



## Stage Four: Negotiation and Renewal

**THE RELEASE OF THE WHITE PAPER** on federal Indian policy in 1969 generated a storm of protest from Aboriginal people, who strongly denounced its main terms and assumptions. It left in its wake a legacy of bitterness at the betrayal of the consultation process and suspicion that its proposals would gradually be implemented. However, it also served to strengthen the resolve of Aboriginal organizations to work together for a changed relationship. This marked the beginning of a new phase in Aboriginal/non-Aboriginal relations.

We have characterized this fourth stage in the relationship between Aboriginal and non-Aboriginal people in Canada as a period of negotiation and renewal, and it is this stage that is still under way. By the early 1970s, it was clear even to most people in non-Aboriginal society that substantial changes in the relationship were required, and negotiations taking various forms ensued — at road block sites, in legislative offices, across the constitutional bargaining table and in international forums. These discussions gradually brought about a better understanding of the Aboriginal perspective and some movement toward a middle ground. A particularly important development was the adoption of a constitutional provision that recognized and affirmed existing Aboriginal and treaty rights and that included Métis people, Inuit and First Nations within the definition of the Aboriginal peoples of Canada.<sup>1</sup> The negotiations were far from smooth, however, and reversals were not uncommon.

We begin our discussion of this period with a review of the major political and constitutional milestones of negotiation, ending with the discussions surrounding the Charlottetown Accord. We go on to describe the evolution of thinking in Canadian courts with respect to Aboriginal and treaty rights. We review several major decisions of the Supreme Court of Canada and

refer as well to provincial court judgements. While recognizing the shortcomings of relying on the courts to redefine the relationship, the decisions do for the most part provide some support for the recognition of Aboriginal and treaty rights. As such, they provide a stimulus to political negotiations.

Finally, the last several decades have also seen much more activity to advance Aboriginal interests at the international level, developments that have had important implications for the Aboriginal/state relationship within Canada. Aboriginal peoples within Canada have formed alliances with similar groups in other countries. They have also played an important role in persuading international organizations such as the United Nations to have indigenous rights recognized at the international level and to apply those standards to specific instances of injustice within Canada. As an example of these developments, we profile the emergence of internationalism among Inuit, with particular attention to the Inuit Circumpolar Conference, an organization that brings Inuit from the world's Arctic regions together as a people on issues of common concern, despite the boundaries imposed by nation-states.

## **1. Legislative and Constitutional Attempts: From the White Paper to Charlottetown, 1969-1992**

The years 1969 to 1992 saw tumultuous relations between Aboriginal people and successive Canadian governments. It began with the federal government's 1969 white paper on Indian policy, which sought to terminate the federal government's special relationship with Aboriginal peoples. It included the standoff at Kanesatake (Oka) in the summer of 1990, captured in a photograph of a battle-ready Canadian soldier face-to-face with an armed, masked Mohawk warrior. And it ended with the defeat of the Charlottetown Accord in a Canada-wide referendum. Two broad themes emerged from this story: the inability of governments, through constitutional reform, land claims policy and government programming, to resolve long-standing disputes with Aboriginal peoples; and the gathering strength of Aboriginal peoples and their political organizations to respond to this failure.

The white paper came shortly after Pierre Trudeau's first election victory as

leader of the federal Liberal party, and his successful 1968 campaign for a "just society". The policy proposals in the white paper sought to end the collective rights of Aboriginal people in favour of individual rights. Included were plans to eliminate the protection for reserve lands, to terminate the legal status of Indian peoples, and to have services delivered to them by provincial governments.

The white paper became a rallying cry for Aboriginal people, and their response was fast and strong. Harold Cardinal, then president of the Indian Association of Alberta, responded with what became known as the 'red paper', in which he described how Indian peoples, as peoples with distinct cultures, wished to contribute to Canadian society while at the same time exercising political and economic power at the community level. The red power movement gave birth to the first cross-Canada political organization of Indian people, the National Indian Brotherhood. The federal government backed down from the white paper, although its underlying philosophy seemed to animate federal policy for years to come.

[A] separate road cannot lead to full participation, to equality in practice as well as theory. ...[T]he Government has outlined a number of measures and a policy which it is convinced will offer another road for Indians, a road that would lead gradually away from different status to full social, economic and political participation in Canadian life. This is the choice.

Indian people must be persuaded, must persuade themselves, that this path will lead them to a fuller and richer life.

*Statement of the Government of Canada on Indian Policy, 1969*

The federal government established an Indian Claims Commission later that year, with Lloyd Barber as commissioner. His mandate, assigned in December 1969, was to review and study grievances concerning Indian claims. His report, tabled in 1977, described the depth and range of issues to be addressed:

It is clear that most Indian claims are not simple issues of contractual dispute to be resolved through conventional methods of arbitration and adjudication. They are the most visible part of the much, much more complex question of the relationship between the original inhabitants of this

land and the powerful cultures which moved in upon them. That the past relationship has been unsatisfactory both for [Aboriginal people] and for [Canadian society] cannot be in dispute. There are too many well-documented cases where [Canada] failed to live up to obligations [that were] presumably entered [into in] good faith, and which Indians accepted with equal or greater faith. Satisfactory settlement of these obligations can help provide the means for Indians to regain their independence and play their rightful role as a participating partner in the Canadian future. The claims business is no less than the task of redefining and redetermining the place of Indian people within Canadian society. They themselves are adamant that this shall be done, not unilaterally as in the past, but with them as the major partner in the enterprise.<sup>2</sup>

Although publication of the white paper coincided with constitutional discussions among federal and provincial governments, these were two very separate paths. The main items for constitutional discussion included the division of powers between the federal and provincial governments, regional disparities, institutional reform, official languages, a charter of rights and an amending formula. Aboriginal rights were not on the table. They would remain off the table for the next 10 years.

During the 1970s, relations were driven by the growing consciousness of Aboriginal peoples and by key decisions of the courts. Aboriginal people in Canada began to look to what was happening around the world. The United Nations was calling for the decolonization of all territories that were geographically and culturally distinct from the states administering them and in a subordinate position politically, socially or economically. New states were being carved out of former European empires. The doctrine of decolonization was not applied to North and South America, however, since, it was argued, countries like the United States and Canada did not control and exploit Aboriginal peoples. This did not prevent Aboriginal peoples in the Americas from pointing to the 'internal colonialism' they suffered.

Aboriginal people from Canada were at the forefront of efforts to form an international network of Aboriginal peoples. The Inuit Circumpolar Conference is described later in this chapter. The World Council of Indigenous Peoples, the first international organization of Aboriginal peoples, owes a great debt to the vision of Canadian Aboriginal leaders

such as George Manuel. It was George Manuel who secured non-governmental organization status for the National Indian Brotherhood in 1974 and who went to Guyana that year to attend the preparatory meeting of what was to become the World Council of Indigenous Peoples. The founding meeting was held on Vancouver Island in 1975. Section 1 of the charter of the World Council of Indigenous Peoples addresses the purposes of the organization:

This organization has been formed in order to ensure unity among the Indigenous Peoples, to facilitate the meaningful exchange of information among the Indigenous Peoples of the world, and to strengthen the organizations of the Indigenous Peoples in the various countries. The organization is dedicated to: abolishing the possibility of the use of physical and cultural genocide and ethnocide; combating racism; ensuring political, economic and social justice to Indigenous Peoples; to establishing and strengthening the concepts of Indigenous and cultural rights based upon the principle of equality among Indigenous Peoples and the peoples of nations who may surround them.<sup>3</sup>

For the first time, Maoris from New Zealand, Aborigines from Australia, Sami from Scandinavia, Inuit from Greenland, Miskitos from Nicaragua, and First Nations from Canada and the United States could talk to one another and begin building indigenous solidarity. George Manuel was chosen as the first president. His message, and the objective of the World Council, were clear:

Organize and unify around a clear set of objectives. Battle against all the forces of assimilation and try to build your nations economically, culturally and politically. Consult the people, politicize the people and never get too far ahead of them, because when all is said and done, they are your masters.<sup>4</sup>

Manuel spoke for many when he concluded that Aboriginal people in North America live in a "fourth world" — sharing the experience of colonization with the third world, but different as Aboriginal peoples, a minority in their own homeland, governed by the laws and institutions of settler governments.<sup>5</sup>

The World Council on Indigenous Peoples held conferences in Sweden in

1977 and Australia in 1981, in both instances with financial support from the host country. The conference in Australia focused on a draft treaty on indigenous rights. During this period, the government of Norway started including Indigenous peoples as part of its foreign policy and began making annual grants to the World Council. Norway, Sweden and the Netherlands became strong supporters of international indigenous rights. With their support, and the leadership of the World Council of Indigenous Peoples, the United Nations was persuaded to establish a Working Group on Indigenous Populations in 1982. That group began working on a declaration on indigenous rights in 1985, and in 1993 it produced an historic document in the field of human rights — the Draft Declaration on the Rights of Indigenous Peoples. This draft declaration is now before the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, as indigenous rights are becoming fully articulated, with the participation of Aboriginal peoples, in international law. Aboriginal people in Canada should share some pride in this accomplishment.<sup>6</sup>

In Canada, Aboriginal peoples were becoming more aware of their legal rights during this period. The landmark Supreme Court decision in the *Calder* case in 1973 led the federal government to establish its first land claims policy, directed to settling the comprehensive claims of Aboriginal groups that retained the right to traditional use and occupancy of their lands. The policy was only moderately successful, in part because of the federal government's policy of extinguishment, which insisted that Aboriginal people agree to have their land and resource rights in the claims area extinguished in exchange for a land claims settlement, and in part because of the federal policy of separating negotiations on land from those on self-government, a topic that emerged high on the list of priorities for Aboriginal people by the late 1970s. Only two claims were negotiated successfully during the decade — the James Bay and Northern Quebec Agreement (1975) and the Northeastern Quebec Agreement (1978).

Support for Aboriginal peoples and their struggles grew, as organizations such as the Canadian Association for the Support of Native People and Project North (composed of Christian churches) sprang up to press governments to address Aboriginal rights to land and self-determination. This led to significant federal government funding for Aboriginal peoples' organizations. Resource megaprojects, such as the James Bay hydro project, the Mackenzie valley pipeline and the northern Manitoba hydro

project, forced confrontations between Aboriginal people on one side and governments and resource companies on the other.

It was at this point that Aboriginal peoples and the constitution began to be linked. Aboriginal people had tried many avenues to effect change, with little result. They turned now to a new approach — constitutional reform. Their opportunity came in 1978, in the aftermath of the election of the first Parti québécois government in Quebec, when the federal government introduced its proposals for constitutional reform, entitled "A Time for Action", and the companion draft legislation, Bill C-60. They contained, for the first time, a draft charter of rights and freedoms, including a provision shielding certain Aboriginal rights from the general application of the individual rights clauses in the charter. Although discussions were held with Aboriginal peoples' organizations during the Trudeau government, it was during the short-lived Progressive Conservative government of Joe Clark that Aboriginal leaders first met formally with federal and provincial ministers to discuss issues to be placed on the first ministers' constitutional agenda, including a commitment to invite national Aboriginal leaders to attend those negotiating sessions on topics that directly affected their people.

With the victory of the federalist forces in the Quebec referendum on sovereignty-association in 1980, and the failure of a first ministers conference on the constitution later that year, the federal government decided to act unilaterally to patriate and amend the constitution. The federal proposal, revised in January 1981 following discussions with Aboriginal leaders, contained three sections that were to address the concerns of Aboriginal peoples. These provisions, variants of which were ultimately proclaimed in the *Constitution Act, 1982*, are described in detail in the next few pages. Eight provincial governments opposed the federal government's initiative, as did many Aboriginal people. National Aboriginal organizations, especially the National Indian Brotherhood (now the Assembly of First Nations) lobbied the federal government separately at first, but then began to co-ordinate their efforts.

Many chiefs of First Nations travelled to England to oppose patriation, concerned that it might damage their special relationship with the Crown (represented by the Queen), and several launched lawsuits in the British courts. Treaty nations, particularly those in western Canada, wanted the

British and Canadian governments to recognize their treaty obligations before patriation took place. In his judgement on the suits launched by Aboriginal peoples' organizations, Lord Denning of the English Court of Appeal stated that Canada had an obligation to fulfil the treaties made in the name of the Crown of Great Britain. The provinces that opposed the federal government's initiative launched a number of court actions in Canada, and the 1981 Supreme Court decision on a constitutional reference resulted in one more first ministers conference being convened.

That conference, held in November 1981, produced a draft constitutional amendment supported by the federal government and nine provinces; Quebec withheld its consent. The accord had a glaring omission — Aboriginal rights had disappeared.<sup>7</sup> As the white paper had done more than a decade earlier, the draft constitutional amendment of 1981 galvanized Aboriginal people, who joined together from coast-to-coast in an effort to have Aboriginal rights reinserted into the package. This time, they had an additional ally — Canadian women who were concerned that the sexual equality rights of the charter might be impaired by the legislative override provision, better known as the 'notwithstanding' clause. The two communities of interest agreed to support each other, and after a massive and intensive lobbying effort, they won their battles. The notwithstanding clause would not apply to section 28, the sexual equality provision of the charter, and Aboriginal and treaty rights were reinstated, albeit with the word 'existing' placed before them. This was a reflection of both the lack of knowledge of Aboriginal matters among federal and provincial governments and the legal uncertainty in the field at that time.

The *Constitution Act, 1982* was proclaimed on 17 April 1982. Section 25 guaranteed that the *Canadian Charter of Rights and Freedoms* would not

...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.

Section 35 stated that



(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 Métis peoples of Canada.

Section 37 provided for a single constitutional conference (which was held in 1983) to identify and define those Aboriginal rights and for the participation of Aboriginal peoples' leaders and territorial government delegates.

That conference was televised live, and the hopes and dreams of Aboriginal peoples were brought to viewers across the country. Aboriginal cultures were given a place of respect through the use of Aboriginal traditions — opening prayers, drumming, the passing of the great pipe of peace. For the first time since Confederation, Aboriginal leaders sat at the table as equals with first ministers.

The conference was noteworthy in another regard. It resulted in the first — and thus far the only — amendment to the constitution under the general amending formula. The 1983 Proclamation Amending the Constitution of Canada included the following provisions:

1. Paragraph 25(b) of the Constitution Act, 1982 is repealed and the following substituted therefore:

"(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired."

2. Section 35 of the Constitution Act, 1982 is amended by adding thereto the following subsections:

"(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 the Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

In addition, the proclamation made a commitment that a formal first ministers conference would be held, with the participation of Aboriginal peoples, before any constitutional amendments that directly affected Aboriginal people. A new section 37 resulted in three more first ministers conferences on Aboriginal constitutional matters, in 1984, 1985 and 1987.

The constitutional process helped bring together Aboriginal people from across Canada. National Aboriginal leaders met to discuss the strategy of constitutional negotiations in a series of Aboriginal summits, a remarkable feat given the diverse nature of and former divisions among Aboriginal people in Canada.

The focus of these three conferences was Aboriginal self-government, a direction that was also advocated in the 1983 report of the House of Commons Special Committee on Indian Self-Government, known as the Penner report.<sup>8</sup>

Over time, all Aboriginal parties to the negotiations came to support the position that the right of self-government was inherent, rather than delegated or constitutionally created.

During this period, the legal position of Aboriginal peoples in the Canadian state was becoming clearer. The Supreme Court decision in the *Guerin* case had the effect of placing the onus on the federal and provincial governments to demonstrate that the legal rights of Aboriginal people had been extinguished with their consent. The decision in the *Simon* case affirmed that treaties predating Confederation, such as those between eastern Aboriginal nations and the French and British Crowns, were protected by the present constitution.

The three constitutional conferences held between 1984 and 1987 produced no amendments. The lack of consensus turned on the question of whether the right of Aboriginal self-government flowed from inherent and unextinguished Aboriginal sovereignty, and from treaty and Aboriginal rights, or whether it was to be delegated from federal and provincial governments. Had Aboriginal peoples been willing to accept delegated authority for their governments, a constitutional amendment would have been theirs.

The close of the 1987 conference was one of high drama, as national Aboriginal leaders summarized their sense of disappointment. Their declarations, excerpted in the accompanying box, spoke eloquently of missed opportunities and fears for the future. Their predictions of a stormy future relationship between Aboriginal peoples and Canadian governments was realized, unfortunately, in the armed confrontation at Kanesatake three years later.

In 1986, the federal and provincial governments began working on what was to become the Quebec round of constitutional discussions, in an effort to complete the work left undone at the 1981 conference when Quebec did not agree (and still has not agreed) to patriation and the *Constitution Act, 1982*. Less than a month after the failure of the first ministers conferences on Aboriginal constitutional matters, the Meech Lake Accord was signed. Because governments considered this the Quebec round, the accord was silent on Aboriginal and treaty rights. Most Aboriginal people reacted in disbelief. How could first ministers accept the vague notion of Quebec as a distinct society while suggesting that the concept of inherent Aboriginal self-government was too unclear? Aboriginal groups did not oppose recognition of Quebec as a distinct society, so long as Aboriginal peoples were similarly acknowledged through recognition of the inherent right of Aboriginal self-government. The reaction of Louis ('Smokey') Bruyere, president of the Native Council of Canada (now the Congress of Aboriginal Peoples), was typical:

Aboriginal peoples' view on the *Accord* can be summarized in four words: It abandons aboriginal peoples. It does this by being silent about the uniqueness and distinctiveness of aboriginal peoples.<sup>9</sup>

Aboriginal people had substantive concerns about the Meech Lake Accord, including provisions that would have made it more difficult for the territories to become provinces and that ignored the role of territorial governments in recommending appointments to the Supreme Court and the Senate. The accord was also silent on the role of Aboriginal peoples in future constitutional conferences on the constitution.<sup>10</sup> The constitutional amending formula gave Parliament and the provincial legislatures up to three years to pass the Meech Lake constitutional resolution.

As the clock ticked, it became more obvious that the Meech Lake

agreement was in trouble. The Meech Lake Accord served to galvanize Aboriginal people, to strengthen their resolve as the white paper and patriation debates had done earlier. Aboriginal people were fighting court battles and engaging in acts of civil disobedience. Canadians came to know the Gitksan and Wet'suwet'en, who were fighting in court to affirm ownership and jurisdiction over their traditional lands; the Haida, who were standing in the path of logging machines about to clear-cut their ancient forests; the Lubicon, who were blocking access to their lands by resource developers; and the Innu, who invaded a NATO air base to protest low-level fighter jet training over their lands and its impact on their hunting economy.<sup>11</sup> By 1990, many non-Aboriginal people also opposed the agreement. Owing to changes in government, the legislatures of New Brunswick and Manitoba had not yet approved the constitutional resolution, and the government of Newfoundland and Labrador had rescinded its original approval.

There was enormous pressure on us. I am sure most of us here on this side of the table, and undoubtedly on the other side of the table, had a couple of sleepless nights to some extent, wondering whether or not we should go with this.... But on this side, and me personally, the question I was debating was: If we agree to an amendment, what does it do to the rights we now have and how does it enhance our situation.

What happens to our treaties? What happens to our bilateral relationship? What happens to what our forefathers have always told us they did, that they did not surrender. They did not surrender their sovereignty.

Georges Erasmus Assembly of First Nations

We came to set a foundation for the liberation and justice for our people. That is the purpose of coming to this conference.... We are not disappointed in the stand that we took — the right to land, the right to self-government, and the right to self-determination. Those causes are right in any society.

By leaving here today without an agreement, we have signed a blank cheque for those who want to oppress us and hold the racism against

us as they have in the past.

Jim Sinclair  
Métis National Council

In early June of 1990 the federal government convened a constitutional conference in a last-ditch effort to save the Meech Lake agreement. After a marathon 10-day meeting behind closed doors, an agreement was reached. Among other items, it included a provision for the resumption of constitutional conferences on Aboriginal rights. The remaining three provinces agreed to introduce the resolution in their respective legislatures.

The people of the future, when they look at what we have turned down here today, will say we were right rather than wrong.

We are not going away. The aboriginal people of this country are always going to be here as strong and if not, stronger, than they are now.

Louis 'Smokey' Bruyere Native Council of Canada

But there are going to be consequences to a continual 'non-success' of these gatherings, and there are grave consequences possible if we continue to meet and not come up with any resolution of these issues.

We continue to have a hope that this great country, which we embrace as our own, will have the sense and the decency — not that I doubt its decency — to someday, in my generation, recognize our rights, and complete the circle of Confederation, because if it is not going to be done in my generation, I have my son standing behind me who will take up the fight with your sons and your sons' sons.

Zebedee Nungak Inuit Committee on National Issues

*Source:* First Ministers Conference on Aboriginal Constitutional Matters, 26-27 March 1987, unverified and unofficial verbatim transcript (Ottawa: Canadian Intergovernmental Conference Document 800-23/004), pp. 220-241.

Progress was slow, and Aboriginal leaders, through MLA Elijah Harper of

Manitoba, were opposing the package. In a final effort to win their support, the prime minister wrote to Phil Fontaine of the Assembly of Manitoba Chiefs, outlining a six-point program for addressing Aboriginal concerns.

1. a Federal-Provincial process to set the agenda for the First Ministers Conference on Aboriginal Matters; and the acceleration of the holding of the first Conference;
2. a commitment by the Government of Canada to full constitutional recognition of the Aboriginal peoples as a fundamental characteristic of Canada;
3. the participation of representatives of the Aboriginal peoples of Canada at any future first ministers conference held to discuss the "recognition clause";
4. an invitation to participate in all first ministers conferences where matters being discussed directly affect Aboriginal peoples;
5. the joint definition of treaty rights;
6. the establishment of a Royal Commission on Native Affairs.<sup>12</sup>

It would turn out to be too little, too late. Aboriginal people were determined to stop a process they saw as unfair and that ignored their fundamental rights.

Coincidentally, during the conference, the Supreme Court delivered its decision on the *Sparrow* case, confirming that the regulation of an Aboriginal right to fish did not result in its extinguishment. Moreover, the burden of justifying legislation that has some negative effect on Aboriginal rights rested with the federal and provincial governments.

What appeared to be a sure thing in 1987 was defeated in part because of opposition from Aboriginal peoples. In a decade, Aboriginal leaders and organizations had become powerful players in the rough and tumble of constitutional politics and negotiations.

## The Death of Meech

An all-party agreement to pass the accord in the Manitoba legislature included the introduction of a motion of ratification in the legislature, ten days of public hearings, a debate in the legislature, and a final vote. All of this was to be accomplished in less than two weeks, by 23 June 1990, when the three-year limit on the Meech Lake Accord expired. On June 12, Premier Filmon asked for unanimous consent from the legislature to introduce the motion without the customary two days' notice. With the encouragement of Aboriginal leaders in Manitoba, and to the surprise of the assembly, the Oji-Cree MLA for Rupertsland, Elijah Harper, denied his consent.

At first, this was thought to be a symbolic gesture, token opposition. Harper again denied consent on June 13 and 14. Support for Harper's stand, a lone Oji-Cree MLA holding an eagle feather in the Manitoba legislature, spread across the country. The rules of the Manitoba legislature enabled Harper to delay the motion for six legislative working days. Finally, on June 20, Premier Filmon was able to introduce the motion. By this time, Elijah Harper had become a hero for Canadians who opposed the Meech Lake Accord. The public hearings had yet to be held, but debate on the motion began. It was too late to save the accord. The Manitoba legislature adjourned without bringing the motion to a vote. Nor was a vote taken in the Newfoundland legislature. Meech was dead.

The defeat of the Meech Lake Accord was received very poorly in Quebec. Meech was meant to heal the wounds created by the patriation and amendment of the constitution in 1982 over Quebec's objection. For years, Québécois were seeking recognition of their historical rights — the reality of *deux nations* — in the constitution. Aboriginal peoples were unable to have their nation-to-nation relationship recognized, and Quebec was unable to have its distinctiveness as a society recognized. The fate of these two Canadian dilemmas had become inexorably intertwined. An attempt to address both would wait for the Canada round, still two years away.

When the Mohawk people of Kanesatake set up road blocks in the spring, no one thought much about it. It was just one more in a long line of similar

actions that had ended peacefully once a point had been made or serious negotiations had begun on the issues at hand. The situation changed when the stand-off began, on 11 July 1990.<sup>13</sup>

At issue was legal title to 400 square kilometres of land that formed the original seigneurie of the Lake of Two Mountains — a land dispute that has been outstanding since the 1700s. The land was granted to the Seminary of St. Sulpice in 1717 and enlarged through a second grant in 1735. The second grant was to provide a greater land base for the original inhabitants. In both cases, the land turned over to the Sulpicians was to be used for the benefit of the Indian residents, on condition that title to the land would revert to the Crown if they vacated the mission.

The Mohawk people always considered these lands to be theirs — before, during and after these grants. When the Mohawk were considering the proposed move to Kanasatake from Montreal in 1714, Chief Aghneetha said,

Again our Priest, in conjunction with the clergy of the Seminary of Montreal, told us we should remove once more with our families, for it was no longer proper that any Indians should live on this Island [of Montreal]. If we would consent to go and settle at the Lake of Two Mountains we should have a large tract of land for which we should have a Deed from the King of France as our property, to be vested in us and our heirs forever, and that we should not be molested again in our habitations.<sup>14</sup>

In February 1721, when the first Mohawk families moved to their new home at Kanasatake, they did so in the belief that the land belonged to them as originally promised. In remarking upon the Two Dog wampum belt made for the occasion, Chief Aghneetha said,

Although it was very inconvenient to us to be quitting our homes and small clearing, yet the desire of having a fixed property of our own induced us to comply, and we accordingly set out, and took possession of the land, and as was the custom of our forefathers we immediately set about making a [wampum] Belt...by which our children would see that the lands were to be theirs forever, and as was customary with our ancestors we placed the figure of a dog at each end of the Belt to guard our Property and to give notice when an enemy approached.<sup>15</sup>



The Mohawk people were not involved in any way in the negotiations that took place among the Sulpicians, representatives of New France, and the regent for the seven-year-old king of France, Louis XV, and it appears that they had no knowledge that the concession would be granted forever to the Seminary, on condition that as soon as the Indian residents left the land, it would revert to the king. Hence the origin of the present dispute.

Title to the former Jesuit seigneurie of Sault St. Louis had been awarded to the Mohawk of Kahnawake by the courts in 1762. However, title to the Seminary of St. Sulpice was recognized by the British as belonging to the Sulpicians in 1841, an act that has been challenged by Mohawk people since that time. Over the years the Sulpicians gradually sold off the land, including the pine forest of the Commons — the site of the stand-off at Kanesatake. Finally, in 1945, the federal government moved to purchase from the Sulpicians the lands still occupied by the Mohawk, which amounted to about one per cent of the original Two Mountains seigneurie.

Part of the pine forest of the Commons was acquired by the municipality of Oka in 1959 to construct a nine-hole golf course, again ignoring Mohawk claims. In 1990, plans were afoot to clear more of the pines in order to expand the Oka Golf Club to 18 holes.

During all this time, the Mohawk of Kanesatake had resisted this invasion and had sought to resolve the matter — in petitions to Lord Elgin in 1848 and 1851, in petitions to the governor general of Canada in 1868 and 1870, through a visit to see the king of England in 1909, in a claim brought before the Privy Council in London in 1912, in their comprehensive land claim of 1975, and in their specific land claim of 1977. The federal government has taken the 1912 decision of the judicial committee of the privy council as the final word on the matter. The court held that the Mohawk people had a right to occupy and use the land until the Sulpicians exercised their unfettered right to sell it.

The Kanesatake land dispute had been festering for more than 200 years by this time. The Oka summer of 1990 — which began when the Oka municipal council called in the Sûreté du Québec (the provincial police force) and escalated to an armed confrontation between the Canadian army and Mohawk warriors — was foreshadowed by violent confrontations as

early as 1877. All avenues for resolving the land question had been closed. After simmering for so long, the situation exploded. The sight of Canada's army pitted against its own citizens received attention around the world. Canada's reputation on the international stage, one of promoting human rights and the well-being of Aboriginal peoples, was badly tarnished. The land dispute has yet to be resolved, although negotiations are continuing, and the federal government has purchased small parcels of land to be returned to the Mohawk people.

Shortly after the demise of the Meech Lake Accord and the Oka crisis, the government of Quebec created the Bélanger-Campeau commission on Quebec's constitutional future,<sup>16</sup> and the federal government established the Spicer commission on national unity. Among other things, the Spicer commission found that Canadians as a whole want to come to terms with the aspirations of Aboriginal peoples. There was broad consensus and support for Aboriginal self-government and land claims and acknowledgement of the contributions of Aboriginal peoples to Canada. As the report of the Spicer commission stated forcefully,

There is an anger, a rage, building in aboriginal communities that will not tolerate much longer the historic paternalism, the bureaucratic evasion and the widespread lack of respect for their concerns. Failure to deal promptly with the needs and aspirations of aboriginal peoples will breed strife that could polarize opinion and make solutions more difficult to achieve. ...

We join with the great majority of Canadians to demand prompt, fair settlement of the territorial and treaty claims of First Nations people, to secure their linguistic, cultural and spiritual needs in harmony with their environment.

We join with the Canadian people in their support for native self-government and believe that First Nations people should be actively involved in the definition and implementation of this concept.<sup>17</sup>

In response to such events as Kanesatake, the failure of the Meech Lake and section 37 processes, the Spicer commission, and the government of Canada's failure to resolve the growing rift in relations between Aboriginal peoples and the Canadian state, the federal government created this Royal Commission on 26 August 1991. With a wide mandate and a mix of

Aboriginal and non-Aboriginal commissioners, it was charged with finding ways to rebuild the relationship between Aboriginal and non-Aboriginal people in Canada. Four years of consultation, study and deliberation would be required.

Constitutional discussions also began anew that autumn, this time with the full participation of Aboriginal peoples. A joint parliamentary committee (Beaudoin-Dobbie) was established to review the federal government's proposals and published in a booklet entitled *Shaping Canada's Future Together*. In addition to the public hearings held by this committee, a series of five public forums was held to discuss the federal government's proposals. Also, a sixth forum on Aboriginal issues, chaired by Joe Ghiz, former premier of Prince Edward Island, was added at the insistence of Aboriginal people. Also, most provincial and territorial governments held public hearings. Funds were provided for national Aboriginal organizations to consult their people. The criticism of lack of public consultation that damaged the Meech Lake process would not apply to what was called the Canada round of constitutional debate — a round meant to address the concerns of all governments and Aboriginal peoples.

The constitutional conferences of 1992, with the full participation of national Aboriginal leaders, resulted in the Charlottetown Accord. The accord included many provisions related to Aboriginal people, but the most important was one that recognized the inherent right of Aboriginal self-government. All governments — federal, provincial and territorial — agreed to include this right in the constitution, an idea some had rejected just five years earlier.<sup>18</sup> The Charlottetown Accord was put before the people of Canada in a national referendum on 26 October 1992 and defeated. Although this doomed the constitutional amendments relating to Aboriginal peoples, the fact that the federal, provincial and territorial governments accepted that the right of Aboriginal self-government is inherent — and not delegated from other governments or created by the constitution — is a recognition that cannot be readily or easily withdrawn.

There may be an opportunity to return to this matter in 1997, when a first ministers constitutional conference must be convened to review the procedures for amending the Constitution of Canada.<sup>19</sup> It would seem highly appropriate, given the precedent of recent constitutional reform efforts, that representatives of Aboriginal peoples would be invited to this

conference. It would also provide an opportunity explicitly to affirm an inherent right of Aboriginal self-government in the constitution.

Within a span of 25 years, Aboriginal peoples and their rights have emerged from the shadows, to the sidelines, to occupy centre stage. While government policies, attempts at legislative reform, and efforts at constitutional change have failed, Aboriginal people have gathered strength, developed national and international political networks, and forced their way into the debate on the future of our country. It is hard to imagine that Aboriginal proposals for the future of Canada, including constitutional reform, can be ignored when discussions about the basic values of our country resume.

## **2. The Role of the Courts**

In the period between the onset of the civilizing and assimilation policies, described in earlier chapters, and the present era, we have seen how Aboriginal people were treated as wards of the Canadian state and were subjected to various oppressive, unfair laws and policies. The clear goal of these policies and practices was to eradicate Aboriginal peoples as distinct peoples within Canada.

Although they did not cease to assert their distinctiveness in the face of Canadian Aboriginal policy during this period, Aboriginal peoples had little incentive or opportunity to go to court to vindicate their Aboriginal and treaty rights. There were many reasons for this, including the fact that some Aboriginal peoples — holding steadfastly to their original nation status — often refused to admit that non-Aboriginal courts had any jurisdiction over them. In other cases, Aboriginal peoples simply had no confidence that Canadian courts would be willing to recognize their rights or to enforce them against the federal or provincial governments.

During this earlier period of Canadian history, it will be recalled, the doctrine of parliamentary supremacy was accepted by legislators and judges without question. This was also the period when Canadian courts were in the grip of a positivist philosophy of the law, as a result of which their focus was less on whether legislative measures were 'just' than on whether they were 'legal' in the narrower sense.<sup>20</sup> Moreover, unlike today, there was no bill of rights or charter of rights and freedoms against which to assess federal or

provincial legislation. Thus, measures such as the oppressive provisions in the *Indian Act* or the manner in which the Métis land grants were administered under the *Manitoba Act* would have been difficult for Aboriginal people or others to attack.

Even where Aboriginal people might have wanted to go to court, many obstacles were put in their way. For example, after 1880 the *Indian Act* required federal government approval for Indian people to have access to their own band funds. This made it difficult for bands to organize, since they would require the approval of the Indian agent to get access to sufficient funds to travel and meet among themselves. There is considerable evidence of the extent to which Indian affairs officials used their control over band funds deliberately to impede Indian people from meeting for these purposes.<sup>21</sup>

In addition, as described later in Chapter 9, between 1927 and 1951 it was actually an offence under the *Indian Act* to solicit funds to advance Indian claims of any kind without official permission. Moreover, it was hazardous in other ways to attempt to organize or to bring legal proceedings against the federal government. This was certainly the experience of F.O. Loft, who was defamed by the deputy superintendent general of Indian affairs, repeatedly investigated by the RCMP at the instigation of Indian affairs officials, and even threatened with enfranchisement because he proposed to bring a legal action to test the constitutionality of provincial game laws in light of treaty hunting, fishing and trapping guarantees.<sup>22</sup>

With the notable exception of leaders like Loft, most Aboriginal people during the historical period we have characterized as 'displacement' were poor, largely uneducated and unsophisticated in the ways of the non-Aboriginal society around them. They tended to rely on the structures and processes of the Indian affairs department, in the case of Indian people, on the RCMP and missionary societies in the case of Inuit, or on provincial institutions in the case of Métis people. Many Aboriginal people, in addition, still lived in physically remote or northern locations, far from the institutions of mainstream Canadian society. To this physical remoteness must be added the fact that Canadian institutions were, and indeed often remain, culturally and spiritually remote. In light of these factors, the courts did not play a positive role in the struggle of Aboriginal peoples to assert and defend their rights until relatively recently.

The vast majority of non-Aboriginal Canadians who have given any thought to the matter would probably acknowledge that Canada's Aboriginal peoples have not been accorded their proper place in the life and constitution of this country. Some might say that this is attributable to deep-seated racism; others might say, more charitably, that it is the result of the paternalistic, colonial attitude we have described, the goal of which was to indoctrinate the original inhabitants of Canada into the ways of non-Aboriginal society and make them over in the image of the newcomers. Whatever the explanation, it seems clear, as a judge of the British Columbia Supreme Court has acknowledged, that we "cannot recount with much pride the treatment accorded to the native people of this country."<sup>23</sup>

There is yet another reason why the courts have played a relatively limited role until recently in the articulation of a balanced approach to Aboriginal and treaty rights within the Canadian federation. The common law of England — the law administered in Canadian courts in all provinces except Quebec — was wholly unable to comprehend the view that Canada's First Peoples had of the world and of their unique place in it. The inability of Canadian courts to recognize or to reflect Aboriginal concepts, of course, owes a great deal to the difference in culture and perspectives between Aboriginal and non-Aboriginal people (see Chapters 3, 4 and 15). In retrospect, it is clear that English and French legal concepts are not universal; they spring from and reflect the distinctive cultures and traditions of Great Britain and France. Although these concepts have undergone considerable expansion and refinement since they were transplanted to North America,<sup>24</sup> the fact remains that for many generations, Canadian judges and government officials were simply unable to accommodate the concepts of Aboriginal or treaty rights in the legal framework with which they were familiar.

Even today, the courts have difficulty reconciling Aboriginal concepts with Euro-Canadian legal concepts. Thus, as discussed later in this chapter, they have been forced in recent years to describe the legal aspects of the overall relationship between Aboriginal peoples and mainstream Canadian society as being *sui generis*. This Latin term means that the matter in question is in a category of its own and that it is unwise to draw too close analogies with similar matters in other areas of the law. In this way, since the early 1980s courts have tried to be sensitive to the uniqueness of the legal concepts that have emerged as a result of the evolution of the

relationship between Aboriginal peoples and non-Aboriginal society without undermining the existing legal framework of the Canadian federation.

However, the courts have not always been so sensitive to the uniqueness of the Aboriginal perspective and the need to accommodate it within the Canadian legal framework. For example, the early efforts of Canadian courts and the judicial committee of the privy council in England (to which decisions of the Supreme Court of Canada could be appealed until 1952<sup>25</sup>) to fit the unique relationship of Aboriginal peoples to their land into the common law concept of property resulted in a distortion of the traditional approach of Aboriginal peoples to their lands. Aboriginal people do not use terms in their own languages that connote 'ownership'; they describe themselves rather as 'stewards' of their traditional territories, with a responsibility to the Creator to care for them and every living thing on them. They tend to focus on the respectful use of lands and resources rather than dominion over them. George Manuel has described the spiritual relationship between Aboriginal peoples and the land as follows:

Wherever I have travelled in the Aboriginal World, there has been a common attachment to the land.

This is not the land that can be speculated, bought, sold, mortgaged, claimed by one state, surrendered or counter-claimed by another....

The land from which our culture springs is like the water and the air, one and indivisible. The land is our Mother Earth. The animals who grow on that land are our spiritual brothers. We are a part of that Creation that the Mother Earth brought forth....

Although there are as wide variations between different Indian cultures as between different European cultures, it seems to me that all of our structures and values have developed out of a spiritual relationship with the land on which we have lived.<sup>26</sup>

Unfortunately, Canadian courts were unable or unwilling to incorporate the perspective of Aboriginal peoples within existing British and Canadian land law. Thus, they simply adopted the 'discovery doctrine' discussed in earlier chapters, asserting that legal title and ultimate 'ownership' of Aboriginal lands in North America either became vested in the Crown at the moment

of discovery by British explorers, or passed from the 'discovering' French king to the British Crown upon France's 1763 cession of its North American possessions to Great Britain. Under the discovery concept the newcomers thus became the 'owners' in terms of their own legal framework. The original Aboriginal inhabitants who had been living on the land from time immemorial were found to have no real property interest in the land at all; rather, they had a mere 'personal' and 'usufructuary' right that constituted a burden on the Crown's otherwise absolute title.

This was the language used, for example, in the leading early case on Aboriginal title. Thus, in 1888 in *St. Catherine's Milling and Lumber Company v. The Queen*<sup>27</sup> the new dominion of Canada and the province of Ontario brought to the Judicial Committee of the Privy Council their dispute about which of them was the true owner in Canadian law of lands ceded to the Crown by the Ojibwa Nation from the Treaty 3 area in Ontario. Although the Crown in right of Canada<sup>28</sup> had taken the surrender from the Ojibwa in 1873, the province contested the right of the dominion government to grant a timber licence to the St. Catharines Milling and Lumber Company. The province argued that the dominion government had no such right because, upon the land surrender by the Ojibwa, the underlying legal title was 'cleared' of the burden of whatever land title the Indian people had and reverted to the ultimate owner — the Crown in right of the Province.<sup>29</sup> The Judicial Committee agreed with the province, awarding ownership of the ceded lands to it and agreeing that the Aboriginal interest in those lands had ceased to exist upon surrender.

Speaking for the judicial committee, Lord Watson characterized the legal nature of the Aboriginal interest in their own lands as "a personal and usufructuary right, dependent upon the good will of the Sovereign." Moreover, Lord Watson attributed the Indian interest solely to the provisions of the *Royal Proclamation of 1763*, equating it with a grant from the Crown rather than as flowing from the use and occupation of the lands from time immemorial. The Ojibwa signatories of Treaty 3 were not represented in these proceedings and therefore never had a chance to present to the lower courts or to the Privy Council their views on the nature of their relationship to their own lands.

Earlier judicial analysis of the nature of Aboriginal title in the United States had taken a more positive turn, however. Chief Justice Marshall of the



Supreme Court of the United States had earlier held, in *Johnson v. M'Intosh* and *Worcester v. State of Georgia*, that Aboriginal title existed quite apart from the Royal Proclamation. It was a legal right, based on Indian peoples' first occupation of the land, and did not derive from any Crown grant:

They [the Aboriginal 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...<sup>30</sup>

Chief Justice Marshall went on to say that, in fact, the discovery doctrine by which European nations claimed Aboriginal lands as their own did not defeat the rights of the Aboriginal peoples already in possession of them, because discovery merely "gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell."<sup>31</sup> In the United States, the more liberal approach of the Supreme Court initially gave considerable scope for Aboriginal and treaty rights to evolve in American law. Inevitably, this led to considerable litigation during the nineteenth century and to the many landmark court decisions that sketched out the contours of Indian law in that country relatively early in its history.

In Canada, however, it was a different story. The judgement in *St. Catherine's Milling* seemed to close off important avenues for Aboriginal peoples to contest Crown claims to their lands or regulations controlling their traditional hunting, fishing and trapping activities. The lack of legal avenues for action, coupled with the restrictive measures discussed earlier in this chapter, led to a long period during which the courts were seldom called upon to deal with important questions of Aboriginal and treaty rights. Referring to this long period of judicial inactivity, the Supreme Court of Canada summed up this time as one when Aboriginal rights "were virtually ignored":

For many years the rights of the Indians to their Aboriginal lands — certainly as legal rights — were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's *The Law of the Canadian Constitution* (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even

in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* (1969), although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land...are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community". In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument...<sup>32</sup>

The process of developing the modern legal framework for the articulation of Aboriginal rights began in 1965, when the Supreme Court upheld the treaty hunting rights of Indian people on Vancouver Island against provincial hunting regulations in *R. v. White and Bob*,<sup>33</sup> affirming the majority decision of the Court of Appeal. The discussion of Aboriginal rights in the British Columbia Court of Appeal decision is significant, especially the judgement of Mr. Justice Norris.<sup>34</sup> For the first time in recent Canadian judicial history, he considered the overall effect of the *Royal Proclamation of 1763* on modern Crown/Aboriginal relations. Unlike the decision of the Privy Council in *St. Catherine's Milling*, Mr. Justice Norris held that the Royal Proclamation was declaratory of Aboriginal rights — it did not create them. Thus, he accepted that the Vancouver Island treaties confirmed Aboriginal rights and did not grant them. The effect of his bold judgement was to reintroduce into judicial discourse the whole question of Aboriginal rights and the modern legal effect of treaties.

When the *Calder*<sup>35</sup> case came before the Supreme Court of Canada a few years later, the *St. Catherine's Milling* decision was still the law in Canada: First Nations had Aboriginal title to their lands solely by virtue of the Royal Proclamation, not on the basis of their use and occupation of their own lands from time immemorial. The Nisg\_a'a people of northwestern British Columbia wanted that changed and brought an action for a declaration that their Aboriginal title to their ancient homelands had never been extinguished.<sup>36</sup> Mr. Justice Hall, speaking for three members of the Supreme Court of Canada, held that the Nisg\_a'a had an existing Aboriginal title based on their original use and occupancy. He relied on Chief Justice Marshall's decision in *Johnson*. Speaking for the other three members of

the court, Mr. Justice Judson held that, whatever title the Nisg\_a'a may once have had, it had since been extinguished. He did not, however, reject the concept of Aboriginal title based on original use and occupation. Indeed he stated the very opposite:

Although I think that 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 and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their own lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the will of the Sovereign".<sup>37</sup>

The *Calder* decision is significant, therefore, for its strong support of the Nisg\_a'a proposition that Indian title in British Columbia was occupancy-based, not derived from the Royal Proclamation. Some months later the Quebec Superior Court ordered a halt to the James Bay hydroelectric project on similar grounds, namely, that Cree and Inuit Aboriginal title had not been extinguished by the Crown in right of Quebec.<sup>38</sup> The injunction was later lifted by the Quebec Court of Appeal, and the Supreme Court of Canada refused leave to appeal the matter further. By then, however, all sides had determined that a negotiated solution was better than continued litigation. The result was the James Bay and Northern Quebec Agreement of 1975.

Although several Canadian courts had an opportunity subsequently to elaborate on the nature and scope of occupancy-based Aboriginal title, few took advantage of the opportunity. In the *Baker Lake*<sup>39</sup> case, however, Mr. Justice Mahoney of the Federal Court of Canada Trial Division held, following *Calder*, that Inuit of the Baker Lake area of the Northwest Territories had an occupancy-based Aboriginal title to the Baker Lake area and that it was recognized by the common law although subject to being abridged by competent legislation. He set out the elements that must be established as follows:

1. the claimants and their ancestors were members of an organized society;

2. the organized society occupied the territory over which they assert Aboriginal title;
3. the occupation was to the exclusion of other organized societies; and
4. the occupation was an established fact at the time sovereignty was asserted by England.

Justice Mahoney found that all these requirements were met by the Inuit of Baker Lake. The only remaining question, therefore, was whether their Aboriginal title had been extinguished, either by the transfer of the lands to the Hudson's Bay Company or by the subsequent admission of Rupert's Land into Canada. He found that neither had the effect of extinguishing the Inuit's Aboriginal title, since no clear and plain intention to extinguish Aboriginal rights had been shown on the part of the Crown. The Federal Court judgement was not appealed. This case is important because it indicated clearly that Aboriginal title can co-exist with settlement or development by non-Aboriginal people.

In the *Guerin* case in 1985, the Supreme Court found that the federal government was in a fiduciary relationship with Indian bands and was therefore responsible for the proper management of surrendered reserve lands. The band in question was awarded \$10 million in damages as a result of federal mismanagement of lands surrendered for a Vancouver golf course.<sup>40</sup> Although analogous to the private law of commercial fiduciaries, the Court characterized the fiduciary relationship between the Crown and Aboriginal people as being *sui generis* and as having the capacity to evolve as the overall relationship between Aboriginal peoples and Canadian society itself evolved.

Importantly, the Court took the opportunity to review the early cases on Aboriginal title, confirming that, by recognizing that the Royal Proclamation was not the sole source of Aboriginal title, the *Calder* decision had effectively overturned the Privy Council decision in *St. Catherine's Milling*. The Court held that Indian title is an independent legal right that, although recognized by the *Royal Proclamation of 1763*, in fact predates it. The Court went on to discuss the nature of Aboriginal title, examining the

various cases and the language they had used to describe it. Was Aboriginal title merely a personal and usufructuary right, or was it an actual beneficial interest in the land itself? In short, was it something that could be dealt with by governments at their pleasure, as the *St. Catherine's Milling* decision had suggested, or was it a real property interest with more serious legal consequences, as some of the later cases had suggested?

Mr. Justice Dickson found an element of truth in both characterizations. He rejected the view that Indian title was simply a personal right, stating instead that it too was *sui generis*, a unique interest in the land that could not be described adequately in terms of English land law. It was personal in the sense that it could not be transferred by Indian people to anyone else. But it was a unique interest in the land because, when surrendered to the Crown, the Crown was not free to do with the land what it liked. Rather, the Crown was under a fiduciary obligation to deal with it for the benefit of the Indians who had surrendered it.

The legal community had hardly begun to digest the ramifications of this case when the Supreme Court decided *Simon*,<sup>41</sup> a treaty rights case based on a peace and friendship treaty<sup>42</sup> of 1752 between the British Crown and the Mi'kmaq Nation. In an earlier case a Nova Scotia county court had held the same 1752 treaty to be legally meaningless, basing this on a distinction between a "civilized nation" and "uncivilized people or savages".<sup>43</sup> As in the earlier decision in *White and Bob*, however, the Supreme Court upheld the treaty right against provincial hunting regulations. Significantly, the Supreme Court affirmed the principle that treaties were to be interpreted as Indian people themselves would have understood them and that ambiguous terms were to be construed in their favour.<sup>44</sup> Moreover, the Court also emphasized the inappropriateness of drawing too close an analogy between Indian treaties and treaties in international law, stating that an Indian treaty is "an agreement *sui generis* which is neither created nor terminated according to the rules of international law."<sup>45</sup>

Referring to the disparaging way the earlier Nova Scotia county court decision had characterized Indian societies, the Supreme Court also took the occasion to speak directly to the legal community about the judicial attitude toward Aboriginal rights it was fostering:

It should be noted that the language used...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.<sup>46</sup>

Another important issue dealt with in *Simon* was the question of who may claim the benefit of treaty rights under Canadian law. Did a treaty beneficiary have to prove lineal descent from a treaty signatory, or could a beneficiary be a successor in interest? This would include, for instance, someone not necessarily related to the original signing party but who through marriage or adoption became a successor to that party's interest. The Court held that, although descent was the basic rule, evidence of descent other than lineal descent from a treaty signatory might be acceptable, for otherwise it would be too difficult to prove:

The evidence alone, in my view, is sufficient to prove the appellant's connection to the tribe originally covered by the Treaty. True, this evidence is not conclusive proof that the appellant is a direct descendant of the Micmac Indians covered by the treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy. The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present-day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this Treaty.<sup>47</sup>

In short order the Supreme Court followed up on treaty issues in the 1990 *Sioui* case.<sup>48</sup> At issue was a document that the federal government argued was a mere safe conduct pass issued by British authorities to members of the Wendat (Huron) Nation in 1760. This case goes farther than *Simon*, expanding the definition of what is considered a treaty in Canadian law. Moreover, it cited the Marshall decision in *Worcester v. Georgia* to the effect that treaties between European nations and Indian tribes were akin to international agreements, concluding that it was "good policy to maintain relations with them very close to those maintained between sovereign nations" and that "the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations."<sup>49</sup> Despite its accent on the international character of certain aspects of Indian treaties, the Court was nonetheless careful not to draw too close an analogy with the international sphere, emphasizing "[t]he *sui generis* situation in which the Indians were placed" in the context of their

relations with the competing European powers.<sup>50</sup>

The immediate issue in *Sioui* was whether the Indian people of the Lorrette reserve were entitled to practise certain ancestral religious rites in Jacques Cartier Park. These rites involved cutting down trees and making fires, contrary to regulations under the Quebec *Parks Act*. The 1760 British treaty with the Wendat, often referred to as the Murray Treaty, protected the free exercise of their customs and religion by the Wendat, and it was acknowledged that the Wendat were well settled at Lorrette and making regular use of the territory covered by the park long before 1760. The Crown argued, however, that the rights of the Wendat had to be exercised in accordance with the province's legislation and regulations designed to protect the park and other users of it. The Supreme Court of Canada disagreed, finding in the treaty itself an intention by the Crown and the Wendat that Wendat rights to exercise their customs be reconciled with the needs of the settler society, represented by the Crown, to expand. Thus, confronted with the conflicting interests of the Crown and the Wendat today, the Court preferred to balance their interests as follows:

Protecting the exercise of the customs in all parts of the territory frequented when it is not incompatible with its occupancy is in my opinion the most reasonable way of reconciling the competing interests.<sup>51</sup>

The Court found that exercise of the rights of the Wendat was not incompatible with the rights of the Crown. The convictions of the Wendat of Lorrette were accordingly set aside.<sup>52</sup>

In *Sparrow*,<sup>53</sup> a member of the Musqueam Band in British Columbia was charged under the federal *Fisheries Act* with fishing with a drift net longer than that permitted by the terms of his band's food fishing licence. He was fishing in a part of the Fraser River where his ancestors had fished from time immemorial. The Supreme Court of Canada affirmed what it had said in *Guerin*, namely that Indian title is more than a personal and usufructuary right — it is *sui generis* — and that the federal government has a responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. The Court pointed out that the relationship between the government and Aboriginal peoples is "trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."<sup>54</sup>

Accordingly, whenever the federal government is exercising its powers under section 91(24) of the *Constitution Act, 1867*, these powers have to be read after 1982 together with section 35(1) of the *Constitution Act, 1982*. The federal power, the Court said, must be reconciled with the federal duty, and the best way to achieve that reconciliation is to require that government justify any regulations that infringe Aboriginal rights.<sup>55</sup> It must never be forgotten, the Court reminded Canadians, that "the honour of the Crown is at stake in dealings with aboriginal peoples."<sup>56</sup>

In the result, the Supreme Court held that the mere fact that federal fisheries legislation and provincial regulations had controlled the fishing rights of the Musqueam people of British Columbia for many years was not in itself sufficient to extinguish their Aboriginal fishing rights under the constitution. Thus, Aboriginal fishing rights continued, subject to regulation in accordance with the justification standard set out in the case. This was the first case in which the Supreme Court of Canada had an opportunity to consider the effect of section 35 of the *Constitution Act, 1982* on federal and provincial legislative and regulatory powers under the *Constitution Act, 1867*.

So, after a long painful process it seemed to Aboriginal peoples that the Canadian courts had finally recognized Aboriginal title based on long-standing use and occupation, even though they had also affirmed that the Crown had underlying title to Indian lands by virtue of its so-called 'discovery' of North America. Moreover, by reaffirming the importance of treaties and the contemporary legal significance of Aboriginal and treaty rights, cases such as those just discussed also seemed to hold out a real promise that the federal government could no longer infringe their Aboriginal rights at will but had to establish that its laws or regulations were compatible with its fiduciary obligations to Aboriginal peoples and could be justified in the context of the Aboriginal rights at stake.

It must have come as a tremendous shock, then, in terms of both the substance of the decision and the strong language used, when Chief Justice McEachern of the Supreme Court of British Columbia rejected outright the claim of the Gitksan and Wet'suwet'en to Aboriginal rights over their traditional lands in northern British Columbia in a 1991 case, *Delgamuukw v. British Columbia*. The hereditary chiefs had brought an



action against the province of British Columbia alleging that from time immemorial they and their ancestors had occupied and possessed approximately 22,000 square miles of northwestern British Columbia. As a result, they claimed unextinguished Aboriginal title to their own territory and the right to govern it by Aboriginal laws. They also claimed damages for the loss of all lands and resources in the area transferred to third parties since the establishment of the colony.

An unfortunate aspect of this case was the language used by Chief Justice McEachern to describe Gitksan and Wet'suwet'en life and social organization before contact. The use of terminology reminiscent of the language deplored by the Supreme Court of Canada in the *Simon* case continues to arouse anger and indignation among Aboriginal people and fuels the distrust of the Canadian justice system often voiced by Aboriginal people across Canada.<sup>57</sup>

After reviewing a number of authorities, including those discussed in this chapter, Chief Justice McEachern concluded that in *St. Catherine's Milling* the Judicial Committee of the Privy Council "got it right when it described the aboriginal interest as a personal right rather than a proprietary one".<sup>58</sup> He also found that whatever rights the Aboriginal people had before the colonization of British Columbia were extinguished by the act of Parliament passed in 1858 empowering the Queen to appoint a governor of the new colony and make provision for its laws and administration. He held further that in 1871, when the colony was united with Canada, all legislative jurisdiction was divided between Canada and the province, and no room was left for any Aboriginal jurisdiction or sovereignty. The Aboriginal peoples' only surviving right, the Chief Justice concluded, was to use unoccupied Crown land for their traditional pursuits of hunting and fishing for sustenance purposes, subject to the general law and until such time as the land was required for a purpose incompatible with the existence of such a right.

This was a major set-back for the Gitksan and Wet'suwet'en, and an appeal was launched immediately. The British Columbia Court of Appeal split on the various issues raised at trial, with a majority of three judges generally upholding the trial decision and dismissing the appeal.<sup>59</sup> Two judges dissented on a number of grounds and would have allowed the appeal.<sup>60</sup> In all, four separate judgements were issued by the Court of Appeal. Although

a further appeal was filed with the Supreme Court of Canada, the parties have requested that it be withdrawn pending negotiations to resolve the many outstanding issues raised at trial and on appeal. Those negotiations are continuing.

In addition to the courts, Aboriginal people have also looked to the international community for legal and political support. Since the end of the Second World War the community of nations has become increasingly anxious to develop standards of conduct in the field of human rights to which all nations should subscribe. This concern was manifested in an ever-increasing number of conventions, declarations and covenants. There is no doubt that human rights considerations have now become a major concern of the world community legally, morally and politically.

Can Canada possibly stand up against a worldwide movement to restore recognition and respect for Indigenous peoples, their distinctive cultures and historical traditions? Chief Solomon Sanderson has said,

By our own efforts, over the last decade, we have successfully re-asserted our sovereignty as Indian Nations in our own homelands and have begun to re-establish our international personality in the courts and political assemblies of the world.

But there is much work to be done. While we have been trussed up and gagged in Canada for the better part of this century, the international community of nations has been re-structured and a body of international law, which is not yet sensitive to our Indian concepts of nationhood, has come into use. In our enforced absence from world forums, nobody spoke for us and nobody contradicted Canada's definition of us as an insignificant and disappearing ethnic minority.

In the thirty-five years since the Second World War, Britain and the other European powers dismantled their colonial empires and, with the United States, sought a new world order. The integrity of every nation, however poor or small, would be protected by universal observance of international law based on common respect for fundamental human rights, including the right to self-determination.<sup>61</sup>

Aboriginal people in Canada are well aware of the importance of

international forums for advancing their rights. It was under the International Covenant on Civil and Political Rights, which guarantees among other things the right of all peoples to self-determination, that Sandra Lovelace took her case against Canada to the United Nations. A Maliseet woman who had lost her status by marrying a non-Indian in 1970, Lovelace was no longer allowed to live on her reserve. She argued that she was thereby prevented from practising her culture and language and that this was a violation of Article 27 of the Covenant, which states that

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.

The United Nations Human Rights Committee agreed with Sandra Lovelace that she had been denied her rights under Article 27, because the only place where she could fully exercise these rights was on her reserve.<sup>62</sup> While the committee could not, of course, force Canada to change its law, the public condemnation voiced in the decision was a tremendous embarrassment to Canada which had long prided itself on being a champion of international human rights. Canada responded in 1985 with Bill C-31, amendments to the status and membership provisions of the *Indian Act* discussed in detail later in this volume.<sup>63</sup>

It is the hope of Indigenous peoples everywhere, including Aboriginal people in Canada, that international pressure will force countries with Aboriginal populations to assure their cultural survival and recognize their right to have their own land and their own systems of government. Can Canadian courts and Canadian governments now, at this late date in our history, change gears and help in achieving this world-wide objective? There is reason for optimism. The courts have come a long way from *St. Catherine's Milling to Guerin* and *Sparrow*. Aboriginal and treaty rights are now protected in the constitution, and federal, provincial, and territorial governments have accepted the view that the inherent right of Aboriginal peoples to govern themselves may well be one of those entrenched Aboriginal rights.

We now have an unprecedented opportunity to learn from the mistakes of

the past and to set out, both as governments and as peoples, in totally new directions. If Canada has a meaningful role to play on the world stage (and we would like to think that it has) then it must first set its domestic house in order and devise, with the full participation of the federal government, the provinces and the Aboriginal peoples, a national policy of reconciliation and regeneration of which we can all be proud.

### **3. The Inuit Circumpolar Conference: The Emergence of Internationalism**

As Aboriginal organizations in Canada have become stronger and more numerous in the decades since the Second World War, they have devoted considerable attention to the situation of Indigenous peoples in other parts of the world and to influencing the activities of established international organizations, especially the United Nations and its affiliated organizations and committees. With the establishment of the Inuit Circumpolar Conference, however, a new international organization was formed, one in which Inuit from Canada have played a leading role.

The Inuit Circumpolar Conference (ICC) is the established international non-governmental organization of the world's Inuit. Its creation and history relate directly to pressures exerted on the circumpolar regions of the world by southern cultures, principally those committed to finding and exploiting the rich resources of Arctic regions. The ICC is known in virtually every household across the circumpolar north, from Alaska, across the great breadth of the Canadian Arctic, encompassing one-third of the country's land mass, in all of Greenland's coastal communities, and throughout the vast Arctic regions of the Russian north.

While estimates of the exact number are difficult to establish, it is believed there are approximately 115,000 to 128,000 Inuit living in the circumpolar regions of Canada, Alaska, Greenland and Russia.<sup>64</sup> It is a small population that, by most conventional international standards, would be considered insignificant. Nevertheless, Inuit of the world take tremendous pride in the fact that they have been able to survive culturally and spiritually and to prosper in the harsh Arctic climate. In this context, Inuit have always seen themselves as one people. Their legends and stories, both ancient and modern, speak of family and relatives in the far-off places. The establishment of a modern, permanent international organization to reflect

their concerns and aspirations as well as protect their environment, culture and basic human rights, was a matter of doing what they had done many times in the past to ensure their survival. It meant adapting to the new forces, circumstances and conditions now facing them, but doing so in a manner consistent with traditions and aspirations that go back thousands of years.

Among these new and intrusive forces were some of the most powerful and influential organizations and institutions of modern society: churches, governments, the military and multinational oil and gas companies. Governments have for decades followed policies of resource development, exploitation, assimilation and colonization. In the 1960s and early 1970s, these policies intensified, driven by the interests of the multinational oil companies and the possibility of petroleum wealth that some thought might be comparable in scale to that available in the Middle East.

In Alaska, Canada and Greenland at almost the same time, an enormous transformation was taking place. Young Aboriginal leaders began not only questioning but even resisting the change. More than that, they asserted Aboriginal ownership and rights over their lands and were insisting on land claims settlements and recognition of their rights to their land and resources, renewable and non-renewable. They found that although governments wanted to dismiss or even ignore their claims, there was growing support in the wider public for equality and justice for Aboriginal peoples.

By November 1973, the Inuit struggle for recognition of their Aboriginal rights was being waged in Canada, Greenland and Alaska. In other regions of Canada and Alaska, First Nations were pressing similar claims. In Norway, Sweden and Finland, the Sami people were also asserting their rights and meeting similar resistance.

Under these circumstances, it was natural for the Aboriginal peoples to look internationally for a common front, and the first important meeting, the Arctic Peoples Conference, took place in Copenhagen in November 1973.

The message emerging from the meeting was clear. Across the circumpolar world, Aboriginal peoples were involved in fighting the policies of governments that had imposed laws and borders without agreement or

consultation. The fact that they lived in the most remote northern regions did not mean that they had to remain in isolation.

What also began to emerge was recognition by Inuit that they must unite as a people. Over the past one or two centuries, although they had never been conquered, they had been divided by colonizing European empires and nations. The circumpolar linkages of language and culture remained, but with the pressures of large-scale development and the loss of land and identity, their ability to establish their own priorities was becoming increasingly compromised.

The founding meeting of the ICC took place in Barrow, Alaska, in the summer of 1977, under the inspirational leadership of the mayor of the North Slope Borough of Alaska, Eben Hobson. The location was significant. The North Slope Borough's 88,000-square-mile region was part of the overall Alaskan Native Claims Agreement (ANCA), negotiated in the face of the oil discovery at Prudhoe Bay and the ensuing trans-Alaska oil pipeline. Hobson saw the enormous political power of the multinational oil companies working in the region. He also knew the poverty and lack of services available to his own people, and he used the compensation money and authority from the land claim settlement to create a strong regional government. Hobson also recognized that the powerful oil companies could try to lower environmental standards on both sides of the U.S./Canada border in the Beaufort Sea and that strong organization was required to counter the threat.

The atmosphere at the Barrow meeting was electric. Inuit were gathering from as far away as Greenland and the most remote and isolated regions of Canada. Inuit from the Soviet Union were invited, but the Iron Curtain could not yet be penetrated. Still, there was a sense of celebration reminiscent of the ancient and traditional Inuit gatherings, along with the drama and excitement of history being made as a new future unfolded. Basic decisions arising from the conference included the recognition that continuing co-operation and organization would be required if Inuit were to protect their culture, their way of life and the environment. It was also agreed that an official charter for the ICC should be established, based on principles of equality, friendship and respect.

When the ICC reconvened its general assembly in 1980, this time in

Greenland, the charter was approved, recognizing Inuit as an Indigenous people with a unique ancestry, culture and homeland. It stated that their lands transcended political boundaries and that the huge resources of these lands and waters were essential to the future development of Inuit. The charter's preamble set the tone and direction for the organization. It called for Inuit involvement at all levels of international policy making. Work started immediately to gain access to the United Nations as a registered non-governmental organization (NGO), a goal that was achieved in 1984 when the ICC obtained NGO status with the Economic and Social Council of the United Nations.

For the past decade, the ICC has played a major role in the United Nations Working Group on Indigenous Peoples while at the same time making a vital contribution to drafting the United Nations Declaration on the Rights of Indigenous Peoples. Concern about human rights issues also resulted in ICC participation in revisions to the International Labour Organisation's Convention No. 169 on the Rights of Indigenous Peoples and Tribal Populations.

In its short history, three priorities have predominated in the work of the ICC. The first of these, emphasized in the charter, is the importance of the environment: "International and national policies and practices should give due consideration to the protection of the arctic and sub arctic environment and to the preservation and evolution of Inuit culture and societies."<sup>65</sup>

The centrepiece for the principle of environmental stewardship was the Inuit Regional Conservation Strategy, presented by the ICC executive council to the ICC general assembly in Sisimuit, Greenland, in 1989. Building on detailed field work by Inuit across the Arctic, it was both an environmental protection strategy and a sound sustainable development strategy. It made clear the importance of all Arctic wildlife, including marine mammals, in contributing to the subsistence food that Inuit require daily. The creation of this strategy greatly influenced the eight Arctic governments in the establishment of a Circumpolar Arctic Environmental Protection Strategy. The ICC and other international Aboriginal organizations are full participants in this international initiative aimed at protecting the Arctic environment.

The ICC also contributed to the United Nations Earth Summit in Rio de Janeiro, Brazil, in June 1992. Along with other Aboriginal peoples, the ICC

submission called not only for international agreements and treaties on sustainable development, but also for greater use of the knowledge base and cultural values of the world's Aboriginal peoples in the protection and preservation of the earth's limited resources.

From its founding meeting, the ICC's second principal objective has been to achieve greater political control over the daily lives of Inuit. The charter sets out the clear objective "that our right to self-determination must be confirmed, and Inuit participation in policies and activities affecting our homeland assured". Progress across the circumpolar region on this question has been remarkable.

Within the ICC fold, Greenland has achieved the greatest measure of self-government. In 1979, Inuit of Greenland achieved home rule within the Danish Democratic Kingdom. Over a phased period, responsibility for government services, departments and institutions (with the exception of justice, defence and foreign affairs) have been transferred to the home rule government, and because of it, a strong confident Inuit society has re-emerged.

In Alaska, various efforts have been made to establish workable local or regional self-government models, but most have met with difficulties. In 1983, the ICC began an examination of the issue, appointing a former judge of the British Columbia Supreme Court, Thomas Berger, to conduct a review of the implications of the Alaskan Land Claims Settlement. Berger's report, published as a book called *Village Journey*, made a major contribution to policy development on indigenous self-government issues.

In Canada, negotiations since the early 1970s had led to comprehensive land claims agreements being negotiated in Arctic Quebec, the western Arctic, and Nunavut, with the exception of Labrador. The principle of negotiating self-government within the Canadian federation in the regions where land claims agreements have been signed is becoming accepted, although the level of actual progress varies from region to region. Many of the agreements that have been negotiated are based on the principles of self-government contained in the ICC Arctic policy document (discussed below), and all provide for a large measure of power and control over Inuit-owned land and resources.



The Nunavut agreement, to take the most recent example, is one of the most comprehensive land agreements signed in Canada and sets aside some 134,390 square miles of land and 580 million dollars in compensation for lands that have been surrendered.<sup>66</sup> To Inuit of the region, however, perhaps more important than the land or the money is the provision in the agreement to negotiate and to establish the new territory of Nunavut, which will have its own government to serve a region where Inuit now make up more than 80 per cent of the population.

A third important objective in the ICC charter is to promote world peace "in furtherance of our spirit of co-operation with the international community". In this regard, the ICC was confronted repeatedly with the realities of the Cold War and the increasing militarization of the Arctic regions, as exemplified by nuclear accidents resulting from military activity. There are documented cases of sunken nuclear submarines and of airplanes bearing nuclear weapons that have crashed into the ocean, all of which pose environmental threats to the Arctic Ocean and to marine life. The Chernobyl disaster resulted in the severe radioactive contamination of the environment and of the reindeer grazing lands of northern Europe and Russia, where the Sami and Russian Inuit live.

One of the major difficulties facing Inuit and the ICC is the impression held by so many, especially governments, that the Arctic is a vast empty land, where military activity and weapons testing can be carried out with minimal risk. To counter this, the ICC has made presentations in various international gatherings and through organizations and conferences, including at the United Nations, depicting Inuit as a peace-loving people caught between superpowers. A resolution passed at every ICC general assembly has called for a nuclear-free Arctic and a lessening of tensions among the world's superpowers.

To advance the principles outlined in the ICC charter, the organization has moved ahead in recent years with development of an Arctic policy. The Arctic policy is a comprehensive policy document, the result of extensive research and negotiations among Inuit in the member countries. It covers every issue important to the future of Inuit, including the environment, the economy, self-government, and social and cultural concerns. The initial draft was approved at the ICC General Assembly in Sisimuit, Greenland, in 1989.

The structure of the ICC as an international organization has also become more clearly established. For example, the general assembly now meets every three years and includes 18 elected delegates from each member country: Canada, the United States (Alaska), Greenland and Russia. The general assemblies are like no other gathering in the circumpolar world, since they are a unique mixture of politics, international diplomacy, family reunion, and cultural and entertainment exposition. In addition to the general assembly, an elders conference — a sort of Arctic senate — is held, bringing the experience, wisdom and understanding of the elders to the issues. On the conference floor, simultaneous interpretation must be available for up to eight Inuktitut dialects.

Two further important developments in strengthening and recognizing the work of the ICC took place in the first half of the 1990s. In 1994, the government of Canada appointed an Inuk, Mary Simon, as its first Ambassador for Circumpolar Affairs — a recognition by Canada of the reality and importance of the circumpolar region.

In addition, representation from all parts of the region was achieved at the 1992 general assembly. Early meetings of the general assembly had to be held without Soviet delegates in attendance, but places were kept open for them, and negotiations continued for more than a decade to bring them to their rightful place at the table. Progress was made in 1989 in Sisimuit, when the Soviet government permitted the Soviet Inuit (or Yupik) to attend as observers. In 1992, when Inuit gathered in Inuvik, Northwest Territories, the Cold War had ended. Inuit believed they played some small part in this development, and they saw as their reward the fact that there would be a full delegation at the ICC general assembly from Chukotka, the Inuit homeland in the former Soviet Union. When the Inuit arrived from Russia, it was one of the most emotional moments in the history of the ICC. Now, at long last, the circle was complete.

## **4. Conclusion**

As these accounts illustrate, this more recent period of negotiation and renewal has been and continues to be an uncertain time, full of change but also reversals and retrenchment. From an Aboriginal perspective, there was sharp disappointment with the 1969 white paper, but then some advantage

was discovered in the court decisions. There was exclusion from the constitutional discussions of the late 1960s, '70s and early '80s, but then a hard-won success in having significant amendments passed. There was lack of agreement at high-profile conferences with federal and provincial leaders in the 1980s and again exclusion from the process and substance of the Meech Lake Accord, but then a reversal of these patterns with respect to the Charlottetown Accord.

Throughout, there were signs of continuing differences in perspective and objectives. Aboriginal leaders pushed strongly for self-government as an inherent right, arguing that its roots lie in Aboriginal existence before contact. For much of this period, however, the federal government was not prepared to move beyond the administrative decentralization of programs and services or the granting of municipal-style governing powers to community-based governments.

Much of the constitutional discussion, too, was devoted to the wish of non-Aboriginal governments to see terms such as 'existing Aboriginal and treaty rights' and 'self-government' defined in detailed and written form. From an Aboriginal perspective, however, it was feasible only to establish agreement on a broad set of principles to govern the future relationship at the Canada-wide level. Given the respect accorded diversity and local autonomy in Aboriginal cultures, it is necessarily up to Aboriginal nations in different parts of the country to negotiate more specific arrangements themselves.

To give a final example, 'existing Aboriginal and treaty rights', from a non-Aboriginal perspective, may be limited to those already recognized and defined by institutions such as the courts, the only requirement being to enumerate and define them more precisely. From an Aboriginal perspective, the term includes many rights that have not yet been defined or recognized by non-Aboriginal society.

There has been some movement, however, especially on the part of non-Aboriginal society, toward greater understanding and recognition of Aboriginal aspirations. It no longer seems so important that Aboriginal societies follow the evolutionary path toward assimilation within non-Aboriginal society. At Charlottetown, there was recognition of Aboriginal participants as political equals at the table. There was also acceptance of the proposal that Aboriginal governments constitute one of three orders of

government based on the inherent right of self-government.

In short, there was a return to at least some of the basic principles that governed the relationship at the time of early contact. Although the discussions are far from complete, there are even some limited, halting efforts in different parts of the country to move from discussion to implementation.

Looking back over the historical record, some would argue that the relationship between Aboriginal and non-Aboriginal people has been entirely negative, from the moment Europeans first set foot on North American soil. We take a different view. Notwithstanding major disruptions, the spread of disease, and conflict in the early centuries of contact, it is our conclusion that a workable relationship was established over the first three centuries of sustained contact. It was a relationship that entailed the mutual recognition of nations and their autonomy to govern their own affairs, as well as an acknowledgement at the level of official policy that Aboriginal nations had rights to the land and that proper procedures would need to be followed to transfer those rights. It was a time when Aboriginal and non-Aboriginal peoples came together as needed to trade, to form alliances, to sign and periodically to renew treaties of peace and friendship, and to intermarry.

By the late 1700s and early 1800s, we came to a fork in the road. While Aboriginal peoples by and large wanted to continue with the terms of the original relationship, non-Aboriginal society and its governments took a different course, for reasons explained in our discussion of the third stage, displacement and assimilation, in Chapter 5. This was a course that involved incursions on Aboriginal lands, lack of respect for Aboriginal autonomy, and commitment to the idea of European superiority and the need to assimilate Aboriginal peoples to those norms, through coercive measures if necessary.

It was a period of false assumptions and abuses of political power carried out over two centuries into the present day — a period that cannot be forgotten by Aboriginal peoples but also one that cannot be allowed to continue or to be repeated. Indeed, the legacy of this time is substantial even in the present day, in the form of legislation, policies and attitudes and in the form of damaged lives.

The Commission believes it is vital that Canadians understand what happened and accept responsibility for the policies carried out in their names and at their behest over the past two centuries. To this end, the next several chapters explore in greater detail four policy directions based on false assumptions leading to abuse of power: the various Indian Acts, residential schools, community relocations, and the treatment of Aboriginal veterans. This historical legacy also inevitably takes up a substantial part of the agenda for change that we map out in subsequent volumes of our report. It is an agenda that addresses the need for a change in assumptions, principles and policy directions, which are rooted in a dynamic of colonialism that has been profoundly wrong and harmful.

We have before us an agenda of decolonizing the relationship between Aboriginal and non-Aboriginal people in Canada — an agenda that the experience in other societies demonstrates is not an easy road to follow. This historical overview has helped to clarify what needs to be changed and what not to do in the future. It has also introduced themes that will be woven through much of our analysis in later chapters and volumes: that there are profound differences in culture, world view and communication styles between Aboriginal and non-Aboriginal people; that as colonial society and governments gained ascendancy in Canada the opportunities for self-expression and authentic participation by Aboriginal people diminished; and that, to most Canadians, displacement of Aboriginal people seemed inevitable and assimilation appeared to offer the only reasonable basis of relationship.

In the past two decades Aboriginal and non-Aboriginal people in Canada have embarked on another path, albeit with faltering steps. Negotiation and renewal to establish a more just relationship have begun. But if the process is to gather momentum and be sustained, the misconceptions of the past, particularly the distorted stereotypes of Aboriginal people and the histories of Aboriginal peoples, must give way to more authentic accounts of their origins and identities. Their perspectives on their encounters with settler society must have a place alongside colonial records. In particular, the legitimacy and authority of the oral traditions of Aboriginal people to shed light on the past and mark the way to a better future must be accorded due respect.<sup>67</sup>

Achieving a balance between Aboriginal and non-Aboriginal perspectives

on Canadian history will require that substantial effort be devoted to recording the histories of Aboriginal nations, in all their cultural and regional diversity.

Aboriginal history is infused with story, song and drama and is rooted in particular places. It crosses the boundaries between physical and spiritual reality. It is imbedded in colonial accounts, represented visually in scrolls and petroglyphs, and etched in the memory of elders. Recording Aboriginal history will require varied methods of documentation, building on existing techniques for preparing printed text and historical atlases, and adapting evolving technologies for multi-media presentation.

The scope of the undertaking we are proposing should be Canada-wide. Its significance to Canadian identity warrants the commitment of public resources but it should not be conceived of as a project of the state. It should be firmly under the direction of Aboriginal people, mobilizing the efforts and contributions of granting agencies, academics and educational and research institutions, private donors, publishing houses, artists and, most important, Aboriginal nations and their communities.<sup>68</sup>

The work of recording Aboriginal histories in this way is long overdue. Some historical work has been undertaken by Aboriginal organizations and communities, but it requires cataloguing and processing to be made fully accessible to the Aboriginal and non-Aboriginal public. Aboriginal people are also acutely aware that elders and others who are fluent in Aboriginal languages and oral traditions are few in number and becoming fewer. An early start on the project and firm timelines for its completion are therefore a matter of urgency.

## **Recommendations**

The Commission recommends that

### **1.7.1**

The Government of Canada

(a) commit to publication of a general history of Aboriginal peoples of Canada in a series of volumes reflecting the diversity of nations, to be

completed within 20 years;

(b) allocate funding to the Social Sciences and Humanities Research Council to convene a board, with a majority of Aboriginal people, interests and expertise, to plan and guide the Aboriginal History Project; and

(c) pursue partnerships with provincial and territorial governments, educational authorities, Aboriginal nations and communities, oral historians and elders, Aboriginal and non-Aboriginal scholars and educational and research institutions, private donors and publishers to ensure broad support for and wide dissemination of the series.

### **1.7.2**

In overseeing the project, the board give due attention to

- the right of Aboriginal people to represent themselves, their cultures and their histories in ways they consider authentic;
  - the diversity of Aboriginal peoples, regions and communities;
  - the authority of oral histories and oral historians;
  - the significance of Aboriginal languages in communicating Aboriginal knowledge and perspectives; and
  - the application of current and emerging multimedia technologies to represent the physical and social contexts and the elements of speech, song and drama that are fundamental to transmission of Aboriginal history.
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## **Notes:**

1 *Constitution Act, 1982*, section 35.

**2** Lloyd Barber, Commissioner on Indian Claims, *A Report: Statements and Submissions* (Ottawa: Queen's Printer, 1977), p. 2.

**3** Charter of the World Council of Indigenous Peoples, p. 1.

**4** Peter McFarlane, *Brotherhood to Nationhood: George Manuel and the Making of the Modern Indian Movement* (Toronto: Between The Lines, 1993), p. 226.

**5** See George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (Don Mills: Collier-Macmillan Canada, Ltd., 1974).

**6** See Douglas Sanders, "Indigenous Peoples and Canada's Role on the International Stage", research study prepared for the Royal Commission on Aboriginal Peoples [RCAP] (1994); and Douglas Sanders, "Developing a Modern International Law on the Rights of Indigenous Peoples", research study prepared for RCAP (1994). For information about research studies prepared for RCAP, see *A Note About Sources* at the beginning of this volume.

**7** What is now section 35 of the *Constitution Act, 1982* was deleted.

**8** House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada, Report of the Special Committee* (Ottawa: Queen's Printer, 1983).

**9** Louis Bruyere, "Aboriginal Peoples and the *Meech Lake Accord*", in *Canadian Human Rights Yearbook, 1988* (Ottawa: University of Ottawa Press, 1989), p. 51.

**10** Clause 13 of the accord provided for annual first ministers conferences, beginning in 1988, on subjects such as Senate reform and fisheries.

**11** See Boyce Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country* (Toronto: The Assembly of First Nations and Summerhill Press, 1989).

**12** Prime Minister Brian Mulroney, letter to Phil Fontaine, 18 June 1990, pp.



6-7.

**13** Much of this description of the background to the Oka crisis comes from “Materials Relating to the History of the Land Dispute at Kanesatake”, prepared for the Claims and Historical Research Centre, Comprehensive Claims Branch, Indian and Northern Affairs Canada (January 1991, revised November 1993); from *The Summer of 1990*, Fifth Report of the Standing Committee [of the House of Commons] on Aboriginal Affairs (May 1991); and from Geoffrey York and Loreen Pindera, *People of the Pines: The Warriors and the Legacy of Oka* (Toronto: Little, Brown & Company (Canada) Limited, 1991).

**14** “Materials Relating to the History of the Land Dispute at Kanesatake” (cited in note 13), p. 8.

**15** “Materials Relating to the History of the Land Dispute at Kanesatake”, p. 10.

**16** The commission’s report led to the adoption of Bill 150, An Act respecting the process for determining the political and constitutional future of Québec, Statutes of Quebec 1991, chapter 34, as amended by An Act to amend the Act respecting the process for determining the political and constitutional future of Québec, Statutes of Quebec 1992, chapter 47, which enabled the government of Quebec to hold a referendum on the Charlottetown Accord.

**17** Citizens’ Forum on Canada’s Future, *Report to the People and Government of Canada* (Ottawa: Supply and Services, 1991), pp. 120, 127.

**18** The general amending formula requires that constitutional amendments receive support from Parliament and the legislatures of seven provinces representing at least 50 per cent of the population. This level of support was not achieved in 1987.

**19** This is required by section 49, which specifies that a meeting will be convened within 15 years of the amendment procedures coming into force (which was in April 1982, when the constitution was patriated). See Volume 5, Chapter 5.

**20** Positivism is concerned not so much with the content or substance of a particular rule of behaviour as with its form — for example, that a given rule is a law, as opposed to a mere moral or ethical precept. The classical exposition of the positivist approach is that of John Austin, who described laws as having three characteristics that distinguish them from other rules. Thus, a law is (1) a command; (2) issued by a political sovereign; and (3) enforceable by the state. Under this approach, a court in Canada would simply examine a legislative enactment to ensure that it had been validly passed by Parliament or a legislature within the limits of its law-making authority as set out in the *Constitution Act, 1867*. The ‘fairness’ or ‘justness’ of the enactment would not enter into the judicial calculation. See J.P. Fitzgerald, ed., *Salmond on Jurisprudence*, twelfth edition (London: Sweet & Maxwell Limited, 1966), chapter 1, “The Nature of Law”, for a discussion of the various philosophies of law, including positivism.

**21** Several examples of tactics like this on the part of Indian affairs officials are given by E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986), p. 102.

**22** See Titley, *A Narrow Vision*, pp. 104-109, for a description of tactics used by Indian affairs officials to hinder and discredit Loft and his movement.

**23** *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 at 37, per MacDonald J. (B.C.S.C.).

**24** As explained in our earlier constitutional commentary, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Supply and Services, 1993).

**25** More precisely, appeals were abolished in 1933 for criminal cases and in 1949 for civil cases. Cases in process in 1949 were concluded in 1952.

**26** Manuel and Posluns, *The Fourth World* (cited in note 5), pp. 6-7.

**27** *St. Catherine’s Milling and Lumber Company v. The Queen* (1888), 14 Appeal Cases 46 (JCPC).

**28** After 1867, it will be recalled, the executive power of the British Crown, one and indivisible in the United Kingdom because it is a unitary state, was exercised by the governor general of Canada and the lieutenant governors of the provinces. Thus the Crown was, in effect, 'split' between the dominion and provincial governments to accommodate Canada's federal structure. See *The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick*, [1892] Appeal Cases 437 (JCPC), where it was held that the provincial lieutenant governor, as the representative of the sovereign, possessed all the privileges, powers and immunities and of the Crown as a function of the division of legislative powers between Canada and the provinces in the *Constitution Act, 1867*.

**29** This was because of the effect of section 109 of the *Constitution Act, 1867* which, at Confederation, had vested in the province underlying title to Crown lands within the new provincial boundaries. The dominion argument was based on the exceptions to this grant contained in section 109 and on the power accorded to the new dominion in section 91(24) over "Indians, and Lands reserved for the Indians".

**30** 21 U.S. (8 Wheaton) 543 at 574 (1823).

**31** *Worcester v. Georgia* at 544.

**32** *R. v. Sparrow*, [1990] 1 S.C.R 1075 at 1103-1104.

**33** [1965] S.C.R. vi; (1966) 52 D.L.R. (2d) 481 (S.C.C.).

**34** (1965), 52 W.W.R. 193. Davey, Sullivan and Norris JJA concurred in finding that the *Indian Act* provision favouring treaties over provincial laws was determinative of the issue, with Sheppard and Lord JJA dissenting. The Supreme Court of Canada affirmed the majority decision of the court of appeal.

**35** *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313.

**36** Extinguishment is the legal term used to refer to the Crown action of putting an end to Aboriginal title or to Aboriginal rights. This is usually accomplished by treaty cessions by Aboriginal people or by legislation to

this effect. Much of the dispute in modern Canadian history is over the precise effect of legislation on Aboriginal rights and title, and how one gages whether the legislation has expressed a “clear and plain” intent to extinguish. For a discussion of Canadian extinguishment policy, see Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Supply and Services, 1995).

**37** *Calder* (cited in note 35), p. 328.

**38** The injunction case is reported as *Gros-Louis et al. v. La Société de Développement de la Baie James et al.*, [1974] *Rapports de Pratique de Québec* 38; the appeal is reported as *James Bay Development Corporation v. Kanatewat* (1973), 8 *Canadian Native Law Cases* 414.

**39** *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1979] 1 F.C. 487 at 557-558.

**40** *Guerin v. The Queen*, [1984] 2 S.C.R. 335. The Court was divided on the precise nature of the obligation (fiduciary, trust or agency) and exactly when it arose in the context of the *Indian Act* land surrender transaction under consideration (before or upon actual surrender by the band). The judgement by Chief Justice Dickson (as he was by the time the judgement was rendered), on behalf of four justices, is generally accepted as the definitive statement:

... where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. (p. 384)

**41** [1985] 2 S.C.R. 387.

**42** This term refers to early treaties between European nations and Indian tribes and bands that do not involve land cessions. There has always been some question in Canadian law about the precise legal effect of these documents, since they were entered into before Confederation and by their terms do not deal with land.

**43** *R. v. Syliboy* (1929), D.L.R. 307 (N.S. County Court).

**44** This principle is based on similar principles of American Indian law and was first articulated by the Supreme Court in 1983 in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, in the context of an interpretation of section 87, the tax exemption provision in the *Indian Act*.

**45** *Simon* (cited in note 41), p. 404.

**46** *Simon*, p. 399 per Dickson C.J.

**47** *Simon*, pp. 407-408.

**48** [1990] 1 S.C.R. 1025.

**49** *Sioui*, p. 1053.

**50** *Sioui*, p. 1056.

**51** *Sioui*, p. 1071.

**52** A framework agreement for the establishment of a new relationship between the Huron-Wendat Nation, the government of Canada and the government of Quebec was signed on 10 August 1995. The parties agreed to undertake simultaneous negotiations concerning the application of the Murray Treaty of 1760 and the establishment of self-government for the Huron-Wendat.

**53** *Sparrow* (cited in note 32).

**54** *Sparrow*, p. 1108.

**55** *Sparrow*, pp. 1113-1119. Section 35 rights are not absolute but can be limited under certain circumstances if the government action can be justified by means of a three-part test:

1. Is there a valid federal legislative objective such as conservation, the prevention of harm or some other “compelling and substantial” objective?

2. Is the honour of the Crown maintained so as to respect the fiduciary relationship and give the proper priority to the Aboriginal or treaty right?

3. Are there other issues to be considered in maintaining the honour of the Crown, such as minimizing the infringement of the right, adequately compensating Aboriginal people in the case of expropriation, and fully consulting them before infringing the right?

Like the categories of fiduciary to which the Court referred in *Guerin* (cited in note 40), the court said that the factors listed in point 3 were open to expansion as circumstances might warrant in the context of the overall relationship between Aboriginal peoples and Canadian society.

**56** *Sparrow*, p. 1114.

**57** *Delgamuukw v. British Columbia*, [1991] 3 W.W.R. 97 (B.C.S.C.). Chief Justice McEachern made many references to the social and political conditions of the Gitksan and Wet'suwet'en, stating that "aboriginal life in the territory was at best, nasty, brutish and short" (p. 126), that the plaintiffs' ancestors were "by historical standards, a primitive people" (p. 141), were "hardly amenable to obedience to anything but the most rudimentary form of custom" (p. 202), had only "a rudimentary form of social organization" (p. 202), and had no institutions by which to govern their territory: "I find they more likely acted as they did because of survival instincts" (p. 373).

**58** *Delgamuukw*, p. 383.

**59** [1993] 5 W.W.R. 97. The three judges were Macfarlane, Taggart and Wallace.

**60** Judges Lambert and Hutcheon.

**61** Solomon Sanderson, "Foreword", in Delia Opekokew, *The First Nations: Indian Government in the Community of Man* (Regina: Federation of Saskatchewan Indian Nations, 1982), p. ix.

**62** *Lovelace v. Canada*, [1981] 2 Human Rights Law Journal 158; 68 I.L.R.

17. The decision was made by the Human Rights Committee (established pursuant to the International Covenant on Civil and Political Rights). The committee held that Lovelace's automatic loss of Indian status upon marrying a non-Indian deprived her of the cultural benefits of living in an Indian community. The rationale for the *Indian Act* provision denying her the right to live in the Indian community was found not to be reasonable or necessary to preserve the identity of the tribe.

**63** See our discussion of Bill C-31 in Chapter 9. As noted there and in Volume 4, Chapter 2, it is our view that Bill C-31 has not corrected the problem of sex discrimination against Sandra Lovelace and other First Nations women, but has merely postponed the effects for another generation. In addition, under the present system, Bill C-31 also poses a threat to the overall population of status Indians, because of the way the new distinctions between sections 6(1) and 6(2) of the *Indian Act* work in practice. See also Chapter 2, notes 13 and 14 and accompanying text.

**64** In its 1993-94 annual report, the Inuit Tapirisat of Canada gave a figure of 115,000, while the Inuit Circumpolar Conference puts the number at 120,000. An adjustment to the number of Inuit living in Canada, based on the adjusted figures from the 1991 Aboriginal Peoples Survey, increases the ICC estimate by 8,000.

**65** "Preamble", Inuit Circumpolar Conference Charter, revised and amended July 1986, Kotzebue, Alaska, p. 2.

**66** This is 16.51 per cent of the land in the Nunavut Settlement Area and 18.3 per cent of the land in that portion of the Settlement Area open to selection. Tunngavik Inc. reports marginally higher percentages. See Terry Fenge, "Inuit land ownership: A note on the Nunavut agreement", *Etudes/Inuit/Studies* 17/1 (1993), pp. 147-150. The dollar amount is the value at the first quarter of 1989. For details see the "Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada" (Ottawa: 1993), article 32, "Capital Transfers", p. 319.

**67** See Royal Commission on Aboriginal Peoples, "Ethical Guidelines for Research", (1992), reproduced in an appendix to Volume 5.

**68** In working papers prepared for the Commission a concept and workplan

for a general history of Aboriginal peoples were developed. See Ted Chamberlin and Hugh Brody, "Aboriginal History, Report to the Royal Commission on Aboriginal Peoples", research study prepared for RCAP (1993); and Ted Chamberlin, "Aboriginal History Update" (August 1993).

The project as conceived would include a series of volumes documenting the histories of diverse Aboriginal nations, an historical atlas, and a volume on historical methods appropriate to the presentation of Aboriginal history. It would draw on insights gained in the production of the General History of Africa, sponsored by UNESCO, and from the Australian Aboriginal Arts Board, which has influenced representations of Aboriginal people in the arts and sciences and humanities in Australia.

The preparation of histories of particular nations would be the responsibility of local groups, while the series itself would be guided by a small board responsible for maintaining momentum and coherence in the overall project. The board could be convened initially through the Social Sciences and Humanities Research Council but might later be included in the mandate of an Aboriginal institution such as the Aboriginal Peoples' International University or the Aboriginal Arts Council proposed in Volume 3.

For additional background on approaches to Aboriginal history, see Lorraine Brooke, "An Inventory of Mapping Projects in Connection with Aboriginal Land and Resource Use in Canada", and Julie Cruikshank, "Claiming Legitimacy: Oral Tradition and Oral History", papers prepared for the RCAP history workshop (February 1993).