Hastings L.J. 1215.
- Niedermeier, L., "Aboriginal Rights: Definition or Denial?" (1981), 6 Queen's L.J. 568.
- Opekokew, D., "Self-Identification and Cultural Preservation: A Commentary on Recent Indian Act Amendments", [1986] 2 C.N.L.R. 1.
- O'Reilly, J., "La Loi constitutionnelle de 1982: droit des autochtones" (1984), 25 C. de D. 125.
- Patenaude, M., "Les Indiens et le droit provincial: rebondissement recent en Cour supreme du Canada" (1986), 27 C. de D. 381.
- Phibus, C., "The Fisheries Act and Native Fishing Rights in Canada 1970-1980" (1981), 39 U.T. Fac. L. Rev. 43.
- Priestly, L., "Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case" (1974), 6 Fed. L. Rev. 150.
- Pugh, R.J., "Are Northern Lands Reserved for the Indians?" (1982), 60 Can. Bar Rev. 36.
- Sacerdoti, G., "New Developments in Group Consciousness and the International Protection of the Rights of Minorities" (1983), 13 Israel Y.B.H.R. 116.
- Sanders, D., "The Bill of Rights and Indian Status" (1972), 7 U.B.C.L. Rev. 81.
- Sanders, D., "Indian Hunting and Fishing Rights" (1974), 38 Sask. L. Rev. 45.
- Sanders, D., "Aboriginal Peoples and the Constitution" (1981), 19 Alta. L. Rev. 410.
- Sanders, D., "Prior Claims: Aboriginal People in the Constitution of Canada" in Canada and the New Constitution: The Unfinished Agenda (S.M. Beck and I. Bernier eds.), Montreal: Institute for Research on Public Policy, 1983, Vol. 1, 225.
- Sanders, D., "The Indian Lobby" in And No One Cheered: Federalism, Democracy and the Constitution Act (K. Banting and R. Simeon eds.), Toronto: Methuen, 1983, 301.
- Sanders, D., "The Re-Emergence of Indigenous Questions in International Law" (1983), 1 Can. H.R.Y.B. 1.
- Sanders, D., "Indian Status: A Women's Issue or an Indian Issue?", [1984] 3 C.N.L.R. 30.
- Sanders, D., "The Renewal of Indian Special Status" in Equality Rights and the Canadian Charter of Rights and Freedoms (A. Bayefsky and M. Eberts eds.), Toronto: Carswell, 1985, 529.
- Slattery, B., "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 Am. J. Comp. L. 361.

Slattery, B., "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 Queen's L.J. 232.

Smith, J.C., "The Concept of Native Title" (1974), 24 U. of T. L.J. 1.

Sprague, D.N., "Government Lawlessness in the Administration of Manitoba Land Claims 1870-1887" (1980), 10 Man. L.J. 415.

Zlotkin, N., "Judicial Recognition of Aboriginal Customary Law in Canada", [1984] 4 C.N.L.R. 1.

Books

Asch, M., Home and Native Land: Aboriginal Rights and the Canadian Constitution, Toronto: Methuen, 1984.

Barsh, R.L. and Henderson, J.Y., The Road: Indian Tribes and Political Liberty, Berkeley: University of California Press, 1980.

Boldt, M. and Long, J.A. eds., The Quest for Justice: Aboriginal Peoples and Aboriginal Rights, Toronto: University of Toronto Press, 1985.

Brody, H., The People's Land: Eskimos and Whites in the Eastern Arctic, Middlesex: Penguin Books, 1975.

Brody, H., Maps and Dreams: Indians and the British Columbia Frontier, London: Jill Norman & Hobhouse Ltd., 1981.

Brossard, J., Immavigeon, H., LaForest, G., Patenaude, L., Le Territoire Quebécois, Montreal: P.U.M., 1970.

Brun, H., Le Territoire du Quebec, Quebec: P.U.L., 1974.

Cardinal, H., The Unjust Society: The Tragedy of Canada's Indians, Edmonton: M.G. Hurtig Publishers, 1969.

Clement, W.H.P., The Law of the Canadian Constitution, Toronto: Carswell, 1916.

Cohen, F., Handbook of Federal Indian Law, Washington, United States Government Printing Office, 1942 (AMS Press Reprint, 1972).

Cohen, M., Nagel, T., Scanlon, T., Equality and Preferential Treatment, Princeton, N.J.: Princeton University Press, 1977.

Conklin, W., In Defence of Fundamental Rights, The Netherlands: Sijthoff & Noordoff, 1979.

Cumming, P. and Mickenberg, N., Native Rights in Canada (2nd ed.), Toronto: General Publishing Co., 1972.

Daniels, H. ed., The Forgotten People: Metis and Non-Status Indian Land Claims, Ottawa, Native Council of Canada, 1979.

Daniels, H.W., Native People and the Constitution of Canada, Report of the Metis and Non-Status Indian Constitutional Review Commission, 1981.

Deloria, V. Jr., Lytle, C., American Indians, American Justice, Austin: University of Texas Press, 1983.

Deloria, V. Jr., Lytle, C., The Nations Within: The Past and Future of American Indian Sovereignty, New York: Pantheon Books, 1984.

Driver, H., Indians of North America (2nd ed. rev.), Chicago: University of Chicago Press, 1968.

Dworkin, R., Taking Rights Seriously, Cambridge, Mass.: Harvard University Press, 1978.

Getty, I.A. and Smith, D.B., One Century Later: Western Canadian Reserve Indians Since Treaty 7, Vancouver: University of British Columbia Press, 1978.

Getty, I.A. and Lussier, A.S., As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies, Vancouver: University of British Columbia Press, 1983.

Hanks, P., Keon-Cohen, B., Aborigines and the Law, Sydney: George Allen & Unwin, 1984.

Hawkes, D., Aboriginal Self-Government: What Does It Mean?, Queen's University Institute of Intergovernmental Relations, 1985.

Hogg, P., Constitutional Law of Canada (2nd ed.), Toronto: Carswell, 1985.

Jenness, D., The Indians of Canada (7th ed.), Toronto: University of Toronto Press, 1977.

Kennedy, W.P.M., Documents of the Canadian Constitution 1759-1915, Toronto: Oxford University Press, 1918.

Kennedy, W.P.M., The Constitution of Canada, London: Oxford University Press, 1931.

Lefroy, A.H., A Short Treatise on Canadian Constitutional Law, Toronto: Carswell, 1918.

Lester, G., Inuit Territorial Rights in the Canadian Northwest Territories: A Survey of the Legal Problems, Tungavik Federation of Nunavut, 1984.

Little Bear, L., Boldt, M., Long, J.A. eds., Pathways to Self-Determination: Canadian Indians and the Canadian State, Toronto: University of Toronto Press, 1984.

Lussier A. ed., Riel and the Metis: Riel Mini-Conference Papers, Winnipeg: Manitoba Metis Federation Press, 1979.

Lyon, N., Aboriginal Self-Government: Rights of Citizenship and Access to Governmental Services, Queen's University Institute of Intergovernmental Relations, 1984.

McNeil, K., Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations, University of Saskatchewan Native Law Centre, 1982.

McNeil, K., Native Rights and the Boundaries of Rupert's Land and the North-Western Territory, University of Saskatchewan Native Law Centre, 1982.

McNeil, K., Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada, University of Saskatchewan Native Law Centre, 1983.

McWhinney, E., Canada and the Constitution 1979-1982, Toronto: University of Toronto Press, 1982.

Morse, B.W., Indian Tribal Courts in the United States: A Model for Canada?, University of Saskatchewan Native Law Centre, 1980.

Morse, B.W. ed., Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada, Ottawa: Carleton University Press, 1985.

Opekokew, D., The First Nations: Indian Government and the Canadian Confederation, Federation of Saskatchewan Indians, 1980.

Patenaude, M., Le droit provincial et les terres Indiennes, Montreal: Les editions Yvon Blais, 1986.

Patterson, E., The Canadian Indians: A History Since 1550, Don Mills: Collier Macmillan, 1972.

Price, R. ed., The Spirit of the Alberta Indian Treaties, Montreal: Institute for Public Policy, 1979.

Romanow, R., Whyte, J., Leeson, H., Canada ... Notwithstanding: The Making of the Constitution 1976-1982, Toronto: Carswell/Methuen, 1984.

Schwartz, B., First Principles: Constitutional Reform With Respect to the Aboriginal Peoples of Canada 1982-1984, Queen's University Institute of Intergovernmental Relations, 1985.

Sheppard, R. and Valpy, M., The National Deal: The Fight for a Canadian Constitution, Toronto: Fleet Books, 1982.

Sigler, J.A., Minority Rights: A Comparative Analysis, Westport, Conn.: Greenwood Press, 1983.

Slattey, B., Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title, University of Saskatchewan Native Law Centre, 1983.

Tarnopolsky, W.S., The Canadian Bill of Rights (2nd ed. rev.), Toronto: Macmillan, 1975.

Varcoe, F.P., The Distribution of Legislative Power in Canada, Toronto: Carswell, 1954.

Varcoe, F.P., The Constitution of Canada, Toronto: Carswell, 1965.

Watkins, M. ed., Dene Nation: the colony within, Toronto: University of Toronto Press, 1977.

Weaver, S., Making Canadian Indian Policy: The Hidden Agenda 1968-1970, Toronto: University of Toronto Press, 1981.

Zlotkin, N., Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference, Queen's University Institute of Intergovernmental Relations, 1983.

Other

Alberta Federation of Metis Settlement Associations, Metisism: A Canadian Identity, Edmonton, 1982.

Brown, G. and Maguire, R., Indian Treaties in Historical Perspective, Ottawa, D.I.A.N.D., 1979.

Chartier C., "Aboriginal Rights: The Metis Perspective", 1983, unpublished.

Daniel, R., A History of Native Claims Processes in Canada 1867-1979, Ottawa, D.I.A.N.D., 1980.

Daugherty, W. and Madill, D., Indian Government Under Indian Act Legislation 1868-1951, Ottawa, D.I.A.N.D., 1980.

Davies, M., Recognition of Aboriginal Rights in International Law: A Pilot Study With Particular Reference to State Practice in North America and in the Spanish-American Empire, LL.M., University of Wales, 1976.

D.I.A.N.D., Living Treaties: Lasting Agreements, Report of the Task Force to Review Comprehensive Claims Policy, Ottawa, 1985.

Henderson, W., Canada's Indian Reserves: Pre-Confederation, Ottawa, D.I.A.N.D., 1980.

Henderson, W., Canada's Indian Reserves: Legislative Powers, Ottawa, D.I.A.N.D., 1981.

House of Commons, Indian Self-Government in Canada, Report of the Special Committee on Indian Self-Government, Ottawa, 1983.

Hudson, M., The Rights of Indigenous Populations in National and International Law, Faculty of Law, McGill University, 1985.

Leslie, J. and Maguire, R., The Historical Development of the Indian Act, Ottawa, D.I.A.N.D., 1978.

Magnet, J., "Interpreting Multiculturalism: Collective and Individual Rights", unpublished, n.d.

Magnet, J., "The Supreme Court of Canada and the Charter of Rights", unpublished, n.d.

Lester, G., The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument, Osgoode Hall, York University, J.D. Thesis, 1981.

Ross, J., Aboriginal Rights, The Canadian Judiciary and the Constitution: An Analysis of Judicial and Constitutional Definitions and Protections of Native Rights, M.A. research paper, Carleton University Institute of Canadian Studies, 1983.

Slattery, B., The Land Rights of Indigenous Canadian Peoples as Affected By the Crown's Acquisition of Their Territories, Oxford, D. Phil. Thesis, 1979.

Stagg, J., Anglo-Indian Relations in North America to 1763 and An Analysis of the Royal Proclamation of 7 October 1763, Ottawa, D.I.A.N.D., 1981.



UNIVERSITÉ D'OTTAWA
UNIVERSITY OF OTTAWA