The Rights of Indigenous Populations in National and International Law - A Canadian Perspective

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Abstract

Canada is considering measures to accord a greater degree of autonomy to its indigenous minorities. The first part of this thesis explores the rights of indigenous populations under Canadian law, with particular emphasis on native claims for autonomy. It concludes that an adequate theoretical framework is lacking in domestic law to address all native claims.

International law to protect minorities is also examined. The examination reveals a growing body of international norms relevant to the protection of minority rights. Against this background it isargued that minorities, including indigenous peoples, should be granted means for independent development where they desire it.

A new concept of minority autonomy entitled "internal self-determination" is proposed. A canvass of international law shows that the concept is not in conflict with the established doctrine of self-determination. Domestic practice in the Soviet Union, the United States, Canada, and Greenland is examined to demonstrate current forms of autonomy. The thesis concludes that "internal self-determination" provides a useful model for native claims within Canada.

Résumé

Le gouvernement du Canada considère présentement la création de normes visant à concéder plus l'autonomie à ses minorités autochtones. La premiere partie de cette thèse est une étude comparative des droits acquis des peuples autochtones en vertu du droit canadien et des revendications de ces mêmes groups à l'autonomie. Elle démontre l'absence d'un encadrement théoretique adéquat de la question.

Cet ouvrage analyse également le droit international en ce qui concerne la protection des minorités. Cette analyse révèle qu'il existe à ce niveau un ensemble de plus en plus important de normes relatives à la protection des droits des minorités. Tenant compte de cette observation, notre argument favorise l'octroi des moyens facilitant un développement autonome aux minorités qui en expriment le désir, y compris les peuples indigènes.

Un nouveau concept d'autonomie des minorités est proposé: "l'auto-détermination interne". Il est démontré qu'en regard du droit international, ce concept ne s'inscrit pas à l'encontre du principe établi d'auto-détermination. La pratique interne de l'Union Soviétique, des Etats-Unis, du Canada, et du Groenland illustrent des forms existantes d'autonomie. En conclusion, cette thèse propose que "l'auto-détermination interne" offre un scheme de référence pratique aux revendications des autochtones canadiens.

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Introduction

The rights of indigenous populations in both domestic and international law are sometimes uncertain. In addition, as with many other rights, the protections which exist may lack adequate mechanisms for implementation. Like other minorities, indigenous groups can face hostility from their national governments and neglect by the international community. However, in recent years increased attention has been given to the concerns of minority populations in both domestic and international law. Indigenous populations have also benefited from this interest in the problems faced by all minorities.

In most cases indigenous populations must rely on domestic law to protect their rights. This requires them to deal with the peculiarities of their legal status in each state created by history. The constitutional system of many countries is inadequate to meet the claims to rights made by these populations. This is particularly true for claims to preserve and develop characteristics which make a minority distinct from the majority. Increasingly indigenous peoples seek the acknowledgement of their separate existence, and their right to preserve it. They demand political arrangements which will accomodate their aspirations within the parameters of independent states.

This process is particularly advanced in the Canadian context. The decisions made today by Canada will be studied and perhaps emulated in other states with indigenous populations. It does not, however, appear that Canada has adopted a cohesive theoretical framework to analyse the process as it occurs. Instead, Canada's political and legal structures are being adapted, as the need arises, in an attempt to meet the claims of the native peoples. However, native organizations are becoming

increasingly aware of the consequences of the present process. More frequently they present claims based on a unique status within the Canadian federation.

This thesis explores the means, legal and political, that may lead indigenous peoples to a degree of autonomy within an independent state. Canada's natives are presented as a paradigm of the problems facing so many other minorities around the world. The thesis is divided into three major sections. The first briefly considers the status of Canada's native peoples in domestic law, including recent political processes, and concentrates on issues relating to autonomy. It is intended as an introduction to the domestic issues viewed as important to Canadian natives, rather than an exhaustive discussion. As an introduction, it presents the demands of natives for greater autonomy within a political and historical context, although the solutions will ultimately require a legal framework. Its purpose is to show that governments of Canada, and as a result Canadian domestic law, have not fully satisfied the claims and concerns of these populations. The discussion will concentrate on the Federal government, as opposed to the laws and policies of the provinces, although reference will be made to them where appropriate.

The second section covers the position of indigenous populations in international law, both as individuals and as collectivities. Its purpose is to describe the protections and standards for treatment of indigenous minorities which exist, or are in the process of evolving, in international law.

The final section draws on the existing international law to propose a new concept entitled "internal self-determination". It is submitted that this concept provides a useful mechanism to resolve minority-majority conflicts within states. While it is not as yet a legal

obligation on states, it accords with existing standards and does not conflict with current principles of international law.

In this thesis the terms "indigenous" and "aboriginal" are used in the same sense to refer to populations who occupied territories prior to their discovery and appropriation by Europeans. They represent the descendants of the original inhabitants in colonial territories which achieved independence under a majority descended from the colonists. In Canada these groups are called "natives" and that term is used in the thesis for the Canadian situation. In Canada three groups are identified as "aboriginal peoples" by the Constitution Act, 1982 - Indian, Inuit, and Metis.(1) Where appropriate, each of these groups is discussed separately. In addition, Canada has developed the concept of "status" Indians which involves a bureaucratic definition of individuals to whom the Indian Act, and certain programs of the Federal government, apply. However, in most cases the general meaning of the word "status" will be used unless noted otherwise.

I. INDIGENOUS POPULATIONS AND THEIR STATUS IN DOMESTIC LAW

The response of Canada to the claims of its indigenous populations has evolved considerably in the past two decades. There is a new willingness to consider and address the concerns of these groups. The ensuing discussion of domestic law in Canada considers the claims of native peoples to a status as unique and cohesive units within Canada.

Canada's indigenous groups argue for an inherent right to be different from the majority of Canadians. Based on their characteristics and particular histories, native claims are presented in order to preserve and ensure the future development of those distinct characteristics. For the most part these claims are not framed in terms of territorial separation from Canada, but seek to create new structures to ensure the preservation of their uniqueness while remaining within the Canadian state.

In recent years indigenous demands for increased autonomy within the Canadian federation have become more vocal and detailed.(2) The primary focus of indigenous efforts during the 1960's and 1970's was to ensure that the government fulfilled obligations created by treaties with the natives and to press for land settlements in areas with outstanding aboriginal title. More recently the emphasis has shifted towards achieving greater native autonomy within the Canadian state, through the articulation of native claims to "self-determination", including an aboriginal right to self-government.(3) This new focus involves claims for the recognition of inherent powers of self-government through indigenous political institutions, the power to determine membership in a native political unit, and the protection by the Canadian Constitution of such structures and powers.(4) Claims that indigenous political units be

provided with reliable economic bases are linked to, and in some ways are an evolution from, the earlier land claims.

The Canadian government's response to these more recent claims to autonomy appears to lack a comprehensive framework of analysis. Within the land claims process some degree of self-government or native autonomy has been allowed but it suffers from the compromises necessary in negotiated settlements. The Federal government has publicly committed itself to the creation of structures to allow greater autonomy for certain indigenous groups.(5) At the same time, provisions in the Constitution to protect aboriginal rights are being relied on by native organizations to argue for inherent rights of native self-government.(6)

Against this background, the domestic law of Canada is examined. This inquiry intends to demonstrate that Canadian law, and where applicable the political system, have not satisfied aboriginal claims to autonomy. The logical first step is an inquiry into the criteria which determine the membership in indigenous groups. Within both the settlement of native land claims and the new structures proposed for native autonomy the question of membership is vital. The first section explores the concerns of both natives and Canada in this area. The provision of an adequate economic base, primarily land, has been a priority for the indigenous groups of Canada for many years. This concern continues and is even more acute today, considering the often dire economic conditions of native communities. A second section briefly considers this complex topic in Canadian law. In addition, the question of self-government and a sufficient financial basis for its sustenance are closely linked. In conclusion, the question of government control versus indigenous self-control or autonomy are discussed in greater detail in the final section.

1. MEMBERSHIP IN INDIGENOUS GROUPS AND CHARACTERIZATION OF STATUS

The interface between groups in a multinational society is complex. One important factor in their interaction is the division of individuals between groups through the use of various criteria. However, only in highly artificial arrangements, such as apartheid, can there be sharp and clear differentiation between groups and even South Africa has found the effort difficult.

The situation of indigenous peoples is a special case because of their unique historical and legal status. While indigenous political units were submerged into settler societies, it can be argued that important aspects of their uniqueness survived. It is submitted that one aspect retained was the ability to define their human boundaries.

a. Interaction Between Dominant and Indigenous Societies

Methods of interaction between a dominant and indigenous societies are not unique and also appear in relation to other minorities. The policies used by a dominant society in relation to the indigenous groups are a function of the interaction involved. The policies adopted towards the native peoples reflect a society's intended interaction with them. The alternative types of interaction include segregation, assimilation, integration, fusion, and various modes of self-management.

Segregation assumes that two societies are sufficiently different that they should be kept separate and unmixed. Controls may come from either governmental institutions and laws in the form of formal sanctions intended to limit contacts or by the actions of the community through

informal sanctions. It is created by a range of means which involve separation and zonification, without automatically implying complete physical segregation.(7)

In some circumstances the segregation of an indigenous population may be for its own protection. The creation of "indigenous parks" in Brazil's Amazon Basin is a recent example.(8) Canada has also had a long tradition of "reserves" for some of the indigenous peoples, which have consisted of lands retained by the natives or else set aside for their exclusive use and occupation by the colonial or Canadian governments.(9) However, poor prospects for the modern economic development of many reserves, and their physicial isolation from job opportunities, has contributed to native poverty.(10)

Assimilation assumes the superiority of one culture with the goal of homogeneity within society. It encourages indigenous groups to discard their culture in favour of the dominant one, either through coercive means or enticements. In most situations indigenous persons are absorbed into the dominant culture only by the sacrifice of all indigenous elements which hinder the process of assimilation. It is assumed that the majority group will be willing to accept members of the indigenous group, "but this is contingent as a conditio sine qua non -upon their accepting its culture"(11)

Assimilation in Canada has occurred since the earliest contacts between natives and Europeans, and at times government policies were designed to discourage native languages, culture, and religion.(12) The goal of Canadian government policies cannot in general be described as coercive assimilation, although they did not attempt to prevent the process. Prior to 1950 the government relationship with the Indians was "custodial and protective, operating within legislation that contained a

represive attitude towards Indian cultures".(13) Some writers of the 19th century were hostile to the native's retention of indigenous cultural elements, and saw them as the cause of his poverty and lack of economic development - the so-called "Indian problem".(14)

The Canadian government did, however, openly advocate policies tantamount to assimilation in its 1969 position paper popularly known as the White Paper on Indian Policy.(15) It proposed to abolish the special relationship which had grown between Indians and the Federal government. The Indian Act and the Federal Indian Affairs bureaucracy were to be abolished, and the Federal government would assign its jurisdiction over Indians to the provinces. Reserves were to be replaced with conventional municipal governments, and fee simple land holdings, under provincial jurisdiction. Treaties with the natives were regarded as historical anachronisms inappropriate to modern Canadian society. Native reaction was swift to oppose the proposal, which was subsequently withdrawn by the government, and some authors regard it as an event which "galavanized Indian political activism on a national scale".(16) The problem of assimilation can not, however, be solely attributed to the policies of the Canadian governments. It was also contributed to by the difficulties for aboriginal peoples to preserve their cultures in the face of the numerically stronger, and well developed, Euro-Canadian society.

Integration combines elements from several cultures while allowing each to retain their basic identity. Understandably two or more cultures cannot be merged with all of their elements complete, and the process demands the abandonment of elements which disturb the new society. It is a two-way process in contrast to assimilation and implies that indigenous traditions and institutions may be retained while remaining open to new ideas. It seeks to "eliminate all purely ethnic lines of cleavage" and

"guarantee the same rights, opportunities, and responsiblities to all citizens, whatever their group membership."(17)

Fusion allows cultures to combine into a new and unique entity which differs from its parent cultures but includes elements of all of them. At the same time, new cultural patterns may develop through the hybridization of the society which draws on both roots. In opposition to a process such as assimilation, fusion assumes the willingness of the cultures involved to abandon certain elements of their own in return for some of the other.(18) Several American countries, notably Mexico, have successfully fused the indigenous and settler cultures.(19) In Canada, the Western Metis people retain both Indian and European cultural traits and claim to constitute a new people. This position is accepted by the Canadian government which included the Metis as a separate indigenous group in the Constitution Act,1982.(20)

Self-management is a process designed from the perspective of the indigenous group. It requires the acceptance by the dominant society of the solutions adopted by the natives. As opposed to integration, it does not seek to eliminate all purely ethnic lines of cleavage but allows the indigenous groups to chose elements of separation which serve their self-identified interests. It involves the "consolidation of communal power in order to guarantee justice and the survival of tribal institutions" to ensure the cohesion of the collectivity.(21) This would include issues of self-government like the power to determine membership. It also involves the recognition and preservation of ownership under communal title of the land and economic base of an indigenous group. The goal of many native groups in Canada is such a new arrangement with the dominant society based on voluntary integration. They want the benefits of the 20th century but wish to retain native traditions to ensure the

survival of their collective identity.

b. Methods to Characterize Indigenous Membership

When a dominant society and indigenous group interact through any of the modes described above, with the exception of fusion, the demarcation line between the groups is important. Such a line is not drawn in the abstract, but is intended to provide a reasonably accurate means to characterize an individual. Even assimilation requires this process since it will only take place over time and the non-assimilated members of the indigenous group must be identified in the transition period.

The methods used to characterize membership are essentially neutral whereas assumptions which lie behind the actual criteria adopted are vital to understand the process. In Canada the dominant society initiates programs for native peoples, although often in consultation with them in recent years, obliging the government to characterize "indigenousness". Many different methods have been used to define "Indian" based on race, residence, descent, family ties, culture, and the concept of "status".(22) When these do not coincide with the definitions adopted by native societies, problems can arise. As a result of past difficulties a major point for native organizations is the need to define their communities with minimal outside interference.(23)

Criteria of characterization are in themselves largely neutral but their unilateral application by the dominant society constitutes an objective definition of indigenousness. It should be noted that the terms "objective" and "subjective" in this discussion refer to the relationship to the indigenous group. Thus the indigenous group may be

either the self-defining subject (subjective) or the defined object by the dominant society (dominant).

The problem of an objective characterization is that it denies the indigenous community an important aspect of self-management. A purely subjective definition also produces problems where there are a number of indigenous groups within a State and the interface between groups may become important. For example, in North America where the forces of assimilation have eroded to some degree tribalism, there exist individuals no longer identified as belonging to a particular tribe or nation.(24) In Canada an administrative process exists to provide status to such individuals.(25) The situation arises when both subjective and objective systems are in operation and access to benefits is tied to acceptance to some indigenous group. The problem is not unsolvable and systems can be designed to provide protection to individuals excluded by indigenous communities.(26)

Turning to the methods of characterization, a racial criterion defines an individual as indigenous if he posseses a certain degree of "native blood".(27) It assumes a correlation between the objective amount of blood and the subjective degree of "nativeness" or distance from the dominant norm. In this sense a racial definition is essentially racist in attributing a particular set of cultural attributes to a racial group. However, indigenous groups regard a racial definition as one method to characterize membership.(28) While native groups do not speak in terms of "race" when refering to membership, the fact is inescapable that aboriginal "nations" are and would be made up of individuals with Indian or Inuit racial ancestry. The Federal government views such definitions with hostility when applied to limit a person's access to political power in a defined territory, like the Northwest Territories.(29)

A definition based on residency defines the inhabitants of a particular territory as indigenous.(30) To compensate for population movements, a definition based on residency may restrict status to persons living in an area at a specific point in time, such as the date a treaty was signed. Persons inhabiting the area at that time would be considered as beneficiaries of the treaty. A similar arrangement exists for some modern land claim settlements, although often a date other than when the agreement was signed is used.(31) This creates a base population at a particular point in time, and thereafter its numbers are increased by other methods of characterization such as descent.(32) The issue of residency has become particularly important to the native peoples of northern Canada who are now in the process of negotiating comprehensive land settlements.(33) Some of them are concerned that non-ethnic government in these territories will lead to a diminished political role for them if large-scale resource development should begin. Some levels of government have shown limited interest in residency requirements for political participation as an alternative to governments on racial grounds.(34)

Descent relies on the existence of a base population of indigenous persons from which an individual can trace descent. Both the original identification and the descent mechanism can be determined by a number of methods.(35) For example, descent can be limited to legitimate children as defined by either the dominant society or the indigenous nation on the basis of matrilineal or partrilineal descent. Characterizing an individual by means of race or descent will, of course, produce similar results. Differences in the methods lie in how limits will be placed on potential membership.

The method based on family bonds relies either on the indigenous or

dominant definition of a "family". It requires a base population of indigenous persons, and then traces their surrounding familial bonds to classify related individuals as part of the group. Children can be classified as indigenous either by their descent from or familial bond with an indigenous person. However, spouses are the primary group to qualify under this criteria for membership. In terms of extended families the classification could be extended beyond the immediate spouse and include related members of his or her family.

In methods based on descent or family ties the definition of "family" is of great importance. It determines, for example, whether non-indigenous spouses will be characterized as indigenous. It reflects a cultural definition since it assumes that a spouse will be incorporated into a indigenous community. Therefore, the terms "spouse" and "family" involve legal categories but they also rely on cultural characteristics.

The method based on cultural indicia relies on the actions and attitudes of an individual to determine membership. It assumes that objective and identifiable characteristics of a group differentiate its members from the dominant society. Examples of such indicia are language and culture, but forms of economic exploitation such as hunting, fishing, and agricultural methods may also be taken into account.(36) Reliance on cultural traits assumes the fixation of certain "indigenous" traits and may not provide for the incorporation of beneficial elements of the dominant society's culture or technology. The same criteria can also be used to deny membership in an indigenous community either through acts of the community itself or the dominant society. For example, in Canada certain activities such as political enfranchisement or individual ownership of land were used to deny Indians status.(37)

An individual's self-identification as an indigenous person relies

upon his own perception of identity. If applied in isolation from other methods it can produce uncertain group parameters. However, used with other methods it can be useful to determine indigenous communities with minimal external interference. An important role in determining status is played by the concept of group acceptance by an extant indigenous group. The group, either by its own initiative or with the agreement of the dominant society, may decide on the criteria to be used. The method has been incorporated into several recent land settlements.(38) In addition, the House of Commons' Special Committee on Indian Self-Government (hereinafter the Penner Report) has urged the adoption of such a system for all Indians.(39)

Several of the methods described above rely on an individual's relationship with some identifiable base population. As a result of the individual's connection, he is accorded indigenous "status" by the dominant society. The administration of such a system relies on a finite population identified at some point in time as a base group. It can be often arbitrary and serves administrative convenience. Either the dominant society or the indigenous community can rely on it, although historically it has most often been employed unilateraly by the dominant government.(40) Its most common application involves benefits arising from indigenous status such as allotments of land and money, or other treaty benefits. In such cases both dominant and indigenous participants may wish to limit membership by means of enrollment or status requirements. The method requires the establishment of a list or roll of eligible persons. Later the list may be enlarged by other criteria. In many cases there will be an appeal process provided in the administrative framework.(41) Both the initial enrollment and appeal structures may rely on indigenous criteria, government prescribed criteria, or some

compromise between the two.

One problem with this method is that over time an increasing number of individuals, who identify themselves as indigenous, may be denied "status" because of administrative criteria. This has been a major concern in Canada with the large number of women and children denied "status" as a result of marriages to men without Indian status, although planned changes to the Indian Act, discussed further below, will move to correct the problem.

c. Historical Characterization of Status in Canada

There are three indigenous groups in Canada- Indians, Inuit, and Metis. The Inuit are restricted to the Arctic regions and only in the past forty years have been exposed to large-scale contact with the dominant society. The vast majority of Indians are found south of the Arctic tree line. The Metis are descendents of persons of mixed Indian and European ancestry and are recognized as a distinct people by the Canadian Constitution.(42) Persons of mixed Indian-European blood are found throughout Canada but the Metis as a distinctive people are concentrated in the Western and Northern regions of the country. The following discussion traces the development in Canada of the criteria for characterizing an individual as indigenous. Recent developments such as the role of land settlement agreements and the constitutional discussions will then be discussed in the next section.

(i) Indians

Under both the French and British colonial administrations, there existed laws, proclamations, and agreements which dealt specifically with the native peoples.(43) However, the earliest legislation in what is now Canada to deal with Indians as individuals were pre-Confederation colonial statutes. These colonies later became the first Canadian provinces. The pattern in these colonies, reflective of British policies dating back to the 1763 Royal Proclamation, was for lands to be reserved for the use of the Indians, and the "issue of lands held in trust and the management of equity in its benefits" to be dealt with by a provincial administrative bureaucracy.(44) The system provided a framework for the orderly disposal of Indian lands and the management of the reserves. Even in the earliest legislation one sees the shift of interaction between the Indians and the settlers from one based on two collectivities to one on an individual-government basis. As the process occurred it was necessary to determine who was an Indian.

The early statutes managed Indian lands and distributed benefits on an individual basis. In 1842 Nova Scotia appointed a Commissioner of Indian Affairs to supervise and manage reserves, determine their boundaries, and protect the lands from encroachment.(45) By 1859 the issue of Indian education was added to the matters covered by statute.(46) Many of the early statutes did not define "Indian" and the practice was to make no distinction between pure or mixed-blood individuals. Persons were considered as "Indian" if they could demonstrate any degree of Indian ancestry, or had been raised by the Indians according to their lifestyle, or had adopted that lifestyle as an adult.(46')

In Québec (Lower Canada) an 1850 statute defined Indians on the basis of blood and familial bonds, with an element of group acceptance. Individuals of pure Indian or mixed race, along with spouses of either sex, were deemed to be "Indian" if they could prove residency.(47) Residency might be assumed to represent group acceptance of an individual into a Body or Tribe. The equivalent legislation for Ontario (Upper Canada) excluded mixed-blood and adopted persons from its definition of "Indian".(48)

The Québec Act was amended in 1851 and in that form was the basis for the future Federal legislation on Indians. The amendment limited the definition of "Indian" and removed status from non-Indian men who married Indian women, dropped reference to adopted children, and deleted the obligation of women married to Indians to reside on the Tribe's lands to retain status.(49) Mixed-blood persons who left Indian lands were deemed to have abandoned the native society and were not considered as Indians.

The first Federal legislation defined "Indian" in nearly identical terms to the 1851 Québec statute.(50) In 1869, one year after the first Act was passsed, the definition was changed to remove status from both Indian women who married non-Indian men and their descendants.(51) This greatly reduced the numbers of mixed-bloods recognized as Indian under the previous Act.(52) The same Act dealt with enfranchisement and removed the effect of most of the legislation from any Indian man and his family (spouse and children) who became enfranchised. For example, lands allotted to an enfranchised Indian were in the form of a life estate but upon his death they passed as a fee simple to the children.

The Federal legislation was again altered in 1876, with the first comprehensive Indian Act.(53) An Indian was defined as

"First - Any male person of Indian blood reputed to belong to a particular band
Secondly - Any child of such person
Thirdly - Any woman who is or was lawfully married to such a person".(54)

Illegitimate children were excluded unless they had shared in benefits with the consent of the band for more than two years in the distribution of benefits intended for band members. New groups of persons were disallowed status as Indians: persons who travelled abroad for more than five years, treaty Indian women who married non-treaty Indians, and Metis who participated in land allottments. At the same time the right to reside on reserve lands was tied to acceptance as an "Indian" under the terms of the Act. This meant that exclusion from the narrow parameters of the Act's definition meant physical isolation from the indigenous community.

The next major change in membership criteria took place with the 1951 revision of the Indian Act.(55) It removed many of the bureaucractic accretions which had accumulated over the years as the degree of government involvement in Indian life had increased. An Indian Register was created of persons with the legal status of "Indian" for purposes of Federal departments. Persons who belonged to a band recognized by the government were placed on a Band List, and individuals without a band were recorded on a General List. Bands were given the right to protest the deletion or addition of a specific individual on either the Band or General Lists.

The idea of a "base population" which possessed status has existed since the earliest Federal Acts. The 1951 Act was intended to only replace the various lists of Indian persons scattered among several departments of the Federal government with a single comprehensive one. In reality the base population shifted away from the historical

definition of "Indian" to a population purely delineated by a bureaucratic formula. The historical definition had relied on a "base" of the pre-existing indigenous community. While the 1951 definition provided for Band input, the primary responsibility for determining status lay with the government. In practice, the enrollment procedures produced inequity and confusion as persons were omitted from the new rolls.(56) The enrollment procedure remains the criteria for identification as a "status" Indian in Canada to the present day.

Since the 19th century the thrust of legislation appears to have been to limit the number of "status" Indians, and consequently removing their right to reside on Indian "reserves". The reserves came to be seen as islands of "Indianness", and it could be argued that individuals were excluded to encourage their incorporation into the surrounding society. Today there are many persons without official "status", but who identify themselves as Indians.(57) Recently, the government of Canada has made considerable efforts to design a more equitable system which incorporates the views of native peoples themselves. These policies are considered further in this discussion, but for the moment the legal framework for indigenous membership in Canada remains as described above.

(ii) Mixed Bloods and Metis

Canada's attitude towards persons of mixed Indian and European blood has traditionally appeared to be to assimilate them into the dominant society whenever possible.(58) By the second half of the 19th century, legislation in Québec only considered mixed-blood persons as Indians if they resided with the Indians, or implicitly self-identified with the

Indians and were accepted by the native group.(59) As the 19th century progressed the numbers of mixed-blood persons who qualified as "Indian" under provincial statutes, or Federal legislation after 1867, was sharply curtailed.(60) For the most part these persons were "excised" from the Indian groups, and it would seem, expected to assimilate into the dominant society.(61)

There were instances of specialized arrangements for mixed- blood persons in some regions, such as the Prairies.(62) In the plains regions the Metis came to identify themselves as a separate and distinct people and played a decisive political role in the formation of the province of Manitoba.(63) At the end of the 19th century Canadian government policies suggested that the Metis were considered to possess Indian rights enabling them to claim interests in the territory of the Rupert's Land purchase.(64) The solution was the "land scrip" system by which some Metis were granted "scrip" for land in return for their abandonment of Indian title claims. Individuals who accepted the "scrip" were removed from the definition of "Indian" in the Indian Act.(65)

Other mixed-blood persons retained an indigenous pattern of life and when the government introduced land cession treaties into the West (1871-1923) many "half-breeds" were included. In some cases they were considered as Indians, while in others they were treated separately by memoranda which provided for the adhesion of Metis groups to Indian treaties.(66)

In particular, programmes administered by several provincial governments have specific references to Metis. For example, the Alberta Metis Betterment Act defines a Metis as a person of mixed blood, not less than one-quarter Indian blood, who is not an Indian according to the Federal Indian Act.(67) Legislation on the provincial level typically

involves economic programmes or special access to social services. However, there is often what appears to be an assimilationist goal as in Alberta where farming colonies were established along with community trust funds to encourage the settlement of Metis peoples.(68)

(iii) Inuit

The Inuit inhabitants of Canada's northern regions are not "Indian" under the Indian Act, although they are considered "Indian" for the purpose of Federal jurisdiction under the Constitution.(69) Due to their isolated position, and the traditionally low level of outside economic interest in their regions, the Inuit did not deal extensively with the Canadian government until the present century. For a long period their contacts with the white man were limited to occasional visits by whaling ships, missionaries, and traders who did not alter the internal political structures of the Inuit. Only in the present century has the Canadian government provided full social services to the Inuit.(70) As a result they escaped many of the problems created by the dominant bureaucracy in the south. This may have also contributed to the strength of their culture and language which has been given a better chance than many other native languages to survive as a regularly spoken tongue.(71)

d. Recent Developments in Canada Relating to Membership

Of major importance to recent developments relating to indigenous membership has been the settlement by agreement of many long-standing land claims in Canada. The Canadian government's policy regarding land claims has undergone considerable evolution in the past 20 years. While there were efforts during the 1960's to create a mechanism to settle the claims, this movement was essentially brought to a halt by the 1969 White Paper on Indian policy.(72) However, in the early 1970's the Federal government altered its policy in response to a number of factors, including the political debates which followed the 1969 White Paper. A major factor was the implicit acknowledgement of an aboriginal title in Canadian law by the Supreme Court of Canada in Calder et al. v. The Queen which is discussed in greater detail further below.(73) Although it occurred after the Canadian policy towards land claims had already begun to change, the injunctive relief granted to the James Bay Cree of Québec against the James Bay hydro-electric development was also a contributing factor.(74) The granting of the injunction was based on Québec's failure to fulfill its statutory duty to extinguish aboriginal title in the territory transferred to Québec in 1912.

The settlement of land claims based on outstanding aboriginal title can be seen as an extension of the earlier treaty process begun in the 18th century. The term "treaty process" refers to the agreements between the Crown and native political units, designed primarily to obtain the surrender by natives of the possession of lands required by the Crown. However, the land settlements of the past decade are no longer simple documents for land cession. They also attempt to determine which aspects of native autonomy will be relinquished to the dominant society, and

which ones are retained by the indigenous group. Within this framework the benefits from present compensation money and future economic development are retained by native collective entities. Thus the question of membership has again become important because the collectivity controls the benefits used to the advantage of an identified group of beneficiaries.(75)

The process of a comprehensive land settlement does not inevitably mean the suspension of the administrative structures of the Indian Act. The agreements may preserve the traditional subjective definitions of the Act, but then create parallel structures.(76) As the creations of negotiation between natives and governments, the land settlements compromise between purely objective or subjective definitions.

For example, the James Bay and Northern Québec Agreement was intended to extinguish remaining aboriginal title over much of northern Québec.(77) Membership in the native communities involved is important for two reasons. First, the agreement creates new institutions of local government to allow the natives a degree of self-government and self-management of social services such as education and health.(78) Participation in local political life depends on community membership. Second, access to the monetary and other benefits of the agreement are limited to defined beneficiaries.

For the Cree beneficiaries the agreement has employed a base population created from the Indian Act band lists. Further members were added by the use of a racial definition combined with residency requirements and group acceptance. The new lists provide a point of reference for future beneficiaries under the agreement. Ancestry is included as a criteria but a specific degree of blood is not stipulated. Instead a subjective criteria is used by reliance on acceptance into a

Cree community as well as some degree of Cree ancestry. In the case of the Inuit beneficiaries a base population list had to be created. For recognition of the social differences between the Cree and Inuit signatories, the agreement uses different criteria for membership in the different peoples.(79) Agreements signed since the James Bay accord adopt similar methods to determine membership. However, in each case different criteria are used to adapt to different groups, as was the case with the agreements with the Schefferville Naskapi and the Western Arctic Inuit.(80) (81)

The land settlements are compromises between the indigenous group and the dominant society represented by the government. Each side in the negotiation process must remain flexible to achieve a consensus. For example, racial ancestry has been traditionally rejected as disciminatory by the government. Often it is regarded as vital by the indigenous nations. The dominant society may be obliged to adapt some of its own traditional values in order to reach a compromise with natives on the issue of membership. Evidence of a certain willingness to do so can already be seen in section 25 of the Constitution Act,1982 which shelters rights which pertain to the aboriginal peoples from anything in the Charter of Rights and Freedoms which might abrogate or derogate from them.

The land settlements are geographically limited to areas where the government or courts acknowledge the continued existence of aboriginal title. As a result, the settlements are unavailable for most of Canada's indigenous groups. The best hope for these groups is the ongoing constitutional process and the debate over self-government for Indian peoples discussed in the next section.

A major change in the Canadian constitutional process occurred with

the 1981 agreement of the three Federal political parties that the Constitution should recognize the "aboriginal and treaty rights". The events of 1981, with the omission of an aboriginal provision in the Federal-Provincial constitutional compromise, and then its restoration through political pressure, proved the precarious nature of the indigenous interests and the importance of constitutional entrenchment.(82) Section 35 of the Constitution Act,1982 enshrines aboriginal rights, although its content and meaning will undoubtedly provide many more years of debate and negotiations.

The issue of membership determination is closely tied to the issue of self-government. One particularly contentious issue has been the equality of native men and women, both in terms of the Constitution's provisions on aboriginal and treaty rights, and in terms of the discriminatory provisions of the Indian Act. The Act's discrimination on the basis of sex have been widely denounced by both Indian and non-Indian women. However,this discrimination, which originated from the dominant society, is now defended by certain native organizations. It led in part to the lack of an agreement at the March 1984 Constitutional Conference of First Ministers on the Rights of Aboriginal Peoples.(83) Some argue that such discrimination protects racial purity and cultural integrity while others view it as another unilaterally imposed membership criteria. Former Prime Minister Pierre Trudeau, the Minister for Indian Affairs, and the Minister of State for the Status of Women committed the government of Canada to eliminate sexual discrimination under the Indian Act. (84) The equality provisions of the Charter of Rights and Freedoms come into force in April 1985 and will override conflicting provisions of all other Canadian legislation.(85)

A related point is the issue surrounding the 1983 Constitutional

Accord on aboriginal matters. It amends section 35 of the Constitution Act,1982 to ensure equal access to aboriginal and treaty rights by both men and women - the so-called "equality clause".(86) The participants at the 1984 Ottawa First Ministers' Conference were unable to reach an agreement on the larger issue of whether the equality amendment to section 35 of the Constitution Act,1982 would be sufficient. They were also unable to agree on the other major issues on the agenda which included the structures for implementing native self-government.

However, in June 1984, the Assembly of First Nations which represents the "status" Indians of Canada reached an agreement in principle on the removal of sexual discrimination from the Act. Legislation to this effect was introduced in 1984 into Parliament, although it failed to receive the consent of the Senate requiring a revised version to be re-introduced in 1985, with both pieces causing new controversy as to which persons should be granted reinstatement of status lost through past discrimination.(87)

Membership is an important element in recent moves towards greater political autonomy for Canada's Indians. The Report of the House of Commons' Special Committee on Indian Self-Government (Penner Report) recommended that

> "...as a principle that it is the rightful jurisdiction of each Indian First Nation to determine its membership according to its own particular criteria. The Committee recommends that each Indian First Nation adopt, as a necesary first step to forming a government, a procedure that will ensure that all people belonging to that First Nation have the opportunity of participating in the process of forming a government, without regard to the restrictions of the Indian Act."(88)

The Federal government's response to the Report agreed with many of the Committee's basic recommendations.(89) The proposed legislation to grant Indian self-government within the Federal government's constitutional

competency also reflected a willingness to leave membership questions to the proposed "Indian Nations". However, certain standards were to be respected- the Canadian Charter of Rights and Freedoms, international covenants on human rights which Canada has signed, and the existing membership of individuals in bands recognized by the Indian Act. (90) If the proposed legislation, or one similar to it, is ever passed by the Canadian Parliament, it will be a significant step forward in according autonomy to natives in the area of membership.

The most recent step by the Canadian government is a new Bill introduced into Parliament to amend the Indian Act to remove the discriminatory effect of section 12(1)b.(91) The amendment would also reinstate most individuals who had previously lost their "status", either due to marriage by status women to non-status men, or for other reasons. The Bill is noteworthy for another reason in that it contains a significant element of increased autonomy for Indian Bands over membership. While the government will retain control over determining "status" for purposes of the Indian Act and its programs, Bands will be given the opportunity to have increased powers over membership criteria.

2. LAND AND OTHER ECONOMIC BASES OF INDIGENOUS PEOPLES

a. Historical Conflict Between Dominant and Indigenous Societies

The earliest European contacts with North America's native inhabitants were largely peaceful. In Canada the French initially had only small settlements and trading posts to trade natural resources, such as furs, from the Indians. Over time the Europeans in North America sought to exclude other colonial powers with larger colonies of settlers to protect territorial claims.(92)

Early European policy towards the Indians' use of land and other resources was a pragmatic one. Numerically small, and restricted to the settlements along the eastern coast of North America, the French in Canada and the English to the south did not initially interfere with native resource use.(93) The sovereignty to the newly colonized territories was considered to be European, a process discussed in further detail below. However, the Indian possession of land was left undisturbed until new areas were required and purchased by Europeans for settlement.

It is not certain that there was a unified legal theory behind the 17th and 18th centuries practice of land purchases until much later.(94) The primary rationale for the policy of land purchase, particularly of the British, was to limit possible friction with the aboriginal inhabitants.(95) However, by the last half of the 18th century, when Britain and France were in competition for the allegiance of Indian tribes, English policy was to restrict occupation of Indian lands without prior authorization by the Imperial Government. For example, an English Privy Council proclamation in 1761 forbade American colonial govenors

from issuing any further grants on lands occupied by the Indians.(96)

Following the British Conquest of Canada, and its cession by France in the Treaty of Paris, the right to purchase Indian lands inside and outside the newly acquired Province of Québec and other specified British possessions was explicitly restricted to the Crown by the Royal Proclamation of 1763.(97) There remains disagreement as to the exact territory covered by the Proclamation's terms regarding the purchase of Indian lands.(98) Its purpose was to regulate the purchase of Indian lands, and banned any further unauthorized settlements. Indian tribes were to be encouraged to give up possession of traditional lands by the inducement of land grants, annuities of goods and money, and in some cases, the preservation of hunting, fishing, or trapping on traditional lands. In the later 18th and early 19th centuries the British colonial government used these treaties to make modern Ontario available for settlement.(99)

The general process by which the native interest in unoccupied Crown land was extinguished through treaty was continued throughout the late 19th and early 20th centuries. In this later period the treaties were negotiated by the Canadian government, often on lands which had never been the subject of the Royal Proclamation.(100) The limited territory to which the Proclamation stated that it applied to argues against the view that these later policies were intended to carry out the Proclamation's terms. However, whether treaties were negotiated to fulfill the Proclamation or were merely government policy, they resulted in the setting aside of lands for the exclusive use and occupation of the Indians. These parcels of lands were called "reserves" and reflected a policy which had existed to some extent since the earliest European settlements in Canada.(101) In addition, traditional patterns of

resource use were often presumed for the Indians on the territories surrendered by treaty, so long as they remain unoccupied Crown land.

After Confederation the new Federal government began an ambitious plan to remove whatever native interest existed in vacant Crown lands from the Northwest through treaties. These "numbered treaties" were signed by various Indian tribes and allowed for the settlement of the Western Prairies region. Documents of the time noted that the main concern of the Indians was that their economic base be preserved even though traditional lands were being vacated to allow for settlement.(102) It must be recalled that hunting and gathering activities in the 19th century meant the full economic use of land to the Western Plains Indians. In the 20th century the full use of the resources could include the mineral and oil wealth, as well as more traditional means to exploit the resources.(103)

One consequence of the historical process was that many natives came to occupy lands which are economically marginal in terms of the 20th century. Under the numbered treaties natives were to be consulted on the setting aside of reserves to retain traditional hunting and fishing areas along with their villages.(104) In other cases reserve lands were chosen on their behalf by government officials based on the assumption of their use for agriculture.(105) The creation of the reserves for Indians in Ontario, Québec, and the Maritimes took place in the period from earliest contact until the 20th century. In some cases lands were assigned to natives for settlements, in others to third parties for the benefit of the natives, and in some instances lands were purchased by the colonial or Canadian Federal governments for the use of Indians.(106) Regardless of their method of creation, the reserves enabled some traditional Indian culture to survive in distinct areas, often by their isolation from the

Euro-Canadian urban centers.

It is also possible, however, to characterize the reserves as locations where the Indians were more easily subjected to government control. Individuals were free to leave the reserves, but in doing so they lost certain benefits tied to residency, and were exposed to possible assimilation by the loss of contact with their community.(107) The major problem today is that many of these lands are unsuitable for any economic use other than hunting and gathering activities. As a result many reserves cannot support present native populations with a modern standard of life.

By the 20th century, government extinguishment of the native interests termed variously as "Indian" or "aboriginal" title through the use of treaties was largely completed in most of Western Canada. However, unextinguished aboriginal title is still claimed by the Indians to have survived in parts of British Columbia, the Maritimes, Labrador, and along with the Inuit, much of the Yukon and Northwest Territories.(108) The concept of "aboriginal title" is discussed in greater detail further in this discussion. In the northern territories comprehensive land settlements are being negotiated to extinguish such title and continue a policy dating from the Royal Proclamation, even in areas like the Northwest Territories where the Proclamation probably never applied.(109)

In conclusion, the competition between aboriginal and Euro-Canadian societies for land was relatively peaceful in Canada. However, as settlement expanded the traditional native uses of land became difficult or impossible in settled areas. The exception, of course, would have been Indians which had previously followed, or had adopted, a settled agricultural or urban lifestyle. Today, the traditional use of lands for

hunting and gathering activities is restricted to areas away from agricultural or urban centers. However, these activities can be endangered as resource exploitation grows in the more isolated regions. Both the possible ecological disturbance and the social changes attendant with large scale economic development can threaten traditional native life-styles, including customary resource use.

b. Sovereignty Through Discovery and Effective Occupation

In the Island of Palmas case, Judge Huber rejected the position that discovery alone gave a complete title of sovereignty to a discovering State.(110) The correct test was whether the State could demonstrate effective occupation of the lands in question to the exclusion of other States. In the case of Canada effective occupation in the sense of agricultural exploitation was limited by the types of land available. However, the extension of governmental authority has proceeded since the earliest days of European colonization and continues with the sovereignty claims over the Arctic waters.

The concept of native title to land in Canada has drawn upon both international and British law and colonial practice. The sovereignty of the colonial powers was based on their effective occupation of the lands "discovered" in the 17th-19th centuries.(111) It can be argued that a colonial Crown's claim of sovereignty over territory automatically extinguished the property rights of the inhabitants, and therefore no aboriginal title remained once a colony was established.(112) This assumes that native property rights were incompatible with the

over-riding political sovereignty of the Crown.

The view of the Canadian courts has been to accept the proposition that some form of aboriginal title or interest in land survived the initial assumption of sovereignty by European colonial powers.(113) There are major debates in the courts, however, as to the continued survival of such interests, and their characterization in Canadian property law. While the native inhabitants of Canada at the time of discovery lacked the full European sense of state sovereignty they still exercised some degree of territorial possession. The Crown's sovereignty represented an over-riding power which diminished the natives' rights in land, but initially left their rights of occupancy and possession unaffected.(114) In situations where lands were settled with the Crown's consent, it was deemed that the Crown had implicitly extinguished any aboriginal title as the right to occupy and use the land by traditional means. This power also meant that in Canada the Crown retained for itself the exclusive right to deal with native groups in order to extinguish remaining aboriginal interests in land. However, where they survived the natives' rights were inherent in their prior possession and traditional use of lands, as opposed to being granted by some higher political power.(115)

Leaving aside the question of where the native interest in property originated, there is the potential problem of the two "sovereignties" to deal with. Sovereignty is used to refer to a colonial State's "external" sovereignty over new territory. It involved international relations and the right to exclude the interests of other States. The "internal" sovereignty claimed by the natives would have encompassed their self-government, and whatever property rights or interests are contained in the term "aboriginal title".

The process of discovery and occupation can be characterized as a

cloak of Crown sovereignty cast over the native political institutions which left them intact. It is akin to the concept that the natives were left with possession of their lands, but their rights were diminished to the extent that the underlying title or sovereignty shifted to the European Crown. One example of this over-riding sovereignty was the British Crown's ability to restrict sales of the possession of native lands to itself.

In this analogy, the Crown diminished the native "sovereignty" by removing whatever international personality it may have possessed, but left some degree of internal political control with native groups. It should not be forgotten, however, that whatever interests or powers had been possessed by the natives were forced to retreat before the Crown's over-riding power; their surrender to an "irresistible force".(116) Still, it can be argued that other aspects of the natives' "internal" sovereignty, in addition to their possession and occupation of unoccupied lands, could have survived until superceded by the Crown's force.

In the classic case of Campbell v. Hall decided in 1774, the British courts echoed the concept of international law that the laws of a conquered people remain in effect until altered by the new Sovereign.(117) More recently the Judicial Committee of the Privy Council reached much the same conclusion in the 1921 decision of Amodu Tijani v. Secretary of State of Nigeria. (118) They stated that even where the political sovereignty is altered the native property interests are preserved and that one should not assume that "general words of cession...related primarily to sovereign rights" were intended to disturb pre-existing titles.(119) There are numerous cases from Africa and other colonial territories where the imposition of British colonial rule, whether by conquest or other means, was held not to affect native

property laws and interests.(120)

In each colony legal concepts of the colonial powers were adapted to accomodate the native property laws. In Canada, native property rights were called "usufructory" interests in an imperfect attempt to describe a non-European idea through European legal concepts. In essence the term "usufruct" described the native right to use and occupy their traditional lands which rested as a burden on the Crown's seisin in fee. The rights survived until they were either negotiated away to or were adversely affected by the Crown. Beneath the native interest was the underlying Crown title which reflected the "external" or international sovereignty exercised over the colony. In Canada, were lands were often reserved for the use of the natives, their title remained with the Crown, but they bore a usufructory burden to the benefit of the Indians for whom they had been set aside. These matters are furthered examined in the discussion of "native title" which follows.

Another challenge to the British legal system was the concept of collective title or rights to property. In nearly all parts of their colonial empire they encountered legal systems where land was held in common for a village, tribe, or nation. The concept has proven difficult to incorporate into British law and the approach taken in Canada was that the Indians do not own their reserve lands. Instead the lands belong to the Federal government and are "reserved for the Indians". The usufructory interests of the Indians are then exercised in a collective fashion. It is also acknowledged that where unextinguished aboriginal title exists it has a communal character. It should be noted that collective ownership of interests in immovables is not entirely unknown to the common law system, as was shown in the decision of the English Court of Appeal in New Windsor Corporation v. Mellor.(121) The decision

is also of interest for acknowledging that collective proprietary interests can be defended as an "historical customary right".

For the reasons set out above concerning the Crown's over-riding power of sovereignty, both in terms of the power's territorial and political aspects, most natives do not argue for complete sovereignty in the sense of a State. Instead, they claim some form of aboriginal title, generally as traditional use and possession of unoccupied land where the title has survived, and an inherent right to self-government. Natives also argue that an aspect of their interest in land is the full use of the natural resources as a logical extension of traditional economic uses, such as hunting and fishing. The problem encountered by aboriginal claims to full use of natural resources is discussed in further detail below.

There are, however, difficulties with the argument that some form of native political "sovereignty" could have survived the process of Canada's colonization and development. In fact, the argument may face even more obstacles in Canadian law than the survival of aboriginal interests in land.(122) The issue of inherent self-government for natives is discussed in further detail in a later section.

c. Native Title in Domestic Law - Canada

The characterization of the aboriginal interest in land has proven to be elusive for both Canadian courts and jurists. The locus classicus in Canadian law with respect to native title to land is the decision of

St.Catherine's Milling and Lumber Co. v. the Queen.(123) Along with other decisions of the Judicial Committee of the Privy Council, it held that the base title of all land in Canada lies with the Crown.(124) Due to the federal organization of Canada the Crown is divided into Federal and provincial jurisdictions. "Lands reserved for Indians" are a Federal responsibility but once the native rights are extinguished the lands lose this status and revert back to the underlying provincial title.(125) Native land rights create a burden on the underlying provincial interest, but a burden which can only be surrendered to the Federal Crown.

The title in question in St.Catherine's was the interest recognized by the Royal Proclamation of 1763. The case dealt with lands surrendered by treaty with Indians. In a frequently quoted and debated passage, Lord Watson stated that

> "...the tenure of the Indians was a personal and usufructory right, dependent upon the good will of the Sovereign".(126)

However, the Privy Council declined to express an opinion on the "precise quality of the Indian right", beyond the statement that it was a "mere burden" upon the Crown's "present proprietary estate in the land".(127) The Privy Council applied the same concept in the Star Chrome case to lands set aside as an Indian reserve in Lower Canada pursuant to a pre-Confederation statute of the Province of Canada.(128) While all of its attributes are not agreed upon, aboriginal title can be characterized as having at least certain aspects; it is a right like a usufruct over the seisin fee of the Crown, it suffers from a restriction on alienation and can only be surrendered to the Crown, it is susceptible to limitation by unilateral acts of the Crown, and it has a communal character.(129)

Canadian courts have examined the question of aboriginal title or interests in lands in several contexts. As with the case of

St.Catherine's, they have considered what right or interest was being recognized by the Royal Proclamation, and whether the Proclamation only recognized or actually created native interests.(130) The rights of the Indians in the reserves created by governments has also been considered.(131) In addition, some reserves were established by statutory instrument rather than treaty, or by grants to third parties to the benefit of the natives. As noted above, the Proclamation had only limited application in Canada, and some natives look to such statutory instruments to recognize, confirm, or create some interest in the lands they occupy.(132) Finally, there is the concept of a common law interest in Canadian lands.(133) The common law is argued in cases where some form of aboriginal title or right is claimed, but there is no statutory or other instrument like a treaty to confirm its existence, and perhaps in part to define its contents. In each of these situations different considerations are raised by natives claiming an interest in land or some related economic right.

There is also debate about whether "usufruct" is an appropriate method to describe the aboriginal interest in land.(134) For example, the agreements on natural resource transfers between the Federal and Western provinces ensured that the title to Indian reserves rested with the Federal government when the lands and resources were transferred to the provinces. However, the agreements referred either to the reserve lands being held "in trust", or else were silent on the issue of the usufruct.(135) The concept has also come under some judicial criticism for the imperfect use of the "usufruct" as an analogy for the Indian tenure in the reserves.(136)

Judicial acknowledgement of the existence of a native title in Canadian law is only one step, since the rights which arise from that

title are still debated. Some judicial decisions have suggested that the Indian interest prior to its surrender or extinguishment by treaty, is limited to traditional native use of lands, such as hunting and fishing.(137) Many Courts have referred to the natives' rights of "occupancy", "use", "possession" or similar concepts, rather than full ownership as understood in European and Canadian law. These are also two uses, along with trapping in some cases, most commonly identified by treaties as surviving on unoccupied Crown land the surrender of Indian possession. In Hamlet of Baker Lake et al v. Minister of Northern Development et al. the issue was whether unextinguished Inuit aboriginal title existed in a part of the Northwest Territories, and whether the title included "surface rights" under applicable mining legislation.(138) The Federal Court's Trial Division stated that a title did exist, and that it had survived the legislative changes of three centuries. It was described as including "...the right freely to move about and hunt and fish over [the territory]...", but not to encompass the surface rights to that region.

While some native groups view the preservation of traditional lifestyles as primary, others claim that rights to resource use should be defined broadly, rather than as a specific activity such as hunting or fishing. It is argued that these were suitable activities for the 18th and 19th centuries when most treaties were entered into, but they are now inappropriate for the basis of native economic development. The argument of "full economic use" is made both in terms of unextinguished aboriginal title, and as part of the economic rights on unoccupied Crown lands which the natives claim were preserved by some treaties.

Perhaps the most important recent Canadian case to consider native title was the Supreme Court of Canada decision in Frank Calder et al v.

The Queen.(139) The Court split in a 3-3-1 decision on several important questions, including the existence of aboriginal title in British Columbia, the application of the Royal Proclamation, and the survival of aboriginal rights after the colonization and settlement of British Columbia.(140) An important point of disagreement in the Court was the applicability of the Royal Proclamation's protection of aboriginal interests to the territory of modern British Columbia.(141) One group of three judges, represented by Mr.Justice Judson regarded the Proclamation as inapplicable to a region which was not even British territory in 1763. The other view, represented by Mr.Justice Hall, regarded the recognition of aboriginal title as a government policy which applied to all British, and then Canadian, territories - the idea that the Proclamation had "followed the flag". However, both judgements representing the six member bench, can be interpreted to affirm the existence of a common law aboriginal title, pre-existing the Proclamation's protections.(142) The Court did not, however, directly address the contents of the aboriginal title claimed by the natives in the case.

The deciding point of division in the Court was whether the colonial and provincial governments of British Columbia had pursued policies inconsistent with the survival of an aboriginal title, regardless of its source. Three of the judges, represented by Mr.Justice Judson's judgement, rejected the concept of its surviving the settlement and granting of lands, while three accepted it, and the deciding judge reached his decision on a procedural point.(143) Prior to the decision there was considerable judicial debate of the role and applicability of the Royal Proclamation in various regions.(144) The debate has continued, both about the Proclamation and the existence of a common law aboriginal interest independent of statutory or treaty acknowledgement, and in

British Columbia the Supreme Court decision is not regarded by some Courts as authoritiative due to the lack of a clear majority.(145) Canadian Courts have continued to debate the existence, and survival under government policies and laws, of a common law aboriginal interest in unoccupied Crown land.(146)

However, subsequent decisions of all levels of Canadian courts have continued to reflect the concepts expressed by Amodu and Campbell that the native interest in land, whatever it encompassed, survived the initial change in political sovereignty.(147) This has been done either expressly, or implicitly by looking to evidence that the interest was extinguished after the imposition of the colonial Crown through adverse policies or by express acts. The door remains open for the natives to argue that other aspects of their societies such as self-government were also left intact. Of course, such powers could only survive in the absence of their express suspension by the new Sovereign or acts inconsistent with their survival.

The full characterization of aboriginal title still remains at issue. As noted above, several Courts have suggested that it entails only possession and traditional resource use where such title has survived. Of course, natives arguing for "full economic use" of traditional lands do not share this view. Cases dealing with claims of aboriginal title or rights must therefore address two issues; the characterization of the title, and its survival of subsequent acts and policies of the Crown.

d. Role of Indian Treaties

The agreements between the Crown and native political units, at least after the 1763 Proclamation, were generally used to extinguish Indian title to lands. However, apparantly the natives also viewed them as a means to obtain government recognition of other rights, such as traditional resource use on unoccupied Crown land. The treaties remain of great importance to many natives whose ancestors entered into such agreements. Potentially the status of the treaties may be altered by the entrenchment of "treaty rights" in the Constitution of Canada. However, many questions of interpretation of that provision remain for the Courts and future political negotiations. For example, what constitutes a treaty under the Constitution remains an issue since many agreements signed by the colonial French and British Crowns are largely unaffected by the Federal government's specific claims policy.(148) The policy permits an administrative settlement of native grievances that treaty terms have not been fulfilled. Whatever the effect of the constitutional reference to "treaty rights", the treaties are important for the Indians.

Treaties can be characterized in a number of different ways: nation-nation agreements, contracts, quasi-legislative enactments by the government, or merely as moral/political undertakings which may be unilaterally suspended by the Crown.(149) The "nation-nation" approach has been most forcefully expressed by Chief Justice Marshall of the United States Supreme Court in the 1832 decision of Worchester v. State of Georgia.(150) In his view the early American treaties were intended to divide the land between the settlers and the Indians, rather than to supplant the inherent political powers of the natives. However, the Indian treaties should not be confused with inter-state treaties since

they have never been accorded such status in international law. This does not weaken their domestic force but determines the forum in which they can be enforced.

The treaties are extremely important to those native groups given an opportunity to participate in the treaty process. Natives have argued that some treaty obligations have not been fulfilled, which led the Federal government to create a land claims office to deal with specific claims concerning treaties. Most often the claims involve the nonfulfillment of treaty terms, or else the loss of lands reserved for Indian use and occupation through government policies or negligence.(151)

The treaties play a vital role in the preservation of certain rights to resource use. This is due to section 88 of the Indian Act which provides that provincial laws of general application will apply to Indians and their lands "subject to treaties and the laws of the Federal Parliament".(152) Many treaties ensure that native rights to traditional resource use on unoccupied Crown lands are not unilaterally suspended by the provinces, and in this respect the Federal government has come to be regarded as a guardian of native interests.(153)

The most common conflicts have involved traditional resource uses protected by treaties, such as hunting, fishing, and trapping. The test adopted by the courts has been whether provincial laws impair the status or capacity of the Indians in their identity as Indians, or lands used by Indians as Indian lands. In both senses the Courts attempt to prevent the application of laws whose express or implied purpose is to restrict the aboriginal status of individuals or lands.(154) However, in the decision of Kruger and Manual v. Regina the Supreme Court of Canada held that only rights acknowledged by treaty would be enforced against provincial laws by section 88, which argues against the protection of

rights to resource use based only on common law.(155)

While provincial laws have been excluded on the basis of the Federal nature of Indians and their lands, or by treaty terms, the converse is not true of the Federal laws. The Northwest Territorial Court of Appeal in Sikyea v. The Queen held that the Federal government is free to unilaterally suspend or affect all rights under treaty, including the protection of resource use, as the inheritor of the colonial Crown's absolute powers with respect to the Indians.(156) The protection of the treaties by section 35 of the Constitution Act,1982 may alter the impact of the decision, but it is another area of concern to natives who rely on the treaties.

The inclusion of "treaty rights" in the section 35 provisions also raises the question of what the treaties actually mean. It could possibly now be argued that their constitutional protection raises the status of some treaties beyond mere moral obligations upon the Federal Crown, or government policy. In addition, the treaties could potentially now be characterized as constitutional documents in the sense that the Federal Parliament can no longer unilaterally affect their terms. However, it should be noted that section 35 protects "treaty rights", and not the actual treaties which essentially avoids any potential arguments that it recognizes the treaties as constitutional documents.

e. Judicial Interpretation of Treaty and Aboriginal Rights

Section 35 of the Constitution Act, 1982 links "aboriginal and treaty rights", even though they are separate but related topics. "Aboriginal rights", as opposed to rights recognized by treaty, must rely on statutory acknowledgement or the common law. For aboriginal rights, there are questions about their very existence, in addition to what their content may be. Treaty rights at least benefit from the existence of written agreements which make it easier for the Courts to define and protect them.

However, even the treaty process has posed a problem for both jurists and the Courts. The questions have revolved around how to characterize the treaties, and then what rules of interpretation are applicable to their terms. The later point is especially important since circumstances have generally altered since the time most treaties were signed with the Canadian natives.

The Courts have been fairly sympathetic to the Indians in their attempts to enforce the terms of the treaties, both in their literal and modern meanings. For example, in R. v. Wesley the court held that there was no lessening of the Crown's duties and obligations if the treaties were not characterized as international agreements.(157) In Pawis et al. v. The Queen the Federal Court of Canada said that the treaties were tantamount to contracts which gave rise to a special relationship between the Crown and the Indian nations.(158) Some courts have been liberal in their interpretation of the term "treaty" and have stated that it includes "engagements of persons in authority to achieve the goodwill of the (Indian) nations".(159) In addition, Courts up to the highest level have subscribed to liberal rules of interpretation for the terms of such

treaties.(160)

In the leading case of Noweglick v. The Queen the Supreme Court of Canada in 1983 implicitly adopted a line of American cases which ruled that the "meaning understood by the Indians" was a key method to interpret treaty terms.(161) This opens the jurisprudential door to United States decisions which state that treaties incorporating "economic base" provisions, in the sense of hunting and gathering activities, must be given a contemporary meaning. For example, in one set of decisions from the United States Supreme Court "fishing" rights in 19th century treaties were interpreted to mean a guaranteed percentage for Indian fishermen of the commercial Pacific salmon catch.(162) As recently as the 1981 decision by the United States Supreme Court in The Montana v. United States these principles have been upheld.(163) While it is not certain that the Canadian courts will follow suit, the decision in Norweglick suggests the direction they may take. The comments of Mr.Justice Hall in the Calder case had earlier suggested that the Indians retained "full use of the land" which raises the possibility that the "full economic use" theory will also be applied in Canada.(164)

While protected to some extent from provincial laws due to section 88 of the Indian Act, treaty rights have not been immune to the restrictions of Federal law to which the section makes no reference. In R.v. Sikyea a Federal statute adversely affected a treaty protected right to hunt game for food in the Northwest Territories.(165) The Court of Appeal decision in the case described the Federal Parliament's passage of a bill inconsistent with the Indian treaty right as an "...apparent breach of faith on the part of the government".(166) However, both the Court of Appeal and the Supreme Court of Canada acknowledged that the Federal Parliament could pass laws restricting treaty rights. Subsequent

decisions have confirmed the ability of Federal laws to over-ride rights created by treaty or recognized by other instruments.(167)

There are several areas yet to be addressed by the courts in the interpretation of treaties. A major question is whether land cession treaties allowed other aboriginal rights inherent in "internal" sovereignty to survive. Decisions on this point will have important consequences for the future negotiations on native autonomy and the provision of an adequate economic base for the native populations. The indigenous nations argue that the treaties were intended to cede territory only and left their other powers intact. At the same time the economic rights protected by treaty are being enforced in the courts by natives with mixed results as they seek a modern interpretation to the full use of lands.

The position of "aboriginal rights" in the Canadian courts is much less certain than for rights recognized by treaty. As noted above there is considerable debate on the contents of aboriginal rights, with some writers and Courts viewing them as only the right of native occupation and traditional resource use on unoccupied Crown land. The source of such rights is also uncertain, with some natives able to rely on acknowledgements of the rights' existence in statutes or the Royal Proclamation. Other natives, however, must argue for the existence of rights at common law.

Even more than the treaty rights, native interests which come under the rubric "aboriginal rights" have been limited by both provincial and Federal legislation. Before the existence of section 35 of the Constitution Act, 1982 there was no express protection for these rights equivalent to section 88 of the Indian Act. Conflicts have most commonly arisen with provincial game laws, and native claims to traditional

hunting and fishing rights. In Cardinal v. A.G.Alberta, the Supreme Court of Canada in 1973 held that provincial game laws of general application can be enforced on Indian reserves due to a provision in the Natural Resources Agreements of the Prairie provinces.(168) Mr.Justice Martland, speaking for the majority, went further and upheld game laws which apply throughout a province, so long as they are of general application.(169) This was by virture of section 92 of the British North America Act, 1867 and the Prairie provinces did not have to rely on the saving provisions of the applicable Natural Resources Agreements. The Supreme Court of Canada again rejected the position that non-treaty aboriginal rights could not be restricted by provincial game laws of general application in its 1977 decision in Kruger and Manuel v. the Queen.(170)

Another concern for natives is that "aboriginal" rights can be read restrictively to limit them to only areas where their existence was recognized and affirmed by statute, treaty, or the Royal Proclamation. In the absence of such recognition, it could be argued that these rights have not survived. By this interpretation, the protection of aboriginal rights by section 35 of the Constitution Act,1982 adds little, since it may only protect the rights which had survived to the present day. Some support for this point of view is found in section 35's reference to protection for "existing" aboriginal rights.

Liberal interpretations of the term "aboriginal rights" argue that they encompass more than merely rights of occupation or traditional economic uses on unoccupied Crown lands. It can also be argued that the rights can include self-government. Indeed, even natives whose ancestors signed treaties have the possibility to argue that these agreements only ceded certain interests in land, such as occupation, but left other

matters of their "internal" sovereignty intact. These are matters, however, which will have to be explored by natives in future, and may depend on the wording of individual treaties.

f. Canadian Response to Indigenous Claims

Indigenous economic claims fall into three categories. Those groups which signed treaties with Canada after Confederation seek to enforce obligations in their broad meaning as understood by the native signatories. They also seek to enforce the specific obligations under treaties which may have been neglected by governments over the years. Groups which inhabit regions in which Canada recognizes unextinguished aboriginal title use the land claims process to preserve and augment their economic bases. In both cases, although in particular the second, possession and exclusive use of land is of major concern in terms of economic security and the preservation of indigenous life-styles. The term "exclusive" is used in the sense of restricting resource use to natives, or recognizing their power to administer the resources.

Many treaties promised certain tangible benefits such as undisturbed hunting and fishing rights and the full use of specific alloted lands. As noted above the Canadian government has attempted to deal with concerns that promises have not been honoured through the specific treaty claims division of the Office of Native Claims. However, it should be recalled that many Indians and all Inuit never signed agreements. For natives whose ancestors did sign agreements, some find that the treaties do not qualify under the present government policy to satisfy specific

claims.

The Federal government has also established a divison of the Office of Native Claims to deal with comprehensive land claims based on unextinguished aboriginal title. However, the Federal government and most of the provinces take the position that there is no extant native title remaining in the majority of Canada's settled regions.(171) They point to early peace treaties as acknowledging the abolition of native title or to the existence of colonization as inconsistent with its survival. However, the government has been slow to respond to the claims of native peoples that those lands were usurped without adequate compensation.

The land claims policy has been useful in those regions where unextinguished aboriginal title is acknowledged. The pivotal James Bay and Northern Québec Agreement has become a model for later agreements.(172) At the present there are Agreements in Principle in existence for the Eastern Arctic and the Yukon Territory, while a final agreement for the Western Arctic was recently announced.(173) The agreements are attempts by the government to extinguish whatever interests are contained in aboriginal title, while natives use them to preserve as much of their independent cultural and social development, economic base, and self-government as possible. (174)

A more recent issue in terms of economic security is the funding of native structures of self-government. One proposed mechanism is to reduce the Federal bureaucracy which administers programs for Indians and to transfer the funds and responsibilities for services to native institutions of government. In specific areas such as Indian education the process is already well under way.(175) Problems could arise because of Federal control of funding which in theory reduces the autonomy of

native government institutions. However, even the acceptance of the idea of transfer payments to aboriginal autonomous structures represents an important concession won from the Federal government.

The question of economic autonomy for natives in Canada is currently being dealt with in a piece-meal basis. There is, however, a significant effort by the Federal government to encourage economic independence for Band governments under the Indian Act. (176) There is also the proposed transfer payments to Indian units of self-government, although legislation to recognize such units must first pass Parliament.(177) It is significant that they reflect positions expressed in the Penner Report on the need to assure native economic autonomy. The Federal government prefers, however, to deal separately with political and economic questions in northern land claims due to the uncertain direction of political evolution in the region.(178) Existing land claims settlements do recognize the importance of assuring economic independence for both native individuals and communities, and these early moves by the Federal government suggest that similar autonomy will be encouraged for other aboriginal groups.

3. GOVERNMENT CONTROL VS. SELF-GOVERNMENT

Over the centuries the power of native political structures was gradually eroded by the colonial and Canadian Crowns. In their place was created a bureaucratic structure imposed by the dominant society.(179) It is only in the past two decades that policy has been questioned and new approaches explored. In March 1984 delegates from the provincial, territorial, and Federal governments met with representatives of major native organizations.(180) Their agenda included the issue of native self-government but the assembled representatives were unable to reach agreement on its substance or form. To date the main problems have been the unwillingness of some provinces to accept the concept that native peoples should exercise self-government, and the natives' own difficulty to present a unified approach to the issue. Critics of native self-government point to the dangers of conflicting jurisdictions or diminished levels of social services as a result of increased autonomy. However, these arguments fail to consider the importance placed by the natives on self-government as a means to ensure their continued collective existence.

The situation at present is somewhat volatile. Native organizations claim self-government but are not unanimous in what structures to adopt. The Federal government has stated that it will create some degree of self-government for natives within the limits of its Constitutional jurisdiction with particular emphasis on Indians.(181) While the creation of native government structures does not necessarily require their acceptance by provincial governments, to facilitate the process agreements with the provinces are being sought by the Federal government when provincial jurisdiction may be affected.(182) Any future native

structures of self-government will demand that practical details be settled by negotiation among all levels of government. The structures proposed by the Federal government to increase native autonomy will not apply to all indigenous peoples since they concentrate on Indians.

Other groups, in particular the peoples of the North, Labrador, and parts of British Columbia, retain the option of achieving a degree of autonomy through the land claims process.(183) In the North these claims are facilitated by the absence of provincial jurisdictions and the relatively wide powers available to the Federal government. However, in general, claims to autonomous native political structures within the northern land claims process have not been entirely successful. In British Columbia and Labrador there is the additional consideration that any claims to autonomy must deal with both the Federal and provincial levels of government.(184)

There also exists the possibility of an inherent right of self-government under section 35 of the Constitution. Such a right could have survived the imposition of the Crown's sovereignty in a manner similar to the survival of native possession and occupation rights in land. In general, the provincial and Federal governments have not accepted the idea that section 35 contains such a right, although many of them have indicated their willingness to see a Constitutional amendment on the issue of aboriginal self-government.(185) While native organizations argue to the contrary about section 35, the possible amendment of the Constitution to provide at least a statement of principles on aboriginal self-government may be the most secure route. Such an amendment avoids creating a third level of government in the Constitution, and as noted above has the support of several provinces and the Federal government.

However, there are some advantages to arguing that section 35 contains inherent self-government, since it already exists, and natives who are ineligible for the proposed self-government legislation and the land claims process would have the basis to argue for similar institutions. At the same time there is an important difference between the recognition of inherent powers of self-government and the delegation by the Federal government of its powers to native political structures. The discussion which follows considers these points against the background of current Canadian policies and the Constitution.

a. Government Control and "Self-Government" on Reserves

Canadian policy has generally denied the importance of an inherent power of native self-government by minimizing its role. Legislation to create Indian self-government generally did not consider the presence of traditional forms. As the Indian Act and related legislation came to control more and more of Indian life in the 19th century, it created bureaucratic structures for local government by the Indians.(186) However, for much of the existence of the legislation the true power of government lay with the Indian Agents and the bureaucracy behind them.(187) During the 1950's the act was substantially altered to attempt a greater degree of native autonomy but only through structures approved by the dominant society.(188)

The Indian Act divides Indians into "bands", either administered by a council headed by a Chief, or by a Chief acting alone.(189) Bands may choose their Chiefs and Council by traditional custom where they choose to, or may rely on provisions in the Act for elected Council and

Chief.(190) The bands are determined on the basis of the reserves set aside for their benefit, or on the basis of having funds held by the Crown for them, or being declared by the Governor-in-Council to be bands for the purposes of the Act.(191) However, some natives view the arrangement as an artificial one imposed by the Federal government.(192) In many cases the system of government designed for the Indian reserves served only as a conduit for government policies rather than an expression of native interests.

The reserve system, with its mixture of elected and customary chiefs, and the limited band council powers, has come to displace traditional native government by diminishing its relevancy. Only with isolated groups like the Inuit have native political structures been able to retain a real role. However, as social services were introduced into these areas in the 20th century the same process began, although to a lesser degree since the "Indian" bureaucracy was never officially extended into the Arctic regions.(193)

Native self-government under the Indian Act can not be assumed to represent true native self-government. While the worst abuses of the past are over, and the band councils do provide a form of representative government for status Indians, the councils are not equivalent to even municipal forms of government. They are nearly totally dependent on financial resources provided by the Federal Department of Indian Affairs.(194) The powers of the bands to pass by-laws involves a limited range of matters.(195) In all cases there remains the over-riding power of the bureaucracy of Indian Affairs and Northern Development.(196)

Despite the efforts at increased local decision making by Indian bands, and the provision of lump-sum funding for a variety of programs, the system remains one of delegated powers. The matter is complicated by

the parameters placed upon the Federal government by its legislative authority under the Constitution. At present government policy is to transfer, as much as possible, responsibility for social and economic matters to the band level.(197) While this approach has been supported by most bands it does not represent true self-government in the sense of the inherent right of the natives to deal with their own affairs. Instead it is delegated power which depends on the policies and programmes of the Federal government, and above all on the good-will of the dominant society. As such these powers of government could be suspended unilaterally or restricted by the dominant society.

Such fears are especially current in the area of social development. Some provincial governments have been willing to delegate child welfare and education programmes to the band level, but retain the power to review the policies and practices of the structures created by the Indian band councils.(198)

The overall arrangement is unsatisfactory to the native groups who feel that they are being given only nominal self-control. There is also the fear that acceptance of such programmes may endanger subsequent claims to self-government as an aboriginal right. The concern is especially acute with the possibility that the section 35 aboriginal rights could be interpreted in future to include native self-government.

b. Inherent Powers of Native Self-Government

The issue of inherent powers of native self-government has only recently been addressed in Canada as part of the general reconsideration of aboriginal rights. The United States has long recognized such inherent powers. Its jurisprudence will certainly be considered in Canadian courts as indigenous groups seek judicial definitions of section 35 "aboriginal rights". For example, the New York Court of Appeals commented

> "...The conclusion is inescapable that the Seneca Tribe remains a separate nation: that its powers of self-government are retained with the sanction of the state..."(199)

However, the approach taken by that court has not always been the policy of the American federal and state governments. For example, in the late 19th century there was a concerted effort on the part of American authorities to abolish native institutions even where they had been patterned after the United States constitutional model. It was assumed that such parallel structures slowed the integration and assimilation of Indians into society.(200) The majority of native political and legal institutions which exist today in the United States are relatively recent and date from the major legislative changes which occurred during the 1930's.

There is a large jurisprudence in the United States which deals with the problems of the inherent power of the Indian tribes to rule themselves.(201) This power includes the ability to pass laws and establish courts and police forces for their enforcement. Much of the case law has concentrated on the problems of overlapping jurisdiction between the native and American legal systems. However, even in this

relatively liberal arrangement the United States courts have always acknowledged the over-riding and "irresistible" power of the American Congress to over-rule native laws and to unilaterally impose their standards. One example was the legislation of the 1960's which imposed standards of civil rights and procedural fairness on the dealings of the native governments with their citizens.(202)

In Canada there were no similar efforts to encourage native political self-sufficiency outside of the Indian Act until relatively recently. Indigenous political structures which did not adapt to the provisions of the Indian Act which allowed Chiefs and Band Council members to be chosen by custom, were either forcibly abolished or were made redundant.(203)

The issue of self-government has come to the foreground within the Constitution. Section 35's protection of aboriginal rights is interpreted by most native groups to include an inherent right to control their destiny.(204) In general the provincial and territorial governments' response has been negative, or hesitant at best, even while structures are being proposed by the Federal government to achieve some degree of native autonomy.(205) The important distinction is that the Federal government proposes to delegate powers to the native political units through legislation. This means that the units will lack inherent jurisdiction and must operate within the parameters of the enabling statute. In addition, there is always the danger that future governments may unilaterally alter the terms of the statute and the powers of native governments.

Native organizations state that the structures and practical details of their governments can be negotiated, but that Canada must acknowledge the underlying inherent right to self-rule.(206) Similar positions are

used to justify the natives' inclusion of political goals within the land claims. Others argue that the right to self-government "flowed through" the treaty process after the arrival of the Europeans, surviving as an aspect of "internal" sovereignty. This position argues that the treaties merely ceded possession to land and whatever was not specifically dealt with was left intact. Thus, it is argued, most native political powers were untouched, even after the assumption of over-riding sovereignty by the colonial Crown.

There are many difficulties with native claims to self-government where they are based on Canadian domestic law. The discussion above concerning the survival of aboriginal interests in land and resources highlights the problem. In any court case, it will be difficult to overcome the argument that the existence of the Indian Act was entirely inconsistent with the survival of any aboriginal right to self-government.(207) It could be argued that an aboriginal system of government without practical effect for over a century could not survive as a legal right. However, it could be rebutted by the point that the co-existence of two or more levels of government can be conceived, whereas two directly competing interests in land are impossible. Likewise, it raises the interesting question of whether the right of a minority disappears simply because the majority denies its existence.

Arguments for an inherent power of self-government are particularly critical to dispersed peoples like the Metis. The Northern peoples have the option of either the land claims process or public government institutions. The latter case is useful to natives since they constitute the majority in the Northwest Territories, and a sizable minority in the Yukon. Status Indians would benefit from the structures of native government proposed by the Federal legislation, and undoubtedly many

non-status Indians will also benefit from them. However, while the Metis constitute a people recognized in the Constitution, they generally lack the cohesive territorial base required by the Federal formula for autonomy. This also prevents their reliance on the land claims process. As a result they are unable to achieve self-government through the existing or proposed structures. Their only recourse may be to argue for a right to self-government under section 35, either in the Courts or through the political process envisioned by section 37.1 of the Constitution Act,1982, as amended by the Constitutional Amendment Accord,1983.

c. Self-government and Comprehensive Land Settlements

The land claims process has allowed natives a new opportunity to retain powers of self-management in a number of vital areas. These accomodations by the governments appear to be granted to encourage a settlement, and thereby to ensure that remaining aboriginal title is extinguished. The last decade's land settlements provide important role models for the native peoples of the south who may wish to emulate their provisions for native local government, but often lack the valuable bargaining lever of unextinguished aboriginal title.

The James Bay and Northern Québec Agreement showed the benefits and potential problems for natives seeking self-government through a land settlement. The Cree and Inuit had to deal with two levels of government in Québec and Ottawa. The compromise between the various parties' interests was in some cases to establish native self-government on the model of Québec's municipal institutions, and in others to retain reserve

style government but not subject to the Indian Act's provisions.(208) Similarly Cree and Inuit school boards and health councils were established to provide social services, but which come under the jurisdiction of provincial ministries.(209) The shared game regulation regime between natives and the province is another example of a bilateral mechanism.(210) The agreement, and the structures it creates, represent a compromise between the reticence of the governments to relinquish any control and the desire of the natives to completely control their development.

Even greater problems are faced by native groups which wish to establish ethnic governments for their territories. The compromise for the Inuit of Northern Québec was to accept non-ethnic political structures in return for greater local government powers. In a sense the sacrifice was not a major one since their isolated location ensures that Inuit will be the majority of the area's population. This may not always be the case in the North and the Inuit people of the Eastern Arctic have long argued for their own territory called Nunavut.(211) The Federal government has always refused to consider an indigenous province or territory, although it is willing to seriously consider structures of public government which would essentially serve the same purposes in the Eastern Arctic.(212) Recent moves towards splitting the Northwest Territories to create an Eastern Arctic territory with an Inuit majority appear to be moving in this direction.

While there have been significant steps forward in the field of aboriginal self-government, it appears that the native peoples and the governments of Canada have failed to agree on a theoretical framework to analyse their sometimes competing interests. Natives argue that they have an inherent right to self-government and the land claims process

only determines the structures best suited to their needs and acceptable to the dominant society. The government attempts to divorce the issue of expressly inherent self-government from the land claims, and instead proposes structures in the land settlements which will allow native input into decision making in the North. The inclusion of structures of native autonomy in land claims agreements apparantly is to expedite the process rather than to acknowledge an inherent right to self-government. This difference of views may produce problems in practice. For example, the potential conflict over ministerial power to over-rule the decisions of administrative boards created by land settlements.(213) In such a case the natives could argue that the boards represent the fulfillment of their right to self-rule, while the government would view them as adjuncts to its own structures.

To the present, however, the land settlements have produced the most feasible models in existence for native self-government. The success of the James Bay and Northern Québec and North-Eastern Québec Agreements attest to the value of these mechanisms even if they do not expressly recognize inherent rights to aboriginal autonomy.

d. Self-Government for Native First Nations: The Penner Report

The report of the House of Commons' Special Committee on Indian Self-Government argued for the creation of institutions of native self-government within the present constitutional framework. The Committee viewed such measures, however, as interim until a constitutional solution could be found for the native self-government issue.(214) Federal legislation to increase self-government would avoid

the immediate necessity of a third level or order of government separate from the Federal and provincial levels, which likely requires an amendment to the Constitution. The previous Federal government responded to the Report in early 1984, and introduced framework legislation in June 1984 to ensure increased self-government to Indian groups.(215) The legislation did not survive the life of that Parliament, but the current government has not indicated a major shift in policy in this area.

The Federal government's response to the Penner Report was largely positive, and its published statement said

> "...In the immediate future, the Government is prepared to proceed with the primary thrust of the Special Committee's recommendations, that the Government, in concert with Indian First Nations and in consultation with Provincial Governments, develop legislation to provide for the recognition of the status and power of Indian First Nation Governments."(216)

The lengthy Preamble to the framework legislation included statements that

> "...Parliament and the government of Canada recognize and affirm a special responsibility in respect of Indians and lands reserved for Indians..." and
> "...are committed to the preservation and enhancement of Indian rights and culture and to the economic development of Indian communities" (217)

The Preamble also noted that

> "...Indian communities in Canada were historically self-governing..."

and that

> "...Parliament and the government of Canada are committed to continuing and strengthening Indian governments on lands reserved for the Indians by providing for the recognition of the constitutions of Indian Nations and the powers of their governments..." (218)

These statements represent an important new direction in Canadian policies towards its aboriginal peoples in terms of autonomy. They remain only statements until the legislation is re-introduced to

Parliament but the new government of Canada has not indicated that it will abandon the essence of the process. In the meanwhile, natives remain within the legal and political system already described.

The primary goal of the native peoples is to increase self-government. Particular priorities are for greater control in education, social welfare, and land management. These are matters partly or entirely within the provincial jurisdiction, although there is the option that the Federal government could occupy any particular constitutional area as legislation dealing with Indians and their lands. This option has not so far been used. The Federal government has encouraged native self-control, while at the same time avoiding potential conflicts with provincial jurisdictions, by individual agreements with provinces.(219) These will ensure that provincial governments do not interfere with native institutions, and the two can meaningfully interact where jurisdictions overlap. The scope of the problem can be appreciated if one considers the problem created by Federal-provincial power sharing arrangments and their attendant disputes. As a related but alternative route native organizations have attempted to have at least a statement of principles related to self-government enshrined in the Constitution. However, there are several provinces which have refused to agree either on principle or until after a lengthy study of possible inter-jurisdictional disputes.(220)

Concern can be expressed with the apparent lack of a theoretical framework to analyse the process. On one hand the Canadian government publicly announced that it wished to fulfill the native demands for self-control. As noted elsewhere, the previous government proposed legislation for that purpose. However, questions and uncertainty remain regarding the proposed native governments' powers, since any Federal

legislation can only delegate jurisdictional powers available to the Federal Parliament under the Constitution down to native political units. Inherent powers of government or jurisdiction for the native units under the legislation proposed in 1984 seem to have been carefully worded in language capable of differing interpretations.(221) While the 1984 legislation did not receive passage by Parliament, the current government has not indicated a major shift of priorities in the field of native self-government. Thus, the concerns with the previous proposal may arise again if the government of Canada introduces similar legislation in future. This could mean that future political institutions created by such a process will be limited by the constitutional powers of the Federal Parliament. Perhaps ever more importantly, structures created or recognized by such legislation may be forced to rely on the majority's moral and political good-will to ensure meaningful autonomy for the indigenous minorities.

4. CONCLUSION

a. Response of Canada to Claims of Indigenous Peoples

There is a new willingness on the part of some levels of government to address the concerns and claims of the indigenous population. However, that willingness may be as ephemeral as a particular government. It is a truism to state that the interests of a minority are not always the priorities of the majority. In addition, the claims of the native peoples are difficult to conceptualize for both politicians and the public. Finally, the costs may be large in terms of both jurisdictional spheres for governments and the economic price of compensation and development aid.

Even with the advances made in the past decade to answer native claims there are many areas which still cause concern. The apparant stalemate or difficulties over the issue of self-government is seen by some native groups as indicative of the lack of long-term will on the part of the governments of Canada to meet their needs. In addition, all the matters discussed above involve a balance of benefits and drawbacks for native peoples as rights are recognized, but must be expressed within paramaters imposed by the dominant society. The points raised in relation to self-government may return to trouble both the native and dominant societies in future decades as the lack of a theoretical framework becomes evident.

An underlying problem with the present process of native-Canada interaction is its failure to coherently analyse the issues. This is particularly evident in the area of economic autonomy for natives, both in terms of adequate land bases and financial support, either through

resource use or government fund transfers. For the most part the native-Canadian economic relationship as it relates to land continues to be delineated by legal concepts developed since the earliest European contacts. They are increasingly inadequate to meet native economic needs. In the 20th century the indigenous peoples of Canada are often faced with concepts drawn from as long ago as colonial practice of the 16th century which they perceive as impeding their development. For example, the question of aboriginal title or the native interest in reserves in Canadian law owes more to 19th century jurists than to the economic reality of most natives. Thus, native claims to an adequate economic land base for development are stymied by arguments that the land cession treaties were final, although many natives stress that their lack of land and resources relegates them a marginal economic position in society.

The concepts of minority-majority interaction inherent in previous relations between natives and Canadians are seemingly inadequate in a world where minorities demand increased rights to autonomy. The problem is most evident in the area of self-government and the collateral issues such as the power to determine membership in indigenous groups. However, it also appears in terms of the economic development of these populations. To some degree the Canadian response to claims for self-government and other elements of autonomy has been uncertain and uncoordinated. This results in the claims of various indigenous peoples in different parts of the country being addressed differently. Where land claims are possible there is some effort to consider claims to autonomy and economic development as a whole but it is not entirely satisfactory. The legislative process proposed for Indian First Nations is a significant move forward, but it is accompanied by its own concerns, such

as inherent jurisdiction. However, the problems faced by the Metis highlight the underlying failure of Canada to consider the essence of the process. Without a discrete territorial base with unextinguished aboriginal title, and their possible exclusion from any legislative process based on Indian First Nations, they are in the position of being "aboriginal" under the Constitution Act,1982 but unable to exercise powers of autonomy recognized for others.

It is possible that problems will arise from decisions on native autonomy made without considering their relation to one another, and in consequence their future effects. In recent years Canada has shown increased sensitivity to native concerns, and a greater willingness to provide a certain degree of self-control over their development to natives. However, the lack of an over-all approach which draws together the political, social, cultural and economic aspects may only create further conflict.

b. Need for International Guidelines for Domestic Settlement of Indigenous Issues

The concerns of the native peoples have not been fully addressed within Canada's domestic institutions and laws. There appears to be no coherent theoretical framework for native efforts to achieve greater autonomy with Canada. It is therefore suggested that both parties to the process, the native peoples and Canada, should look to the international sphere for a new framework.

It is also important that natives convince the governments of Canada that their concerns involve more than purely domestic issues and are part

of the wider picture of human rights. Canada prides itself on its participation in the development of the international law of human rights and native peoples could seek inspiration from this avenue. From the Canadian government's perspective it is in their interest to ensure that there is a coordination between domestic policies towards the indigenous minorities and the human rights standards that Canada defends internationally.

The discussion which follows examines international law from the perspective of the native peoples of Canada. The primary focus will be on norms concerning individual and collective human rights which have evolved over the 20th century. The essential concern facing Canada's indigenous peoples is their right to be acknowledged as different and to fulfill their right to autonomous structures. It is suggested that support for these claims can be found in the international law of human rights.

II. INDIGENOUS POPULATIONS AND THEIR STATUS IN INTERNATIONAL LAW

Introductory Observations

Within the present century it was assumed that no entity other than a State could possess status in international law. However, since World War II the trend is clear that entities other than States can possess standing. The process has been most evident in the growth of the international law to protect human rights which has raised the interests of the individual to the level of inter-state affairs.

While organizations of states, states, and in some specific cases individuals, possess standing in international law, the situation of a collective of individuals is somewhat more nebulous. References to "peoples" are numerous in international instruments like the Charter of the United Nations. However, they are generally refering to States, and it can be misleading to interpret them to include minorities.

Indigenous populations as collectivities have been dealt with by international publicists and state practice for centuries. The discussion below considers how these peoples were dealt with by international law until relatively recent times. Those aspects of the international law of individual human rights relevant to the concerns of indigenous peoples will be discussed. Finally, the treatment of national minorities in international law and its application to indigenous populations will be considered. It will be shown that while certain protections exist in international law they are insufficient either in content or practice to address all native concerns.

1. INDIGENOUS POPULATIONS IN TRADITIONAL INTERNATIONAL LAW

Initial contacts between Europeans and the natives of the Americas occurred well before the 15th century, and by the 17th century several legal responses had been formed. Since Spain was the first of the European colonial powers to encounter the native inhabitants of the Americas, Spanish policies will be considered first. Early French policies in North America followed equivalent paths. Subsequent British expansion adopted similar legal approaches before an extensive English colonial practice was established.

One line of thought viewed the lands of North America as *territorium nullius* -devoid of state sovereignty and open to occupation by the Europeans. Another was to view the absorption of American lands into the European colonies as an act of conquest. A third view of the relationship was that the natives possessed some form of sovereignty but it was imperfect and permitted the European Crowns to establish their rule over the New World through discovery and effective occupation. A final justification for colonial rule was that the natives were a backwards people in need of protection and guardianship. These doctrines, and their evolution in modern international law or demise with the passage of time, are discussed below. It should be noted, however, that even where certain doctrines are no longer accepted in international law they remain in the domestic practice of States.

a. Native Lands as Territorium Nullius

(1) Traditional Views

To appreciate the theoretical framework for the Spanish conquest and rule in the Americas it is necessary to recall that the 1490's saw both the final expulsion of the Moors from Spain and the first Spanish colonies in the New World. Some writers of the 19th century claimed that medieval jurists regarded the Americas as territorium nullius ie. devoid of inhabitants with reason and open to usurpation by any discovering sovereign.(222) However, more recently scholars have proven this assumption about medieval attitudes to be incorrect.(223) More commonly European sovereignty was justified by a mixture of religious and legal doctrines adapted to the conditions of the New World. Thus, by the 16th century, the Pope and leading Spanish theologians acknowledged that American natives possessed reason.(224) As men endowed with reason they could exercise sovereignty over their lands and rule their own affairs. In practice this did not prevent the Spanish colonial expansion but it did alter the legal justification for it.

Related to territorium nullius was the doctrine that nomadic peoples did not possess adequate sovereignty to repel a more effective European occupation and use of the lands. M.de Vatel (1758) commented in his Law of Nations, with reference to nomadic peoples who did not till their lands,

> "Those who still retain this idle life, usurp more extensive territories than they would have occasion for, were they to use honest labour, and have therefore no reason to complain if other nations more laborious and too closely confined, come to possess a part. Thus...the establishment of many colonies on the Continent of North America may on their confining themselves within just

boundaries be extremely lawful."(225)

(11) Effect of Western Sahara Case

In the Western Sahara case the International Court of Justice considered questions posed by the General Assembly with respect to Spain's plans to decolonize the western Sahara. One issue was whether at the time of the Spanish colonization in the 1880's the territory was territorium nullius. The lands were traversed by nomadic peoples who had transigent political contacts with the Empire of Morocco and the "entity" which had preceded modern Mauritania.

The Court held that the Saharan tribes did not possess sovereignty in the international sense. However, it admitted that their political units had considerable autonomy from both regional powers. Accordingly the territory could not be termed territorium nullius. At paragraph 80 the Court states

> Whatever differences of opinion there may have been among jurists the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as terrae nullius. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of terrae nullius by original title, but through agreements concluded with local rulers."(226)

The Court went on to comment that the word "occupation" was often used in a non-technical sense and meant the simple acquisition of sovereignty. The agreements with local rulers were regarded as derivative roots of title to the lands, and were not original titles obtained by occupation of empty territories.

The importance of the decision is that it lays to rest the theory that Canada was ever territorium nullius. All parts of what would become

Canada, with the possible exception of some Arctic islands, were traversed by the natives or were subject to their political control. This meant that the French and British colonial Crowns did not occupy a vacuum but displaced an existing sovereignty, albeit one exercized by entities less than States.

b. Natives as Conquered Peoples

Claims of conquest over native peoples were based on the concept of "just war" waged against infidels by the Christian Princes of Europe. It was an important basis for Spanish rule in the Americas although neither France or Britain extensively relied upon it in Canada. However, the works of Spanish jurists of the 15th and 16th centuries indicated that even the Spanish had doubts about this basis for their rule.

Terrible abuses of the natives of the Carribean in the early years of Spanish rule led several leading theologians to attack the assumptions behind Spanish claims to sovereignty.(227) A leading theoretical defender of the Indians, Francisco de Vitoria, in his De Indis et de Jure Belli Relectiones, systematically repudiated all Spanish justifications for their rule in the New World - including conquest in a "just war".(228)

Hugo Grotius in Mare Liberum (1609) followed the views of Vitoria.(229) Puffendorf (1672) interpreted Grotius' comments in his De juri belli et pacis (1625) to mean that sovereignty over lands and property could be seized by the Europeans either through conquest or occupation but the same did not apply to sovereignty over men. Puffendorf noted that

> "The way of acquiring sovereignty by violence is usually termed occupation or seizure; which yet we must observe to be different from that by which we lay hold on things that want a proprietor, and thus make them our own...but since every man is, by nature, equal to every man, and consequently not subject to the dominion of others, therefore this bare seizing by force is not enough to found a lawful sovereignty over man, but must be attended with some other title."(230)

c. Extinction of Native "Sovereignty"

Regardless of the legal justification for European occupation, Canada's native political units were unable to resist the colonial Crown's power. This extinction of native sovereignty must be considered in two senses - the end of independent native political entities with international status, and the effect on their powers of "internal" sovereignty or self-rule.

Reference has already been made to the decision of Campbell v. Hall relating to British practice towards inhabitants of newly acquired colonies. Similar policies were adopted towards the native inhabitants of Canada. In the Royal Proclamation of 1763 the Crown recognized the property rights of the Indians and declared that they were not to be disturbed except by the Crown.(231) It can be argued that like the co-existence of Crown title and native possession of land, the "internal" sovereignty of natives survived the arrival of the Crown's "external" sovereignty.

Chief Justice Marshall stated in the early 19th century that the indigenous nations lacked sovereignty in the sense of States. However, he accepted that they retained certain aspects of sovereignty such as self-government by virtue of their "dependent" status. This doctrine has

remained a mainstay of judicial reasoning in the United States.

It can be argued that native political units in the period of colonization never possessed international status in the contemporary international law. However, while they may not have been recognized as equal and sovereign States by the Europeans, it can also be argued that international law accorded some kind of status for indigenous political units. The stage of development of each native society, and the particular policies of a European colonial power, would of course bear heavily on the discussion. For example, evidence of the social organization of natives in the Sahara and the colonial practice in the late 19th century were both considered by the International Court of Justice in the Western Sahara Case cited above. A full consideration of the status of aboriginal native units in international law from the Middle Ages to the present is beyond the scope of the present discussion.

However, the proposition that native nations were entirely terminated by the imposition of the colonial power is incorrect, whatever their status may have been in international law at any particular point in time. While it is accepted that these entities lost whatever attributes they may have had as international political units, it should not be assumed that all aspects of sovereignty were removed. Therefore, the task for domestic law is to consider what aspects may have survived the process of colonization.

d. Natives as "Non-civilized" Peoples in Need of Guardianship

Vitoria disproved the legal legitimacy of Spanish rule in the New World. However, with regard to the Spanish Crown's de facto sovereignty over these regions he wrote

> "...it is evident, now that there are already so many native converts, that it would be neither expedient nor lawful for our sovereign to wash his hands entirely of the administration of the lands in question."(232)

Implicit in his words is the concept that Europeans owed a duty to less advanced peoples of the world. The duty's earliest roots lay in the religious obligation to spread Christianity and thereafter to protect the converts from infidels.

The concept was in considerable vogue during the high point of colonialism in the 19th century and was popularized as the "white man's burden". During this period it came to be known as the "sacred trust of civilization" imposed on the colonial powers granting them the right to rule colonial territories and peoples. In return for colonial rule such peoples received benefits of social and cultural advancement. An English international jurist in the present century wrote

> "Governments and peoples at home have been more and more concerned with the general welfare of the natives under their control. Their professed aim has been to raise them in the scale of civilization, and furnish them with the mental and manual training and the material equipment necessary to enable them to improve their conditions; and the duty of the advanced towards the backward races has come to be expressed as that of a trustee towards his cestui que trust, or of a guardian towards his ward."(233)

The goal of such a trust was less clear although some measure of self-government was accepted as an endpoint of the process.(234)

International instruments of the late 19th and early 20th centuries recognized the importance of the "sacred trust". It was included in the

Brussels Act of 1892 to combat slavery and the Convention of St.Germaine of 1919.(235) Furthermore, the declarations of the European colonial powers at the 1885 Berlin Conference on Africa indicate that the concept had become more than merely a moral precept by the end of the 19th century.(236) Its status as a principle of international law binding on colonial powers was accepted by some jurists of the early 20th century and it is noteworthy that it was included as a guiding principle in the Mandates Article of the Covenant of the League of Nations.(237)

The "sacred trust" was apparantly directed towards self-government within global empires. For example, the British Empire provided some measure of home-rule for the peoples of Asia and Africa as the 20th century proceeded and prior to widespread demands for independence. In its international legal sense the "sacred trust" later came to be regarded as an integral component in the evolution of self-determination. Judge Nervo in the South-West Africa cases pointed this development out.(238) However, within the North American context the meaning was less clear as the concept was divorced from its earlier applications. Certainly it was viewed as the guiding principle of government policies towards the natives in order to ameliorate their condition. In most states of the Americas the "sacred trust" represented the need to advance the Indian by integrating him into society as an equal citizen.(239) In the words of Chief Justice Marshall, speaking of the relationship between the Indians and the United States in 1831,

> "They are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."(240)

However, these roots and its recent permutation as an integral part of colonial practice should not detract from the impact of the "sacred trust" in non-colonial situations. As noted by one writer speaking of

the duties of trusteeship under the League Mandate system,

> "...the duties of trusteeship are no less imperative in non-mandated than in mandated backward territory for a colonial Power that wishes its actions to be judged by modern standards follows from the evidence marshalled (here).."(241)

It should be noted that there is an implicit reference to "non-civilized peoples" in Article 38(c) of the Statute of the International Court of Justice. It refers to general principles of law accepted by "civilized nations". The subjective element in this reference is evident if one recalls the enormous numbers of states which have succeeded in being acknowleged as civilized in the last century. The process has been particularly effective in the period of decolonization since World War II.(242) The process by which peoples are protected until they are "prepared" to determine their own destiny is also evidenced in the existence of both the Mandates Trusteeship System under the League of Nations and the Non-self Governing Territories System of the United Nations. In all of these instances peoples which were once considered as "uncivilized" and incapable of managing their affairs were able to escape this nomenclature and take their place among the world's states.

Canada's indigenous peoples were also denied recognition as States or civilized peoples on the basis of their level of development. As a result they have been economically marginalized and suffered considerable social deprivations. However, no one could argue that they are incapable of managing their own affairs. Like the larger principle of self-determination, the "sacred trust" has not been fully satisfied on the national level, as it has been in the international sphere. Canada's natives do not wish to pursue the "sacred trust" to achieve independence, but arguably Canada retains a duty to fulfill the trust and end the lengthy period of tutelage. At the same time the indigenous peoples have

not forgotten the promises given to them that their autonomy would be respected in relations with the colonial sovereigns. These two principles provide a cogent argument for increased autonomy for Canada's indigenous peoples.

Certain obligations created by the sacred trust remain in place and in the context of the colonization of the New World it is submitted that:

(1) European policy in the Americas allowed native political units to retain their autonomy along with certain aspects of "internal" sovereignty not specifically denied or superseded by adverse policies of the Crown

(2) the "sacred trust" doctrine was applied to the Indian nations to ensure their advancement and eventual integration into the new states of the Americas, but elsewhere in the world the doctrine was applied to advance peoples towards a goal of self-government in the earlier part of this century, and later to full independence.

(3) while the "sacred trust" was inherently racist, it is of some benefit to Canada's natives, since they were considered as backwards and in need of guardianship, but should now be entitled to claim the benefits of the "sacred trust".

In terms of domestic policies this could provide native peoples with a strong argument for rights to adequate social and economic development and respect for their political claims. Most other "backwards" peoples were eventually accorded a position of equality which respected them regardless of their stage of development. The indigenous peoples of the New World were not given an opportunity to follow suit. The fulfillment of the "sacred trust", or the maturation to the status of a civilized nation, entailed independence for most peoples. It is suggested, however, that alternative mechanisms exist which are already provided for in the

international theory of human rights and the structures possible in domestic law.

2. INTERNATIONAL LAW OF HUMAN RIGHTS AND INDIGENOUS POPULATIONS

a. United Nations Experience

The terrible abuses of human rights immediately before and during World War II attracted the world's attention to the close relationship between peace and human rights. The failure of the League of Nations to prevent that costly conflict was keenly felt by those who set about to create a new international organization after the war. Whereas the League of Nations had generally avoided the issue of human rights, with the notable exception of the minority protection system, the United Nations did not intend to repeat the mistake. (243)

The inclusion of extensive references to human rights in the Charter of the new organization was testimony to this change in world opinion. Within a few years of its creation, the organization had written the important Universal Declaration of Human Rights and laid the foundations for the Human Rights Covenants.

While the League's attention to human rights had concentrated on certain European minorities, the post-war world had very different priorities. For various reasons the attention of the United Nations immediately after the war shifted away from collective interests and concentrated on the protection of the individual.(244) In part this corresponded to the pre-eminence of the United States in the early post-war period with its traditional protection of individual rights and freedoms.

The discussion which follows briefly describes and discusses the general provisions on human rights which exist under the auspices of the

United Nations. While the focus of this thesis is on the collective interests of indigenous populations, it should be noted that the rights and freedoms accorded to individuals by domestic and international law are part of such protection. The trend for several decades after World War II was to concentrate on the interests of the individual, often to the detriment of non-State collective interests. This pattern is changing and there are signs of a renewed interest in minority affairs. While the advances made in the area of individual protections are important, they may not always satisfy the demands by the collective identity of an individual minority member.

(1) United Nations Charter

The Charter makes extensive references to human rights in both the Preamble and the substantive text.(245) What constitutes the rights ensured to all men and women without discrimination is not entirely clear, although some writers argue that the Universal Declaration of Human Rights serves as an interpretive tool for these references.(246) An important contribution of the Charter was its recognition of the universal application of human rights and freedoms and the dangers posed by discrimination. The connection between human rights and the preservation of international order and peace is also implicit in the words of the Charter.(247)

The importance of the Charter's human rights provisions was recognized by the International Court of Justice when it condemned South Africa for its racist policies in Namibia.(248) In addition, the General Assembly has frequently used the Charter as the basis for criticism of various states for human rights abuses. Even before the adoption of the

Universal Declaration of Human Rights, the General Assembly pointed to the Charter as the source of human rights obligations on the Member States. The first instance was the complaint of India against South Africa's treatment of its Indian citizens. The General Assembly adopted a resolution referring to the failure of South Africa to fulfill its duties under the Charter.(249) Another example was the so-called "Russian Wives" case in which the Soviet Union was criticized for its laws concerning Soviet citizens' rights to marry foreigners and emigrate.(250)

Charter prohibitions of discrimination are useful to indigenous groups which may suffer from such behavior. The Charter provisions served as valuable precedents for the later work of the United Nations in the area of racial discrimination. As a general comment, the problem of racial discrimination is complex and the solutions equally varied. While the Charter merely noted the importance of non-discrimination on a number of grounds it opened the door for many valuable instruments which have approached the problem in greater detail. The later work has attempted to design methods for improving the situation of groups which have been discriminated against. These programmes have been significant contributions to the protection of minority groups.

In a document of international scope like the Charter there is no direct reference to indigenous groups, or minorities at all for that matter. However, in light of the persecutions of indigenous peoples in several countries any documents which advance the general cause of human rights must be viewed with favour. In Canada the domestic commitment to human rights is high at all levels of government. The threats to the basic human rights and fundamental freedoms of native peoples in this country are not great, but unfortunately the situation is not as positive in other regions. It is in those areas that documents like the Charter

are most useful.

(ii) Universal Declaration of Human Rights

The Universal Declaration is viewed by some as a tool to interpret the Charter's human rights obligations. Other writers view the Declaration itself as the source of such obligations, and argue that at least some of its provisions now constitute customary law.(251) The Declaration makes no direct reference to minorities although an earlier draft prepared by the Secretariat did include such an article.(252)

The importance of the Declaration to the world-wide protection and growth of human rights has been discussed on many occasions. It has contributed to the raising of standards for basic rights and freedoms around the world, and indigenous persons have benefited along with other citizens of their countries. In a country like Canada these protections served as models for our domestic human rights systems which have already achieved a high degree of efficacy.

The Universal Declaration concentrates on the protection of the individual, but there are several articles of particular interest to indigenous groups. For example, the freedom of association is extremely important for indigenous groups who rely on their collective identity to ensure their survival.(253) The extreme poverty of many Canadian natives indicates the failure of our society to fulfill the social and economic rights referred to in the Declaration. Likewise the right to culture in Article 27 is empty if it is restricted to the right to take part in the majority or official culture. Property rights under the Declaration refer to the "right to own property alone as well as in association with others" and the right not to be arbitrarily deprived of it.(254) All of

these rights are of particular interest to indigenous communities around the world.

(iii) Human Rights Covenants

The International Covenant on Civil and Political Rights elaborates on many of the rights contained in the Universal Declaration. Early drafts of the Covenant inspired the words of the European Convention on Human Rights, which was a model for at least parts of the new Canadian Charter of Rights and Freedoms. The significant change in the Covenant from the Universal Declaration was the inclusion of Article 27 and the protection it accords to the members of national minorities. The meaning and effectiveness of this article are discussed at a further point in this thesis. Major advancements by both Covenants over the Declaration were their implementation mechanisms and the creation of treaty obligations on States.

The International Covenant on Economic, Social, and Cultural Rights broke with the liberal-democratic tradition of human rights descended from the Declaration of the Rights of Man of the French Revolution. Instead it owed its ancestry to the 19th century Gotha Declaration of the German Socialists and the special attention given to these rights by 20th century socialists and communists.(255) The Universal Declaration contained reference to many of these but the treaty Covenant went further. It commits governments to work progressively to attain specific goals of social, economic, and cultural stnadards. These include rights to education, protection of the family, employment opportunities, health care, social security, and labour related rights.(256) Based on the principle that the citizen can expect certain programmes from his

government is an important contribution to the field of human rights. For indigenous peoples plagued by illiteracy, unemployment, and general poverty the Covenant identifies goals to be achieved. Equally important are the State commitments created by the treaty to direct national policies in those directions.

In Canada the under-development of many native communities in contrast with the majority stands as an indictment of national policies which have failed to correct these problems. This is particularly so in light of the obligations Canada undertook with the treaty and the generally high standard of Canadian life. Statistics indicate that most native peoples have educations, incomes, and life expectancies far inferior to those of the average Canadian.(257) The Covenant on Economic, Social and Cultural Rights serves as a standard against which to measure this failure.

(iv) Conflict Between Individual and Collective Rights

An inherent conflict exists between the interests of the individual and his community. One is an autonomous unit and the other is the summation of many individuals' interests. The theory of human rights has attempted to find structures to resolve this conflict.(258) In the case of an indigenous individual the problem is two-fold since his interests must be balanced against both the dominant society and of his own indigenous group.

In Canada these problems have become evident in the protracted negotiations over land settlements. On one hand the indigenous society wishes to preserve and consolidate its political, economic, social and cultural autonomy. At the same time the dominant society must consider

its own collective interests and the economic and jurisdictional costs of a land settlement. This is an example of the conflicting interests possible between two groups.

The conflict between individuals and both dominant and indigenous groups has also occurred in Canada. The failure of indigenous groups to agree on the elimination of sexual discimination from the Indian Act is one example. Some native communities feared that the legislated return of "status" to an estimated 23,000 women and 40,000 children would create unacceptable economic burdens.(259) Native women found themselves in disagreement with both the government and their own communities. However, in 1984 the Assembly of First Nations, which had previously prevented a resolution of the reinstatement issue, finally agreed in principle that they would participate in the government's plans to amend the legislation.(260) This does not automatically remove the barriers to the amendment of the statute but at least now all parties are in agreement that the changes should be made.

The incident highlighted the potential conflicts between the interests of the native individual and his collective identity. Similar problems can be anticipated when self-government is extended to indigenous groups. They will be given the right to establish membership criteria and procedural rules for their systems of government. Individuals may find themselves in conflict with the rules and interests of their own native communities. This has already occurred in the United States where the unilateral imposition of the Indian Civil Rights Act still creates problems.(261)

The United Nations' early concentration on the concerns of the individual has now shifted. There is now a greater appreciation for collective concerns. This brings new dangers since governments are

always ready to limit individual rights in the State-defined interests of the collectivity. However, the process has not benefited the minority community, which has found itself largely ignored from both perspectives -the individual's and the dominant collectivity's. What is needed is a new theoretical formula to balance the sometimes competing interests of the minority community with both its own members and the majority society.

b. Regional Experience - Organization of American States

Under its umbrella of activities and organs the Organization of American States involves Central and South America, the United States, and much of the Caribbean. The methods adopted by the OAS to protect human rights and freedoms in the region do not differ significantly from the United Nations'. However, the region is of particular interest due to the large indigenous populations in nearly all states of the region outside of the Caribbean. As a result the region has so far been unique in its attempts at a common response to what was perceived as a common minority "problem".

This section will discuss the regional response of Spanish America to the issue of human rights, and more specificially to the problems of the region's indigenous populations. It is presented for two reasons; while Canada is not a member of the various hemispheric organizations it has expressed interest in OAS organs relating to human rights. In addition, regional standards for the treatment of aboriginal minorities would undoubtedly influence international standards.

(i) Regional Human Rights Instruments

(1) Charter of Organization of American States

The 1948 Charter of the Organization of American States contained an article that the "American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex."(262) The Charter did not elaborate on the rights available to the individual or provide for a mechanism for their enforcement. Also adopted at the Ninth International Conference of American States in 1948 was the American Declaration of the Rights of Man which is discussed below.

The Charter was extensively amended in 1967 with enlarged provisions on human rights.(263) The new Charter includes principles on social rights, the importance of economic prosperity, the fundamental rights of the individual without discrimination, and the "spiritual unity of the continent based on respect for the cultural values of the American countries..".(264) The treaty obliges member states to work progressively to fulfill the principles enunciated.

Of particular interest to indigenous minorities are provisions which deal with anti-discimination, the recognition of the importance of organizations, and the need to incorporate the marginal sectors of the population

> "...in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system."(265)

While Indians benefit from many of the provisions some could be viewed as counter-productive for groups concerned with separate but equal

development from the majority.

(2) American Declaration on the Rights and Duties of Man

The 1948 Bogota Conference of American States proclaimed the American Declaration of the Rights and Duties of Man.(266) Another resolution of the conference was the Inter-American Charter of Social Guarantees.(267) There is debate concerning the status of these resolutions since the Conference itself denied their obligatory status and stated that they did not elaborate on the human rights provisions in the O.A.S. Charter.(268) However, they were publicly supported by government delegates in a regional forum. For Indians the most important aspects of the Declaration are the two articles which deal with the right to equality and personality before the law. However, these do not significantly augment standards found in United Nations instruments.

(3) Inter-American Charter of Social Guarantees

The Charter of Social Guarantees has more explicit reference to indigenous populations. Article 39 reads

> "In countries where the problem of an indigenous population exists, the necessary measures shall be adopted to give protection and assistance to the Indians, safeguarding their life, liberty, and property, preventing their extermination, shielding them from oppression and exploitation, protecting them from want and furnishing them an adequate education.
>
> The State shall exercise its guardianship in order to preserve, maintain and develop the patrimony of the Indians and their tribes; it shall foster the exploitation of the natural, industrial, or extractive resources or any other sources of income proceeding from or related to the aforesaid patrimony, in order to ensure in due time the economic emancipation of the indigenous groups.

> Institutions or agencies shall be created for the protection of Indians, particularly in order to ensure respect for their lands, to legalize their possessions thereof, and to prevent encroachment upon such lands by outsiders."(269)

(4) American Convention on Human Rights

The Convention augments and creates procedures for the implementation of the rights and freedoms it recognizes. There is an extensive section on civil and political rights while economic, social, and cultural rights are covered only by a general undertaking to achieve progressively the standards set forth in the O.A.S. Charter of 1967.(270)

Most importantly the Convention formalizes the existence of the Commission of Human Rights which had previously functioned as the creation of a resolution of O.A.S. Foreign Ministers Conference in 1959.(271) In addition, the Commission's jurisdiction and functions were enlarged to allow for a petition system akin to the European model, and a new Inter-American Court of Human Rights was created.

The substantive portions of the Convention do not significantly add to other international standards such as the Universal Declaration of Human Rights. Its importance lies in the existence of a regional human rights treaty with a formalized system of implementation. With respect to indigenous people there are no important additions beyond the reinforcement of the respect for rights and freedoms without discrimination.

(ii) Inter-American Human Rights Commission

The Commission's initial duties were to develop awareness of human rights among the peoples of the Americas and to make general recommendations to the collective OAS membership on progressive measures in favour of human rights.(272) It was also instructed to prepare studies or reports as it considered advisable and to urge governments to supply information on measures adopted by them on human rights. Finally, it served as an advisory body to the O.A.S.(273)

The Commission interpreted its mandate to include the making of general recommendations to individual states as well as the organization.(274) In addition, it claimed the right to study "situations relating to human rights" in individual states and to publish reports on violations.(275) In 1965 the Commission was empowered to receive individual petitions which dealt with specific rights, and this power is retained in an expanded form under the Convention. (276)

In 1972 the Commission adopted a resolution on indigenous populations which noted that

> "...for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the States..." (277)

It was the culmination of a process initiated by a UNESCO resolution inviting the O.A.S. to assist in the eradication of any kind of discrimination against indigenous populations.(278) During this period there was considerable debate on the abuses in Brazil's bureaucracy intended to protect the Indians. The physical suffering and cultural ethnocide of the Amazonian tribes in the face of economic development were widely known and debated at the time.(279)

The Commission published a report in 1973 on its ten years of activities. It contained a short summary of work with respect to the indigenous populations and noted

> "The constitutions of the American States proclaim these egalitarian principles in a general manner, but discrimination and differences of treatment resulting from a variety of complex economic, social, educational, and cultural factors subsist in the ordinary laws and in customs and practice.
>
> The right to life appears to be jeopradized in the case of certain indigenous communities which, because of their cultural backwardness, are unable to offer adequate resistance to rapacious settlers or intruders who covet their land and try to acquire it by the simple and direct procedure of eliminating its rightful owners. The laudable efforts made by some States to protect these indigenous populations should be an inspiration for others which suffer from the same problems."(280)

The Commission could clearly play a useful role as a regional conscience in these matters.

In addition to providing guidelines for national governments the Commission has supplied a forum to discuss specific cases. For example, in 1974 a complaint was registered against Paraguay based on the massacres and persecutions of the Ache tribe.(281) The Commission found that the massacres were not the result of official policies but resulted from poor supervision of isolated areas where individuals had created the troubles. It recommended that Paraguay take "vigorous measures for the effective protection of the human rights of the Ache" people.(282)

The Commission adopted a resolution in 1981 concerning the massacres of several Indian villages by the Guatamalan army after Indians expressed concern over agricultural rights,

> "Facing such divestment of land, the rural Indians have organized to fight for their legitimate rights. Every time the country's agricultural frontier is expanded, every time new territories are settled or given over to foreign companies for exploitation, the Indians are forced to abandon the land they have traditionally farmed and that

has belonged to them since late in the last century."(283)

The report for 1981 described the dismal poverty of the Indians of Guatemala and the gross disparity with the primarily non-Indians urban population.(284)

In the same year the Commission released a report on human rights in Columbia which found that military operations intended to fight guerillas were adversely affecting Indian villagers.(285) It recommended that special priority be given to Columbian laws designed to better the Indians' situation and to the norms of Convention 107 of the International Labour Organization.

At present, complaints against other countries involving Indians are before the Commission. Brazil faces allegations that it has abused the rights of the Yanomani Indians of the Amazon Basin.(286) The situation of the Moskito Indians in north-western Nicaragua has also been of concern since their relocation away from the border by the government.(287)

The Commission must work under the same limitations faced by other international commissions or committees designed to implement human rights standards. It gives governments the opportunity to respond to allegations but it cannot force them to participate in the process. Likewise, if a government fails to submit its reports on human rights measures then there is little recourse beyond exposing the fact. However, the Commission plays a valuable role in Latin America as an official forum for the discussion of particular cases and patterns of abuse. It faces enormous obstacles but, along with the new Inter-American Court of Human Rights and the Convention, it may ultimately raise the general level of human rights in the area. This can only help Indians and provide a valuable example to other regions.

(iii) Regional Standards for Treatment of Indians

The first Inter-American Congress on Indian Life met in 1940 in Patcuaro, Mexico at the request of a resolution of the 1938 Inter-American Conference and resulted in the Convention of Patcuaro. It established the Inter-American Indian Institute as a permanent committee for regional conferences on Indian life.

The Preamble of the Convention states that governments recognize that "the Indian problem is a question of interest to all America" and

> "...it is highly desirable to clarify, stimulate and coordinate the Indian policies of the various nations, said policies being construed as the aggregation of desiderata, standards, and measures that should be applied for integral improvement of the living standards of the Indian groups of the Americas."(288)

Governments pledge to cooperate in solving the problems of the Indians through regular consultations, the Inter-American Indian Institute, and the creation of national Indian Institues.

The Convention obliges state signatories to create national Indian Institutes to "stimulate interest in and furnishing information about Indian matters to any persons and to public and private institutions."(289) They have proven more important than this modest task would suggest since they were sometimes the first formal structures in some countries to deal with Indians in a sympathetic manner.

The Inter-American Indian Institute solicits and distributes reports on a range of issues including "recommendations made by the Indians themselves in regard to any matters of concern to their people".(290) Its other functions are to train national experts in the field of indigenism, coordinate seminars and conferences on aspects of Indian life, and to serve as a clearing house on information of a scientific nature relating

to Indians. Recently the Institute has called for a Five-Year Inter-American Action Plan with 22 progammes throughout the region designed to raise the standard of living of the Indian populations. The programme was approved by the 1980 meeting in Washington of the 8th Regular General Assembly of the O.A.S.(291)

Under the Convention of Patcuaro the Inter-American Indian conferences are held every four years, and

> "...shall be composed of delegates appointed by the members governments and by a representative of the Pan-American Union. An effort shall be made to include members of the National Institutes and Indian members among the staff of the delegations."(292)

By an agreement dated March 1953 between the Inter-American Indian Institute and the O.A.S. Council, the former was classified as a "Specialized Organization".(293) The Conferences themselves are considered as organs of the O.A.S. and are "Specialized Conferences" under the terms of the 1967 Charter.(294) These facts and the government appointed delegates lends a certain force to the resolutions of these conferences.

The list of matters covered by the nine conferences held to date has been extensive and will not be canvassed in detail. They have concerned general policy, the training and more effective use of specialists, the use of laws for the betterment of the Indians, agrarian reform, measures to ensure Indian participation in the political process, and improved social services and preservation of the Indian family.(295)

Some of the recommendations have been particularly sensitive to the needs of the Indians. For example, in the area of social change recommendations include methods for the preservation of indigenous culture and institutions, provision of general guidelines for community development, and economic programmes.(296) In education, recommendations

involve the greater use of Indian cultural norms and languages, emphasis on practical training and literacy programmes for children and adults.(297)

Both the Institutes and the Conferences have contributed in a positive manner to the evolution of higher standards for the treatment of Indians. They have increased the region's appreciation of the problems faced by the Indians and dealt with them as separate entities within independent states. Through the process the states of the area agreed to coordinate and improve their policies towards the Indians and this has served to raise the general level of treatment throughout the region. However, it should also be appreciated that the underlying philosophy has remained paternalistic and sought to impose external solutions onto the Indians. While raising Spanish America's consciousness of Indian conditions, the Institutes and Conferences have seen assimilation with national populations as the ultimate solution for the Indians. Where appropriate measures are taken to protect certain native characteristics such as language, these are viewed as interim measures along the route towards full integration in national life.

Despite these problems the process remains important for two reasons. The example of a regional approach to minority problems should not be lost on other areas where minorities cross international borders. Secondly, the process is an attempt at a more humane treatment of a minority which recognizes their distinct character and needs within an independent state.

3. TREATMENT OF NATIONAL MINORITIES IN INTERNATIONAL LAW

a. Minority Protection Prior to World War II

Minorities have been protected and exploited for both altruistic and cynical reasons for as long as state practice has been recorded. State intervention in the affairs of neighbours to protect ethnic fellows is a practice of long standing. In addition there have been many other incidents where the complaints of minorities have been heeded by states who then interceded with the governments involved. These interventions must not, however, be confused with international legal obligations on states to protect minorities. The discussion which follows considers what international standards of practice with regards to minorities have been created by the intermittent state practice in the area.

The European history of state protection of minorities in other states was largely limited to the protection of Christian minorities under non-Christian rulers. Examples are the 19th century warnings by France, England, and Germany to the Ottoman Empire concerning its treatment of Armenians and other Christian minorities.(298) The body of law dealing with "humanitarian intervention" arose from these efforts of European powers to protect members of minorities in other states. Some writers argue that there was a pattern of European behavior to indicate that the abuse of a minority, even by another Christian prince, was an adequate cause for state protest or intervention.(299)

The events of World War I fulfilled nationalist aspirations of several minorities. It is incorrect to say that the Versailles Peace Conference of 1919 represented the liberation of Europe's minorities,

since it merely acknowledged the de facto independence of several peoples who had previously been minorities. However, the war heightened awareness of the connection between the frustrated aspirations of minorities and threats to international peace and order. For this reason several of the peace treaties contained terms for the protection of minorities in the fields of language use in education and public administration, religious freedoms, and other specialized arrangements.(300)

The treaties were not universally applied, even among the defeated states. Instead, they were primarily applied to the newly created states of Central and Eastern Europe.(301) The supervision of compliance with the terms of the treaties was given to the Council of the League of Nations. The Council also oversaw state compliance with unilateral declarations before the League concerning minorities.

The treaties' importance is two-fold; they are significant as international recognition of the dangers to world public order created by the disatisfactions of minorities. In the words of United States President Woodrow Wilson

> "We are trying to make a peaceful settlement...to eliminate those elements of disturbance...which may interfere with the peace of the world, and we are trying to make an equitable distribution of territories according to the race, the ethnographical character of the people inhabiting those territories...Take the right of minorities. Nothing, I venture to say, is more likely to disturb the peace of the world than the treatment which might in certain circumstances be meted out to minorities,.."(302)

Furthermore, they are important as acknowledging the concerns of European minorities after World War I. The matters covered by the treaties were

(1) the right to education in the minority language and the expectation of state funding of such institutions as were necessary

(2) the right to minority language use in courts and other organs of public administration

(3) the right to institutions and organizations designed to meet the needs of minority communities

(4) the need for international supervision of state compliance with these rights.

The treaty standards were never applied outside of Europe, or even beyond the limited number of countries that they were imposed upon. However, the practice of the League of Nations Minority Secretariat was a valuable precedent for the effectiveness of international organs designed to oversee the protection of minority populations. In addition, the treaties recognized that there were certain matters of common interest to minorities created by their minority position. In these respects the inter-war minority system deserves some attention even in the present. While indigenous populations were never given the opportunity to benefit from similar protections the treaties serve as a useful example of international standards.

It is difficult to speak in absolute terms of any minimun protection for minorities before World War II. The very abuses of minority interests before and during that conflict argue against any international legal standards in the area. However, it could be argued that the humanitarian interest shown in the 19th century for Christian minorities and the protections for European minorities during the inter-war period created at least moral standards for the treatment of minorities. There is no doubt that Germany's treatment of its Jewish minority during the 1930's offended world public opinion. However, there were few arguments on the basis of international law to oblige the German Reich to act otherwise.

These problems were also faced by Canada's indigenous groups before World War II. There is the case of the delegation of the Iroquois Seven Nations Confederacy to the League of Nations in 1929.(303) The delegation intended to bring the grievances of the Seven Nations against Canada to the world community. The Confederacy succeeded in gaining support for their application from at least the Dutch and Ethiopian delegations to the League but the matter was quickly rejected by the Council. The failure of the Council to even consider the matter highlights the problems faced by minorities during this period. Aside from the fairly selective League Minority Secretariat there were no other alternatives for a public hearing of the complaints of a minority too weak to defend its interests with violence.

b. Convention on the Prevention and Punishment of the Crime of Genocide

A state's acts against its own citizens in peacetime do not come under the mandate of either the London Charter or the Nuremberg Principles.(304) This makes the existence of the Convention on the Prevention and Punishment of the Crime of Genocide particularly important since it is not restricted to time of war. Approved and proposed for signature and ratification by the United Nations General Assembly in 1948 it entered into force in January 1951. Most of the American states with indigenous populations, including Canada although not the United States, have ratified, acceded to, or given notification of their succession to the Convention.(305)

Article 1 of the Convention states that genocide, whether committed in time of peace or war, is a crime under international law. The

difficulties faced by the International Law Commission to create a mechanism to punish international crimes will not be addressed. However, Article 4 deems punishable any person who commits genocide or related crimes "whether they are constitutionally responsible public officials or private individuals."

Genocide is defined in Article 2 as acts committed with intent to destroy in whole or in part a "national, ethnic, racial or religious group as such" by a variety of means. These include physical destruction or injury, mental harm, the prevention of births, forcible transfer of children to another group, or deliberately inflicting conditions on the group calculated to bring about physicial destruction.

The question of intent was addressed by one writer in terms of American atrocities against Indians during the 19th century,

> "...it would appear to be a difficult task to prove that the United States acted with the requisite 'specific intent'. It has been argued that one can imply the mental element to commit genocide by circumstantial proof where a large number of victims have been affected. However, the contrary position seems to be the prevailing view..."(306)

In Canada there is little history of violent native-government interaction. The real danger to native communities has been official policies whose express purpose, or incidental consequence, was to assimilate them and destroy their collective identity. While assimilation involves a form of ethnocide, it can easily be justified as an effort to merely "change" a people rather than physically destroy them.(307) Thus, based on the rather limited language of the Convention it would appear that policies aimed at cultural "genocide" or ethnocide would not qualify under the treaty's terms.

In Canada one possible argument exists that policies which allow native children to be removed by social welfare agencies and placed in

non-native foster homes are a threat to the existence of native communities. However, government plans to delegate social welfare to the level of the individual Indian band will do much to alleviate this concern. In addition, it would be impossible for any native group to prove a concerted effort by Canadian government to remove Indian children from their communities, let alone the intent of genocide.

The only possible example of genocide in Canada was the unofficial policies that led to the extinction of the Beothuk people over a century ago. Native concerns over cultural and social "genocide" need to be addressed, but the answer does not appear to lie in the Genocide Convention. Its existence is important, however, as the very minimum standard expected of State policies towards minorities. The underlying idea of the Convention is the fundamental right to existence of a collectivity which does not constitute the majority of a state.

c. Slavery Conventions/Forced Labour Conventions

The abuses of the Caribbean natives in the 16th century led to the first Spanish legislation designed specifically for the protection of indigenous peoples.(308) These included royal prohibitions of the enslavement of the natives although it was permitted in time of war or as punishment for acts against the Crown.(309) During the 19th century all nations with indigenous populations in the Americas abolished the institution of slavery.(310)

However, into the present century there remained practices akin to slavery in Spanish America. These practices involved feudal land tenures based in serfdom, either from pre-colonial regimes or imposed by the

Spanish colonial rulers.(311) Thus in the mid-1960's the Anti-Slavery Society estimated that 200,000 Indian children were in a state akin to slavery in Bolivia alone.(312) There have also been isolated incidents of slave hunting in the more isolated regions of states like Paraguay within the past decade.(313) However, for the most part the dangers of enslavement for the indigenous inhabitants of the Americas has passed, especially with agricultural reforms in Spanish America which have abolished the rural forms of serfdom.(314) In Canada the enslavement native inhabitants was never widespread, and any incidents of slavery were abolished by the British in the 19th century.

The international instruments dealing with slavery and slave-like practices have proven useful to the aboriginal peoples of Central and South America and are noteworthy for that reason. These instruments include the 1926 Slavery Convention, the 1952 Protocol which amended it and substituted the United Nations as the supervisory body, and the 1956 Supplementary Convention on the Abolition of Slavery. As with the Genocide Convention their existence contributes to an evolving standard of conduct expected of states.

d. Convention on the Elimination of All Forms of Racial Discrimination

Before dealing with the specific Conventions and Declarations on the issue of racial discrimination, reference should be made to the provisions of the United Nations Charter. Article 1(3) describes as one of the purposes of the organization to promote and encourage respect for human rights without distinction as to race, sex, language or religion.(315) Article 55 uses similar language which raises the

perennial question of what obligations lie upon State Members in regard to domestic law and human rights.

However, under the auspices of the United Nations system racial discrimination has been systematically denounced as contrary to all basic standards of state behavior. The International Court of Justice has stated

> "To establish ...and enforce, distinctions, exclusions, restrictions, and limitations exclusively based on grounds of race, colour, descent, or national or ethnic origin which constitute a denial of fundamental rights is a flagrant violation of the purposes and principles of the Charter."(316)

The United Nations and its specialized agencies have overseen a number of different international instruments on racial discrimination. Perhaps the most important is the 1965 Convention on the Elimination of All Forms of Racial Discrimination but it should be read in conjunction with these documents:

(i) Discrimination (Employment and Occupation) Convention (1958)

(ii) UNESCO Convention Against Discrimination in Education (1960)

(iii) United Nations Declaration on the Elimination of All Forms of Racial Discrimination (1963).

(iv) UNESCO Declaration on Race and Racial Prejudice (1978)

(v) Declaration of World Conference to Combat Racism and Racial Discrimination (1978)

(i) Discrimination (Employment and Occupational) Convention

The 1944 Declaration of Philadelphia from the International Labour Organization affirmed that

> "...all human beings, irrespective of race, creed or sex, have the right to pursue their material well-being and

> their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity"(317)

In 1958 the General Conference of the I.L.O. adopted Convention No.111 concerning discrimination with respect to employment and occupations. (318) It defines discrimination as follows

> "(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, or political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
> (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation..."

In Article 2 of the Convention, States undertake to declare and pursue a national policy designed to promote "by methods appropriate to national conditions and practice" equality of opportunity and treatment in respect of employment and occupation.

The Convention promotes special programmes designed to better or meet the requirements of persons in need of special protection or assistance due to a number of factors including "social or cultural status".(319) In this sense the Convention anticipates later instruments which specifically exclude special assistance programmes for certain disadvantaged groups from "discrimination". Beyond these measures the Convention states that Members "may" provide such special programmes to assist special groups of workers but there is no positive duty to do so.

(ii) UNESCO Convention Against Discrimination in Education

Under the terms of its Constitution, UNESCO has the purpose to institute collaboration among nations with the view to further universal respect for human rights and equality of educational opportunity.(320) In 1960 the General Conference adopted the Convention Against Discrimination

in Education which defines discrimination as

> "..any distinction, exclusion, limitation or preference which, being based on race, colour, sex. language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education..."(321)

The definition goes on to particularize the deprivation of any person or group to education, their limitation to an inferior standard of education, or "inflicting on any person or group of persons conditions which are incompatible with the dignity of man." Article 2(b) excludes from discrimination the establishment or maintenance for "linguistic or religious reasons" separate education systems if attendance is optional and the education provided is in conformity with education standards laid down by the competent authorities.

Of particular interest to the educational needs of minorities is Article 5(1) which reads in part,

> "The States Parties to this Convention agree that:
> "...(c) it is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and depending on the educational policy of each State, the use or the teaching of their own language, provided however:
>
> (i) that this right is not exercised in a manner which prevents the members of those minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;
>
> (ii) that the standard of education is not lower than the general standard laid down or approved by the competent authorities; and
>
> (iii) that attendance at such schools is optional."

The article goes on to ensure that State Parties will take necessary measures to apply the principles in Article 5(1). There is a positive obligation on states to assist minorities in their efforts to educate children. The problems can occur, however, with the prohibition of

measures which would prejudice "national sovereignty". In the modern world nation-building often takes precedence over the rights of minorities and the phrase potentially weakens the Convention. It remains important, however, for accepting the concept of a minority's right to a separate education.

(iii) United Nations Declaration on the Elimination of All Forms of Racial Discrimination

Declared by the General Assembly in 1963, the Declaration prohibits discrimination on the basis of "race, colour or ethnic origin".(322) Article 1 describes discrimination on these grounds as an

> "..offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations..."

Article 2 extends prohibition of discriminatory acts to individuals and groups as well as to institutions and States.

Article 2(3) goes on to deal with affirmative action programmes deemed necessary to secure the adequate development or protection of individuals belonging to certain racial groups for their enjoyment of human rights. Such "special concrete measures" shall be taken by the State in the appropriate circumstances according to the article. Thus, in the few years between the Declaration and the earlier treaties on discrimination, affirmative action progressed from merely an allowable form of discrimination to an express duty on States. However, Article 2(3) also states

> "..These measures shall in no circumstances have as a consequence the maintenance of unequal or special rights for different racial groups."

The question posed in the Canadian context is whether the native minority should be given the right to choose a separate development from that adopted by the majority. This is not to say that they will never choose to integrate, but the Declaration does not provide an element of choice in the relations between the majority and a disadvantaged racial minority.

(iv) International Convention on the Elimination of All Forms of Racial Discrimination

Opened for signature by the General Assembly two years after the Declaration of 1963, the Convention relied on a broad definition of racial discrimination to include

> "..any distinction, exclusion, restriction, or preference based on race, colour, descent or national or ethnic origin which has the purpose of impairing the recognition"(323)

of the exercise of human rights.

Article 1(4) states that discrimination does not include special measures taken for the "sole purpose" of securing the adequate advancement of certain racial and ethnic groups and individuals in order to enjoy full enjoyment of human rights. Such measures cannot lead to the maintenance of special rights for different ethnic groups or continue after their objectives have been attained.

Article 2(2) states that States Parties shall take

> "...special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them."

Once again the Convention takes care to ensure that such programmes do not result in different rights for racial groups once equality has been achieved.

The Convention aims to remove barriers to the advancement of a racial or ethnic group created by discrimination. Clearly, the natives of Canada can benefit from the process. It can be said that Canada has already done a great deal with the anti-discrimination provisions in the Constitution and the extensive structures intended to prevent discrimination. Despite Canada's relatively liberal history and its efforts to combat discrimination, there still remain problems. Unfortunately, the Convention can do little to combat societal discrimination beyond encouraging public education which Canada already does. Another problem with the Convention is that while States are obliged to institute measures to advance racial minorities there is no prohibition of such measures being unilaterally imposed on a group.

An important advance over earlier efforts to combat racial discrimination was the inclusion of an implementation mechanism. The Committee on the Elimination of Racial Discrimination, consisting of eighteen members of high moral standing, receives and reviews the intitial and bi-annual reports of the States Parties. The jurisprudence of this body is discussed in the section which follows, dealing with the work of the United Nations and its allied bodies.

(iv) UNESCO Declaration on Race and Racial Prejudice

In 1978 the General Conference of UNESCO adopted by acclamation a Declaration which examined issues created by racial prejudice.(324) The Declaration brought together two lines of thought- that racism must be abolished in recognition of the essential unity of mankind and that all peoples have an inherent value and right to exist. The Preamble notes

> "Convinced that all peoples and all human groups, whatever their composition or ethnic origin, contribute according to their own genius to the progress of the civilizations and cultures, which in their plurality and as a result of their interpenetration, constitute the common heritage of mankind."

It lists as "offences against human dignity" racism, racial discrimination, colonialism, and apartheid, and describes how these offences are perpetrated through government and administrative policies contrary to the principles of human rights. "Offences against human dignity" include

> "...relationships and attitudes, characterized by injustice and contempt for human beings and leading to the exclusion, humiliation and exploitation, or to the forced assimilation, or the members of disadvantaged groups.".

This statement is important as the recognition that one of the highest forms of racial discrimination are efforts to destroy an ethnic or racial minority through assimilation. Indeed it is the greatest rebuke of a minority's value short of genocide since it denies the value of the mere existence of traits which make a group distinctive.

The individual and collective right to be different and to preserve elements of distinction is expressed in Article 1(2)

> "All individuals and groups have the right to be different, to consider themselves as different and to be regarded as such...."

Since UNESCO is particularly concerned with the cultural element of the collective identity, the Article 5 discussion of culture states that education should help individuals

> "...to recognize that they should respect the right of all groups to their own cultural identity and the development of their distinctive cultural life within the national and international context, it being understood that it rests with each group to decide in complete freedom on the maintenance, and if appropriate, the adaptation or enrichment of the values which it regards as essential to its identity..."

Where the difference of a group contributes to its disadvantaged position in society, the Declaration anticipates special programmes designed to improve that position. In a major shift from earlier documents on the problem of racial discrimination, the Declaration does not expressly forbid the creation of specialized mechanisms based on racial or ethnic grounds. Article 6(3) states in part

> "...Where circumstances warrant, special programmes should be undertaken to promote the advancement of disadvantaged groups, and in the case of nationals, to ensure their effective participation in the decision-making processes of the community."

Read in conjunction with the statements of the collective right to be unique, this last article carries a quite different meaning from the earlier instruments' provisions for affirmative action programmes.

Of course, the Declaration does not bind even the members of UNESCO. It constitutes only a direction for the organization's policies and

> "...to call attention of States and peoples to the problems related to all aspects of the question of race and racial prejudice."

However, it is a significant recognition by government delegates that racial discrimination has several components. While it is vital to ensure the de jure equality of all people regardless of race, colour, origin, or other factors, it is equally important to ensure that there is de facto equality for the members of such disadvantaged groups. At the same time the majority must recognize the right of individuals and groups to be different and incorporate that right into programmes intended to better the position of those groups in society.

(v) Declaration of World Conference to Combat Racism and Racial Discrimination

In November 1973 the General Assembly announced the Decade for Action to Combat Racism and Racial Discrimination in honour of the 25th anniversary of the adoption of the Universal Declaration of Human Rights.(325) During the last half of the decade there were a series of regional seminars organized by the Secretary-General on action against racism and racial discrimination. The World Conference to Combat Racism and Racial Discrimination took place in Geneva in August 1978.(326) It was attended by the representatives from 125 governments. These included most countries with indigenous populations except Laos, Paraguay, Surinam, and the United States.(327) The Declaration adopted by the Conference contains general points on minorities and specific discussion of indigenous populations.

The Declaration is divided into a declaratory section and a Programme of Action on specific issues. With respect to minorities the Conference recognized the potential role that minority members could play in the promotion of international cooperation and understanding. However, national protection of minority rights under Article 27 of the International Covenant on Civil and Political Rights was "essential to enable them to fulfill this role."(328)

The Programme of Action noted the need for special measures to ensure real equality for minority members and commented

> "..Such specific measures should include appropriate assistance to persons belonging to minority groups to enable them to develop their own culture and to facilitate their full development, in particular in the fields of education, culture, and employment."(329)

There are also specific references to indigenous peoples,

> "The Conference endorses the right of indigenous people to maintain their traditional structure of economy and culture, including their own language, and also recognizes the special relationship of indigenous peoples to their land and stresses that their land, land rights and natural resources should not be taken away from them."(330)

The Programme goes on to discuss a number of specific issues such as the collective right of indigenous peoples to call themselves by their own name, to have an official status, to form their own representative organizations, and to

> ",.(c) to carry on within their areas of settlement their traditional structure of economy and way of life; this should in no way effect their right to participate freely on an equal basis in the economic, social and political development of the country;
>
> (d) to maintain and use their own language, wherever possible, for administration and education
>
> (e) to receive education and information in their own language, with due regard to their needs as expressed by themselves, and to disseminate information regarding their needs and problems."(331)

The Declaration goes even further and states that "funds should be made available by authorities for investments" in the economic and cultural spheres of activity. The uses of these funds are to be determined with the participation of the indigenous peoples themselves according to the Declaration.

Since many indigenous peoples, including those of Canada, find themselves divided between several post-colonial states, the Declaration urges States to allow cultural and social links of those peoples with "their own kith and kin everywhere". Such policies must, however, include strict respect for the sovereignty, territorial integrity, and political independence and non-interference in the internal affairs of the States involved. States are also urged to facilitate and support the

establishment of international organizations for indigenous peoples, "through which they can share experiences and promote common interests".

e. International Covenant on Civil and Political Rights

The Covenant on Civil and Political Rights has the only specific reference to minorities in the three instruments which make up the International Bill of Human Rights. Article 27 reads

> "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 other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."(332)

The article's reference to "ethnic, religious, or linguistic" minorities reflects its antecedents before World War II. The earlier instruments had dealt with the various national minorities of Europe which could be identified in ethnic, religious, and linguistic terms. This does not, however, prevent the application of Article 27 to the indigenous populations of most states.(333)

The application of Article 27 assumes, of course, the survival of an identifiable minority group. For example, in Spanish America the characterization of a person as indigenous is generally on the basis of traits which distinguish them from the majority such as the use of native languages, custom of dress, or life-style. In Canada, where the majority of the indigenous peoples have been greatly assimilated, the identification of native status is either on the basis of race or by bureaucratic identification based on "status".

Francesco Capotori, in a major study of the rights of persons

belonging to minorities under Article 27 for the United Nations, considered the term "minority" in the Covenant. The Sub-Commision on the Prevention of Discrimination Protection of Minorities at its 50th session recommended that the Commission on Human Rights adopt a draft resolution concerning the definition of "minority" based on the following elements:

> "(i) the term minority includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religous or linguistic traditions or characteristics markedly different from those of the rest of the population
> (ii) such minorities should properly include a number of persons sufficient by themselves to preserve such traditions or characteristics
> (iii) such minorities must be loyal to the State of which they are nationals."(334)

For the purposes of his study Capotori envisaged the term "minority" to mean

> "..an ethnic, religious or linguistic minority is a group numerically smaller than the rest of the population of the State to which it belongs and possessing cultural, physical or historical characteristics, a religion or a language different from those of the rest of the popultion."(335)

One advantage of the non-numerical definition suggested by the Sub-Commission is that in some countries the Indians are the majority but do not play a significant part in government. Such is the case with both Peru and Bolivia, although the latter is certainly the worst offender. On the other hand the Sub-Commission suggests that a distinction between the majority and the minority must be on the basis of traditions and characteristics "markedly different" from those of the dominant population. In states like Canada where assimilation has proceeded for many years there may be little outward cultural differences remaining and yet the natives have a distinct character.

Article 27 reflects the reluctance of most governments to provide positive protection for minorities. However, it prohibits state denial

of the individual's right to participate in collective right, and in that sense implicitly recognizes their existence. Professor Capotori explains this reliance on the individual for the protection of Article 27 as a result of several factors; historical precedents in the European minority treaties which accorded rights only to individuals, the need for a coherent formulation of individual rights in the International Bill of Rights, and the political atmosphere of the period after World War II with the unwillingness of most states to specificially recognize minority rights.(336)

At the same time Capotori makes these comments

> "...it must be borne in mind that the rights in question will be exercised by their holders 'in community with other members of their group'....That is easily understandable when it is considered that the rights provided are based on the interests of a collectivity, and consequently it is the individual as a member of a minority group, and not just any individual, who is destined to benefit from the protection granted by Article 27."(337)

The Human Rights Committee, established under Article 28 as the implementation mechanism, has implicitly dealt with the matter. The Committee gave its views of the matter in relation to the the petition of a Canadian Indian woman under Article 1 of the Optional Protocol- the case of Sandra Lovelace. It involved a status Indian woman who married a non-Indian and under the terms of the Indian Act lost her status rights which included the right to live on her Indian band's reserve lands.(338) The same disability does not apply to status Indian men who marry non-status women, and so Mrs.Lovelace argued that the Canadian statute discriminated on the basis of sex.

The Committee ruled that it lacked jurisdiction to consider the initial loss of status by Mrs.Lovelace since her marriage took place before the Covenant entered into force for Canada. For this reason the

Committee as a whole did not address the question of sex discrimination, though Mr.Nejib Bouziri in a separate opinion considered that such discrimination continued to exist until the date of the application. The Committee did, however, consider the issue of Mrs.Lovelace's rights under Article 27 since her loss of status barred her from residence on the reserve lands of her former Indian band. The critical passage of their reasons reads,

> "...The right to live on a reserve is not as such guaranteed by Article 27 of the Covenant. Moreover, the Indian Act does not interfere directly with the functions which are expressly mentioned in that article. However, in the opinion of the Committee the right of Sandra Lovelace to access to her native culture and language "in community with other members" of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists...."(339)

Capotori's view is implicit in the reasons which strongly suggest that while Article 27 is drafted in terms of individual rights, the rights of collectivity must also be protected.

Professor Capotori goes even further and proposes that the obligations upon States under the article are positive as well as the passive duty not to interfere. In relation to cultural rights he comments,

> "...At the cultural level...it is generally agreed that because of the enormous human and financial resources which would be needed for full cultural development, the right granted to members of minority groups to enjoy their own culture would lose much of its meaning if no assistance from the Governments concerned was forthcoming. Neither the non-prohibition of the exercise of such a right by persons belonging to minority groups nor the constitutional guarantees of freedom of expression and association are sufficient for the effective implementation of the right of members of minority groups to preserve and develop their own culture."(340)

The interpretation of Article 27 to create positive duties on States is not accepted by many governments. However, even a narrow construction allows the recognition of true collective rights inherent in the wording of the article. For indigenous groups threatened with assimilationist policies by their governments even this limited protection is welcomed. In the case of Canada's native peoples the implicit requirement of positive protection adds valuable support to their arguments for greater control and financial aid in the creation of indigenous social institutions such as native language schools.

In the most recent Canadian report under the Covenant, submitted in March 1979, Federal policies were discussed in relation to Article 27. The report noted the Multiculturalism Directorate of the Department of Secretary of State as

> "...designed to encourage the development of a society in which individuals and groups have an equal chance to develop and express their cultural identity as an integral part of Canadian life."(341)

In relation to indigenous minorities the report states that Canada seeks to "maintain and develop Indian culture" and cited examples of 250 schools which offer classes in or are taught in native languages, the programme to standardize written Inuit, and policies to encourage native arts. In response to questions from the Committee on the programs designed to protect and develop aboriginal minorities, Canada's supplementary report of 1983 detailed efforts to provide mechanisms of self-government to Canada's natives.(342) The report took pains to describe efforts to correct the former system of administering natives as opposed to recognizing truly indigenous political structures and power. It is important to note that the programs described in these reports are not merely the encouragement of native languages or arts, but involve the

government's recognition and encouragement of native autonomy.

Clearly Canada regards the natives as Article 27 minorities and policies to encourage their autonomy as fulfilling the obligations of the treaty. This suggests that Canada also reads certain positive duties into the terms of Article 27. Natives could argue in future that Canada cannot unilaterally rescind these programmes since it has used them to demonstrate its fulfilling of Article 27 duties.

An argument by native groups based on Canada's reports to the United Nations would rely on the concept of estoppel. It has already been applied by the International Court of Justice on several instances. For example, in the 1960 case of Arbitral Award by the King of Spain and the 1966 Temple Case, the principle was related to the doctrine that States are obliged to fulfill expectations in the international community created by their conduct.(343) Such conduct could be shown by the actions of state representatives or the statements of high officials. Examples of the latter situation are the East Greenland and Nuclear Tests cases.(344) Support for the estoppel principle is not universal and a writer as noteworthy as Brownlie has stated

> "..it is necessary to point out that estoppel in municipal law is regarded with great caution and that the principle has no particular coherence in international law, its incidence and effects are not being uniform...."(345)

The principle has been applied to the international conduct of state relations. Its underlying assumption is that world public order demands that States be able to rely on each other's public gestures and statements. A minority which seeks to enforce its own State's conduct on the basis of estoppel would face a much more onerous task than another State. However, with the problems of standing before a body of international judicial competency aside, it would be possible for a

minority's representatives to raise the argument before a body like the Human Rights Committee.

f. UNESCO Declaration on the Principles of International Cultural Co-operation

The Declaration on the Principles of International Cultural Cooperation was proclaimed by the General Conference of UNESCO in 1966.(346) As a declaration of principles by a governmental organization it deserves attention as an expression of standards towards which States are expected to work.(347) In addition, it is a useful tool of interpretation of cultural rights contained in multi-lateral treaties dealing with human rights.

In relation to a domestic right to culture the most interesting portions of the Declaration are Article 1 which states that:

> "1. Each culture has a dignity and value which must be respected and preserved
> 2. Every people has the right and the duty to develop its culture..."

Article 2 states that:

> "Cultural cooperation is a right and a duty for all peoples and nations, which should share with one another their knowledge and skills."(348)

The Declaration is noteworthy for not limiting the right to culture to States or dominant cultures, and instead stressing that all peoples and all nations possess the right.

The collective right to culture should be read in conjunction with the individual right to take part in cultural life. The Universal Declaration of Human Rights states that

> "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."(349)

Article 15 of the International Covenant on Economic, Social, and Cultural Rights elaborates on this individual right in these terms:

> "1. The States Parties to the present Covenant recognize the right of everyone to:
> (a) to take part in cultural life....
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture."(350)

With respect to a positive obligation on governments in the area of culture, the essential role of the state to provide adequate funds and the proper planning of cultural institutions and programmes has been recognized in conferences held under UNESCO auspices. One example, is the 1970 Intergovernmental Conference on Institutional, Administrative and Financial Aspects of Cultural Policies held in Venice.(351) In the words of a working document prepared for the 1972 Inter-governmental Conference on Cultural Policies in Europe,

> "...the right to culture implies the duty for governments and for the international community to make it possible for everyone, without distinction or discrimination of any kind, to take part in the cultural life of his community and of mankind generally, For the universal participation to be effective, the State must furnish the necessary means to those who are underprivileged in their access to cultural life..."(352)

For any minority threatened by assimilationist policies, the right to culture can be argued to contain two components - the right to have and participate in a minority culture and the right to have the State provide the essential measures for the conservation, development, and diffusion of that culture to members of the community. In the words of Professor Capotori

> "..it is inconceivable that the State should have fewer cultural obligations vis-a-vis minorities than towards its people in general."(353)

g. Convention 107 of the International Labour Organization

Convention 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries was created under the auspices of the International Labour Organization. The I.L.O. had given consideration to the special problems of indigenous workers since 1926, although it was not until the Philadelphia Conference in 1944 that a distinction was made between workers in colonies and independent states.(354)

A 1953 study of indigenous populations by the I.L.O. stated

> " The problems of indigenous workers should not be seen as a problem concerning a particular somatic or ethnic group but as one concerning a section of the population, which for economic or historical reasons, has not yet been integrated into the social and economic life of the community as a whole; that is to say that when the expression indigenous worker is used, the stress should be on the second word and not on the first."(355)

The philosophy inherent in the work of the I.L.O. is that the primary duty of governments is to integrate indigenous groups into the national life as quickly as possible. As the central assumption of its programmes, the issue before the organization when drafting Convention 107 was to find the most efficient means and to establish measures to protect primitive peoples in the process of integration.

The Convention, as its title implies, is intended to cover two very different groups of peoples. Article 1 states that the Convention applies to members of tribal or semi-tribal populations whose

> "...social and economic conditions are at a less advanced stage than the stage reached by other sections of the population."(356)

It equally applies to populations

> "...which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of the conquest or colonization, and which irrespective of their legal status, live more in conformity with the social, economic, and cultural institutions of that time than with the institutions of the nation to which they belong."(357)

This rather lengthy description creates a narrow range of peoples to whom the Convention's protections would apply. The dichotomy between the general tribal characteristics and the specific indigenous groups was to satisfy the problems of primitive tribes in states which were not ruled by the descendents of colonists.(358) In both cases, however, primitive peoples were contemplated by the drafters and the "indigenous" class is assumed to be economically inferior.

The Convention does not bluntly intend to abolish pluralism and is clearly in favour of better living standards for indigenous peoples. The means chosen by ~~the Convention involve the natives'~~ integration based on their abandoning any characteristics which may slow the process. In this sense it is a return to 19th century solutions to the "Indian problem" by the virtual destruction of the Indian identity.

g. United Nations Activities Related to Indigenous Populations

While the United Nations has served as a valuable catalyst for the creation of standards in human rights little attention has been given to the specific problems of indigenous minorities. Studies and reports on

specific human rights problems such as slavery have included references to these groups but it is only in the last decade that specific studies have considered the indigenous peoples.

The General Assembly has considered questions involving indigenous peoples on only a few occasions. More specific work to create standards for the protection of aboriginal groups can be found in the subsidiary bodies. This is particularly true of the work of the Human Rights Committee and the Committee for the Elimination of Racial Discrimination.

(i) General Assembly Resolutions

The issue of indigenous populations has come up infrequently in the General Assembly but it is possible to detect a change in attitude in the past four decades. In the 3rd Session Bolivia submitted a draft resolution which proposed that a sub-commission of the Social Commission be established by ECOSOC to "study the social problems of the aboriginal populations of the American continent".(359) After the matter was revised by the Third Committee and the Ad Hoc Political Committee, the resolution read in part

> "Whereas the Charter sets forth as one of the objectives of the United Nations the promotion of social progress and higher standards of living throughout the world.
>
> Whereas there exist on the American continent a large aboriginal population and other under-developed social groups which face peculiar social problems that it is necessary to study in the face of international co-operation.."(360)

The Resolution recommends that ECOSOC study the situation of American indigenous populations in collaboration with the Inter- American Indian Institute in States which request such help. It also invited the Secretary-General to co-operate in such studies in consultation with

interested Member States. In the Secretary-General's report to the 11th Session of ECOSOC he noted that his office had received no comments or requests from any Member State for the Secretariat to initiate a study of the situation of American aboriginal peoples.(361)

This early effort reflects the prevailing attitude of the period which viewed the issue of indigenous peoples only in terms of their lack of social progress. As a socially disadvantaged group, measures were sought to raise the standard of living of indigenous populations, and to integrate them into the national state. Nowhere in Resolution 275(III) was there a suggestion that indigenous peoples have any inherent right either to development, or to control their own destiny within the state.

In contrast there are a series of General Assembly resolutions from a latter period which deal with violations of human rights in Chile after the military coup. While the resolutions are important for their consideration of the domestic policies of a Member State, they are especially important for their reference to the indigenous peoples of Chile. There were several resolutions on the human rights situation in Chile during the 1970's but Resolution 32/118 of 16 December 1977 instructed ECOSOC to report on the protection of human rights in Chile.

The report produced by ECOSOC dealt with a range of issues including the situation of the indigenous population. Particular attention was given to the Mapuche people who number about 1 million and constitute approximately ten percent of the Chilean population.(362) The report detailed the dismantling of measures installed to protect the collective ownership of Mapuche lands and the measures designed to provide free medical and cultural services to them. The Working Group for the General Assembly dealing with Chile received complaints from the Mapuche on education rights, poverty, malnutrition, and the dissolution

of collective ownership.(363) With the report of ECOSOC before it the General Assembly adopted Resolution 33/175 on 20 December 1978. After a general call to the Chilean government to restore and safeguard basic human rights and fundamental freedoms, the resolution "urges the Chilean authorities in particular" to deal with twelve specific topics including

> "(l) to safeguard the human rights of the Mapuche Indians and other indigenous minorities, taking into account their particular cultural characteristics."(364)

One year later Resolution 34/179 was adopted in which the General Assembly expressed "grave concern" at the deterioration of a number of areas including the treatment of Chile's indigenous peoples.(365). The Chilean authorities were strongly urged to

> "..respect and promote human rights in accordance with the obligations of Chile has undertaken under various international instruments, and in particular,
> (g) to respect the rights, in particular the economic, social and cultural rights, of the indigenous population..."(366)

In February 1980 the Commission on Human Rights adopted Resolution 21 (XXXVI) which called for Chile to "restore the rights, in particular the economic, social and cultural rights of the indigenous population".(367) The General Assembly later that year adopted Resolution 35/188 which repeated earlier calls for the restoration and enforcement of human rights and in particular to take the concrete steps cited in the Commission's resolution.(368)

Subsequent reports of ECOSOC on the situation in Chile have noted the problems faced by the Mapuche minority with regards to their loss of economic, social and cultural rights. In addition, one report notes

> "...In addition they are victims of the violation of a specific right to which they can lay claim as members of an indigenous ethnic minority, the right to preserve their cultural and social identity and their traditional forms of work and ownership. Their integration into the economic structures favoured by the present-day authorities and

> imposed by authoritarian means without consultation or the participation of those concerned who are at an obvious disadvantage, is yet another factor which may contribute towards the extinction of their culture and the loss of their identity as a people."(369)

The attention given by the General Assembly to the Mapuche does not necessarily mean an equal amount of attention is given to all indigenous peoples. For example, on the same day as Resolution 35/188 on Chile there were similar resolutions on the human rights situations in Bolivia and El Salvador which made no reference to Indians.(370) This does not negate the fact that the Chilean case recognized that the rights of indigenous peoples were more than merely moral.

The importance of the case lies in the change in attitudes it suggests is now occuring. It is submitted that the emphasis has shifted away from the early position that States should protect their disadvantaged indigenous minorities, to the more recent position that States bear some kind of duty to respect the inherent rights of such groups, although little effort has been given to define those rights.

(ii) Commission on Human Rights

The problems of indigenous populations were not dealt with specifically by the Commission or its subsidiary bodies before 1969.(371) There had been earlier references in reports on slavery which discussed conditions of agricultural penury in some Latin American countries. For the most part, specific attention has been relatively recent.

In 1969 the Sub-Commission on the Prevention of Discrimination and Protection of Minorities received a report on racial discrimination in the political, social, economic, and cultural spheres. It dealt in part

with indigenous peoples.(372) In 1971 ECOSOC authorized the start of a massive study on the special problems of discrimination against indigenous peoples which has recently been completed.(373) Logically, an important step in the creation of international standards for the treatment of indigenous peoples is to identify current problems. In certain quarters of the United Nations there is a call for an international instrument to deal with minority rights which could possibly have a special provision on indigenous peoples.(374) At the moment, however, much of this work is eclipsed by the much greater attention given to the issue of racial discrimination.

There are three Working Groups which deal with indigenous populations in some aspect of their work. The Working Group to inquire into the situation of human rights in Chile has had its task continued by a Special Rapporteur since 1979.(375) The Working Group on Slavery, established in 1974, meets annually and submits a report to the Sub-Commission with references to residual problems in Spanish America.(376) In May 1982 ECOSOC authorized an annual working group on indigenous populations whose task is to

> "...review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, including information requested by the Secretary-General annually from governments, specialized agencies, regional intergovernmental organizations and non-governmental organizations in consultative status, particularly those of indigenous peoples, to analyze such materials and to submit its conclusions to the Sub-Commission."(377)

The Working Group is also instructed to give special attention to the evolution of standards for the rights of indigenous peoples.

The Report of the Working Group on Indigenous Populations of the first session under the Chairman-Rapporteur Mr.Asbjorn Eide was issued in August 1982 and there have been periodic releases of information since

that time.(378) In its first report the Group described the principles which would guide its work. With respect to the evolution of standards it noted the importances of gathering information from both governments on present standards and indigenous populations on what standards they would wish to see. It noted

> "Special attention should be given to the application of standards in the context of development policies and development projects. Minimun standards should be applied both by governments and international agencies involved in development activities. In particular, there should be firm protection of land rights of indigenous populations and these populatons should play a central role in the planning and execution of development projects affecting the territories in which they live. Standards to be developed could concern:
> -right to maintain own culture, language, and way of life
> -land and mineral rights
> -self-management, consultation, participation, self-government, or self-determination
> -freedom of religion and traditional religious practices."(379)

The work of this Group is extremely important since it shows a new emphasis to consider the claims of indigenous groups as opposed to merely setting standards for their treatment.

(iii) Human Rights Committee

Although created by the specific terms of the International Covenant on Civil and Political Rights, the widespread adoption of the Covenants on Human Rights makes the role of the Committee important in the establishment of standards. In this sense it plays a valuable role in interpreting state obligations under the treaties. In addition, even for states which have not ratified the treaties, the Committee serves to evolve the standards of human rights throughout the world.

When states appear before the Committee it does not hesitate to deal with indigenous peoples within the terms of Article 27. This has occurred in the face of official denials of the Article's applicability to indigenous groups as was the case with Chile in 1979.(380) Silence in reports on the indigenous groups is also met with requests for further information as was the case with the 1980 report of Surinam when the Committee

> "...asked what measures existed to enable minorities to preserve their own culture while participating on an equal footing with the rest of the population in the country's political life; and how land claims were being dealt with."(381)

Columbia in its 1980 report was also questioned on why it considered that the Indians were not an ethnic minority. The Committee's report summarized its questions about why the Indians of Columbia could not be an ethnic minority when

> "...it was generally known that American Indians constituted a linguistic, ethnic, and sometimes even a religious minority; why they did not have juridical personality and why they were represented by government officials and not by representatives of their own choice. Information was requested on the situation of this community, on their participation in the life of the country, on the educational and medical facilities at their disposal, on whether they enjoyed the right to elect and to be elected to public office, on whether they were consulted on the question of drafting a national Indian Statute and under what conditions the Indians could enjoy the right to self-determination or the fundamental rights of minorities in accordance with Articles 1 and 27 of the Covenant."(382)

It is noteworthy that the Committee mentioned self-determination with respect to Columbia's native minorities. The Committee has also questioned the representatives of the Soviet Union and the Byelorussian SSR concerning "national groups" and "minorities and indigenous groups", and one writer notes

> "...both the representatives, as well as members of the Committee who put the questions, assumed the right of

self-determination of Article 1 applied to nations and ethnic groups of a multi-national state..."(383)

Self-determination in the context of minority groups was also raised in the discussion of the report of Yugoslavia in 1984. In the summary of the Committee's discussion with the representatives of the Yugoslavia the following exchange took place concerning Article 1's reference to self-determination,

> "Turning to the specific articles of the Covenant and with specific references under article 1 ...it was asked what had been done to promote the rights of minorities in Yugoslavia; how self-management was applied in concrete terms to the different nationalities of the Yugoslav population, in conformity with the principles of the Covenant; how equality was achieved between those nationalities; and what were the legal provisions on ethnic minorities in the Constitutions of the republics and provinces.
>
> In response, the representative referred to the Constitution of 1974 which confirmed the equality of all nations and nationalities...and that special attention was given to the representation of nationalities in federal, provincial and communal organs of authority. He expressed his Government's willingness to prepare an additional report regarding provisions of the Constitution and the legislation relating to the equality of nations and nationalities of Yugoslavia."(384)

Not all governments have been as responsive to questions about the rights of minorities, especially when they are posed in terms of Article 1's references to self-determination. In 1984 Sri Lanka was asked

> "...whether...part of the population might not claim the right of secession or plead for a federal form of government in accordance with the right of peoples to self-determination as enshrined in this article." (385)

Other members of the Committee pointed out that self-determination in Article 1

> "could not be exercised to the detriment of territorial integrity or by elements which formed an integral part of any given country. They did not agree, however that this right was not applicable to sovereign States since it was a right of a continuing character - the right of the whole people to choose their form of government and to elect

> their chosen representatves to carry out politics endorsed by the electorate." (386)

The Government of Sri Lanka's representative also took objection to the interpretation of self-determination as applicable to minorities, and reiterated his government's view that the right applied to "peoples still under alien and foreign rule but not to sovereign independent States or to a section of a people or a country."(387)

There was recently presented to the Committee in its capacity under the Optional Protocol the interesting prospect of squarely addressing the issue of self-determination and minorities. In a Communication brought against Canada by a Miqmaq Indian it was claimed that Canada denies self-determination under Article 1 and had

> "...deprived the alleged victims of their means of subsistence and has enacted and enforced laws and policies destructive of the family life of the Miqmaqs and inimical to the proper education of their children...It is stated to be the objective of the communication that the traditional Government of the Miqmaq tribal society be recognized as such and that the Miqmaq nation be recognized as a State."(388)

The issue did not need to be directly addressed, however, as the Committee ruled the Communication to be inadmissible since the

> "...author has not proven that he is authorized to act as a representative on behalf of the Miqmaq tribal society. In addition, the author has failed to advance pertinent facts supporting his facts that he is personally a victim of a violation of any rights contained in the Covenant."(389)

Despite these isolated examples of the Committee's individual members raising questions about minorities in terms of Article 1, most discussions of minority groups occur in considerations of Article 27's protections. In the case of indigenous minorities, these questions have often been thorough, and have touched on issues viewed as highly important by Canada's natives. For example, in 1980 Costa Rica was questioned about the right to land for Indians and whether

> "...they possessed an independent juridical status; on the steps taken to preserve their culture, language, and land...Questions were also asked on whether current legislation was effective in protecting lands belonging to the Indians and preventing their lands from being transferred to other people..."(390)

The 1983 report of Mexico was questioned on the use of Indian languages in education and "what practical opportunities are available to enable Indian communities to maintain their native languages and cultures and to use their own resources and land for their own development."(391) Land rights have also been raised by the Committee with respect to Surinam, Costa Rica, Columbia, Peru, Panama, and Mexico.(392) In 1984 El Salvador was asked to provide information on its minorities,

> "...particularly aborigines which existed in their country, their participation in political life, the extent to which they were involved in the internal conflict and the manner in which their cultural identity was being preserved and protected."(393)

A Supplementary Report was filed by Canada in 1983 pursuant to questions posed by the Human Rights Committee in March 1980. These included questions concerning article 27,

> "What is the actual situation of the various ethnic groups and minorities living in Canada? Are there programmes intended to encourage the development of the various ethnic groups and minorities within Canadian society? Is Canada seeking to strengthen ethnic identity or to assimilate minorities into the rest of the population?"(394)

Questions were specifically raised in relation to Canada's native peoples, including a request on how the "system of autonomy granted to Indian tribes" functioned. The Canadian response in the Supplementary Report detailed the government's efforts to encourage political, economic, social and cultural autonomy among Indians and Inuit groups, and stated

> "The Government's policy on the Indian and aboriginal peoples may be summed up in a few words: to end a state of dependency, resulting from a much too paternalistic policy,

by encouraging a feeling of community belonging and autonomy from the government."(395)

The Committee has taken an activist role in its comments on the Covenant's provisions and its reliance on both Article 1 and Article 27 constitutes an important source to interpret state obligations. Of equal importance is that States like Canada, perhaps reacting to this position by the Committee, are framing their reports on Article 27 in terms of measures to ensure minority autonomy, in addition to measures intended to merely protect them.

(iv) Committee for the Elimination of Racial Discrimination

The valuable work of the Human Rights Committee has been paralleled by that of the Committee on the Elimination of Racial Discrimination (CERD). It was created under the Convention for the Elimination of All Forms of Racial Discrimination mentioned above.

Like the Human Rights Committee, the CERD has encountered states that deny the existence of racial minorities. This was the case with Bolivia's reports which denied any racial discrimination existed despite its mainly rural and poor Indian majority.(396) Similar problems have occured with Uruguay and its indigenous minorities.(397)

In most cases, however, governments have reported on their measures to protect and advance indigenous minorities. In several cases the Committee has stressed the importance of a balance between advancement through integration and the preservation of the minorities' uniqueness. Dealing with the 1978 report of Argentina the Committee

> "...emphasized that the policy of 'voluntary integration' must be gradually implemented in order to ensure that 'aboriginal' communities retained their cultural identity, and that the purpose of that policy should be to secure the

> economic and social development of the ethnic groups concerned while at the same time enabling them to preserve their culture characteristics..."(398)

The need to protect Indians in the face of development was also the subject of questions aimed at the 1978 report of Brazil in respect to development in the Amazon.(399)

The issue of the preservation of indigenous cultural and social structures was also stressed in the 1979 consideration of Mexico's report.(400) Similar ideas were expressed with respect to the report of Panama when the Committee commented that

> "..some members of the Committee...had expressed doubts as to whether the objective of the Government of Panama was to preserve the customs and traditions of indigenous groups or to integrate them into the national community and life of the nation. In this connection, the Committee welcomed the new policy of the Panamanian Government which aimed at enabling the indigenous communities to participate fully in the socio-economic development programmes of the country while safeguarding the continuity and promoting the development of their cultures and languages."(401)

The rights of indigenous minorities to their lands and the benefits of resource development have also been raised. In the discussion of Argentina's 1980 report the Committee inquired into efforts to secure for indigenous groups the possession of their lands through reservation and the rights such communities had to the minerals found in the areas.(402) In 1981 Chile was questioned about its abolition of programmes and institutions designed to aid the Mapuche people and its policy to allow the subdivision of the communal Indian lands.(403) Similar questions have been asked of Ecuador in relation to agrarian reform and its impact on indigenous farmers, and Costa Rica on the preservation of communal land rights.(404)

In its first report to the Committee in 1971 Canada stated that "cultural diversity is valued as a positive factor in Canadian life", and

detailed the programs designed to "assist the development of native people".(405) The description of policies to ameliorate the condition of natives is presented by Canada in terms of article 2.2 of the International Convention on the Elimination of All Forms of Racial Discrimination which admits "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them". In its fourth report to the Committee in 1978 Canada reported that the Department of Indian Affairs and Northern Development was

> "...placing particular emphasis on activities related to local self-government and decision-making for Indian and Inuit peoples. The objective of this thrust is to enable Indian and Inuit communities to increasingly assume control of their own local affairs..."(406)

Through its questions the Committee constitutes another element in the evolution of international standards for the protection of indigenous minorities. Like the Human Rights Committee this is done not so much as the formation of international law but as the elucidation and interpretation of treaty obligations. In a similar situation to the Human Rights Committee, the CERD can encourage States to view their policies towards racial or other minorities in terms of encouraging equality through a certain degree of autonomy.

4. Conclusions

If the international law in relation to indigenous minorities is examined as a whole several points become evident. The most important is the recognition of their right to exist and to be different. The corollary right to retain and develop that difference is also being developed in the international scene. This acknowleges the basic dignity of man through the inherent worth of the collective expression of his identity. From the acceptance of this principle has flown all the other rights of collectivities and minority individuals. Protections of language, religion, and culture in international instruments are evidence of the evolution of such a principle.

Traditional international law acknowledged the existence of indigenous peoples as separate entities even if they were not accorded complete equality with the states of Europe. As the world has evolved international law has adapted to the "maturation" of the majority of these peoples into independent states. In the case of the indigenous peoples of the New World the process has not taken place due to a variety of reasons. In North America these included the size of indigenous populations, particularly since they were severely diminished after contact with the Europeans, and in most cases their technological inability to prevent colonization. Consequently, although there are countries in the Americas where the majority may claim some degree of indigenous origin, it is difficult to speak of any "aboriginal" states in the New World.

In most cases the international law relating to human rights, both collective and individual, lacks effective enforcement mechanisms although there are notable exceptions. This should not, however, diminish

its value as a standard against which state behavior can be measured. It is particularly valuable in a country like Canada which prides itself on its human rights record and role in the evolution of international standards. However, it is submitted that there is a need for a comprehensive framework to analyse the concerns of minorities which can draw together the standards developed by international law. The section which follows proposes such a framework based on the rights and standards already recognized by states.

III. INDIGENOUS POPULATIONS AND SELF-DETERMINATION : A PROPOSAL

Introductory Comments

Canada's indigenous peoples confound the current doctrine of self-determination. They claim to be peoples in a sociological sense and nations in a political sense with a right to determine their destiny. However, unlike either an historic minority like the French or later immigrants they are the original inhabitants of the Canada, and their lands were some of the first European colonies.

To many indigenous peoples it is ironic that they are denied self-determination because the forces of history allowed their colonial rulers to numerically overwhelm them. Thus, with increasing frequency indigenous populations around the world are demanding "self-determination" though their actual goals vary widely.(407) The common elements, however, are some degree of self-government and a secure economic base, generally related to land.

As noted above, the earliest European contacts with Canada's native societies were on the basis of equality which later evolved into a relationship akin to guardianship. Throughout this process native peoples have been accorded some degree of self-control although its scope has depended on the particular period and country. As the settler populations and territories expanded in the 19th century, the concept of the political equality of the Indian nations became a legal fiction. Political structures to manage their internal affairs were undermined and replaced with externally imposed government intended to provide an interface with the new states. However, it is important to recall that at least in the American context the concept of separate nationhood for the

Indians was maintained in the legal notions of the 19th and 20th centuries. Canada did not evolve such a cohesive framework for its dealings with the natives but such concepts are now entering our judicial system.

Reference has already been made to the "sacred trust" and the role it has played in the evolution of modern concepts of self-determination. Its application to North American indigenous peoples was less clearly connected with the wider concepts of self-government or independence, but the "tutelage" of such peoples must terminate at some point. As the colonial age ends writers are examining the possible future applications of self-determination to non-colonial situations, perhaps aided by its application to Black South Africans and Palestinians who are not strictly in a colonial situation.(408)

The discussion which follows considers the value of self-determination to indigenous populations. These groups present a unique problem as natural beneficiaries to "anti-colonialism" who are barred from the benefits by their location within independent states. For self-determination to have a meaning after the colonial age one must consider what forms it might take in the future. It is suggested that one form of self-determination may be for limited powers of self-government and development for minorities within independent states. The indigenous peoples of Canada are in a unique situation in that their historical relations with the dominant society have in part been based on this approach. The international law concerning self-determination may be helpful in this respect to interpret and develop the Canadian experience.

1. Scope and Benefits of Proposed Principle of "Internal" Self-determination

a. Self-Determination and Individual Human Rights

The relationship between individual human rights and the collective right of self-determination is highlighted by the Charter of the United Nations. Article 55 identifies the individual's human rights as one of the means to achieve

> "...creations of stability and friendly relations among nations based on respect for the principle of equal rights and self-determintion of peoples..."(409)

Since the drafting of the Charter this linkage has received considerable attention. This was particularly true during the period when the Human Rights Covenants were being drafted. Article 1 in each Covenant identifies the collective right to self-determination within the context of instruments to deal with individual rights. The refusal of the Human Rights Commission to deal with the potentially discordant issue led in the 1950's to several directives from the General Assembly to include self-determination in the Covenants.

Resolution 637 (VII) of 16 December 1952 "The right of peoples and nations to self-determination" begins "Whereas the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental rights". The resolution places particular emphasis on peoples of Non-Self-Governing Territories. Earlier in the year an American proposal to amend a planned USSR amendment to the draft Covenant sought to ensure that self-determination would be applied to all states and not only colonial powers.(410)

The debates surrounding the amendments indicates the period's mood

on the issue. Syria's representative noted that self-determination was

> "...indeed the corner-stone of the whole edifice of human rights..."(411)

India's spokesman identified the recipients of self-determination as "those who were subject to colonial regimes and those who were not on an equal footing with the peoples with whom they were associated."(412) The Ukrainian representative asked

> "..how individuals could enjoy civil, political, economic, social and cultural rights if, collectively, they were not free to determine their fate and the form of their government".(413)

The inclusion of Article 1 in the Covenants indicates the success of the Ukrainian position noted above tempered by the words of general application urged by the United States. This has enforced the connection between self-determination and individual human rights throughout the protections for the inherent dignity of man.

This process has two important consequences. As a subsidiary principle from the recognition of inherent human dignity, self-determination assumes the "same universal validity as other human rights."(414) As expressed by Mr.Cristescu report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities

> "Recognition of the right of peoples to self-determination as one of the fundamental human rights, is bound up with recognition of the human dignity of peoples, for there is a connection between the principle of equal rights and self-determination of peoples, on the one hand, and respect for fundamental human rights and justice on the other. The principle of self-determination is the natural corollary of the principle of individual freedom, and the subjection of peoples to alien domination constitutes a denial of fundamental human rights.."(415)

The second consequence is that self-determination becomes a concern to each individual in his pursuit of personal human rights. Self-determination, as a fundamental right, is a prerequisite for the

full enjoyment of individual rights. Although the Ukrainian representative's words were intended to deal with colonial peoples they are equally true in other circumstances. For the members of a minority group the denial of their collective identity diminishes their capacity to enjoy their individual rights.

Therefore, it is submitted that some form of self-determination for indigenous peoples is a pre-requisite to the fulfillment of their individual human rights. The Canadian government expressed the following views on state obligations on human rights in a letter dated 9 January 1979 from the Legal Bureau

> "It is the view of the Canadian government that the observance of human rights is obligatory under international law. The Canadian Government views the Universal Declaration of Human Rights as a valid interpretation and elaboration of the references to human rights and fundamental freedoms in the Charter of the United Nations. Consequently, the obligation on states to observe the human rights and fundamental freedoms enunciated in the Universal Declaration derives from their adherence to the Charter of the United Nations.
>
> The Canadian government regards the rights and freedoms enunciated in the Universal Declaration on Human Rights as fundamental and applicable to all individuals everywhere. However, it is recognized that different approaches are necessary for the implementation and full protection of different rights and freedoms."(416)

It is submitted, therefore, that the Canadian government should recognize the close connection between self-determination and the protection of human rights. In light of the statement above it should be conscious of the related nature of state obligations towards different modes of human rights.

b. Territorial Integrity: A Corollary of Self-Determination

The words of the League of Nations Judicial Committee concerning self-determination and the duty to refrain from the destruction of state units are equally applicable today. They considered that self-determination could describe the process of state-building as it proceeded but it could not be invoked by other states to justify their participation in the process.(417) While self-determination has certainly evolved into an obligatory principle of interntional law since the decision on the Aaland Islands it can be argued that this obligation applies only to the colonial aspect of the principle.

It is submitted that self-determination is not limited to the colonial cases, and arguments to the contrary appear to be overly restrictive, if indeed self-determination is a prerequisite for the enjoyment of human rights as discussed above. However, it is accepted that self-determination imposes a duty to respect territorial integrity on all claimants to the right. This restriction was made abundantly clear by the United Nations instruments which deal with self-determination, and by the limited state support given to secessionist movements. Self-determination has been analyzed as a mechanism to ensure world public order, and if this is correct, then it would be inconsistent for it to contribute to an extremely disruptive process like territorial secession.(418)

Based on pronouncements in the United Nations, self-determination in any form requires respect for territorial integrity of all states.(419) It could be argued that the preservation of national unity is another duty incorporated into the principle. It has been identified in several United Nations instruments as a value which deserves the same protection

as territorial integrity.(420) National unity appears to be an extension of territorial integrity, in the sense that a society, even a pluralistic one like Canada, needs to preserve some element of unity. Territorial integrity would be the corollary of political self-determination, while national unity corresponds as a balance to demands for the economic, cultural, and social aspects of self-determination. In the argument which follows autonomy is suggested to be an allowable form of self-determination which respects territorial integrity. Likewise, development of a minority's economic, social and cultural autonomy could be permitted, as long as it respected national unity of the country. However, the preservation of territorial unity *per se* is given a much more prominent position, perhaps because granting political autonomy to minorities is perceived as more threatening than other expressions of autonomous development.

c. "Internal Self-Determination" Defined

Self-determination, to retain its traditional vigour and flexibility, must evolve in these final decades of the 20th century into new directions. Since World War II the principle has been instrumental in the decolonization of much of the world. It has also been used as the basis of sovereign equality and the full range of collective rights claimed by states to economic control, development, and other measures of independence.

The roots of self-determination lie in the inherent dignity of man, both in his individual capacity and when he chooses to form a collective

identity. The individual and his collectivity have a right to determine their destiny. This freedom, of course, must be exercised within the pragmatic parameters of society. For the individual the society is the state he lives within. In the case of a collectivity, the society is both the state and the international community of states interested in maintaining world public order. These are not new concepts, and draw upon the philosophies of writers such as Rousseau and Locke.

One must consider the potential price of the denial of a group's expression of self-worth and self-control. There is always the potential for violence when the desires of a group are denied by an alien power or an insensitive majority. In the case of minorities this potential for violence has often become a terrible reality in many parts of the world.

As currently expressed in international law, self-determination fails as a mechanism for dispute resolution in the case of minorities within independent states. This position does a disservice both to the historical development of the principle and its potential to resolve longstanding disputes between minorities and dominant societies. As an alternative, it is suggested that self-determination can be expressed on the domestic level. This would include the expression of its constituent elements- political, economic, social and cultural. The domestic expression is termed "internal self-determination" for the purposes of this thesis.

It should be noted that "internal self-determination" in this discussion means the capacity of a group within a state to pursue some degree of autonomous development. Although related to the concept of "internal" self-determination as representative government, it should not be confused with the term as used by writers to mean

> "...a principle...which encompasses the right of all segments of a population to influence the constitutional and political structure of the system under which they live."(421)

In this discussion the term is used to refer to some degree of autonomy for groups living within independent states.

The expression of the proposed "internal self-determination" must respect certain parameters:

(1) The preservation of a state's territorial integrity is a duty on claimants to all forms of self-determination. Inherent in the principle is the concept that a minority cannot use it as a means to achieve independence. Secessionist movements undermine both national and international harmony which negates an essential role of self-determination.

(2) National unity must also be preserved by the claimants of an "internal" form of self-determination. To ensure such unity the mechanisms to express the principle must be consistent with the practical limitations of each state. For example, the economic system of a state could not be put in jeoprady in order to fulfill the financial demands of a minority.

Once these parameters are respected then all of the aspects of self-determination are capable of expression by a minority. These would include political, economic, social and cultural rights within the limits discussed. On the inter-state level these aspects of self-determination have evolved from the concept of the sovereign equality of states. However, they owe their ancestry to the concept that each individual and accordingly each group has a right to be different and to express that difference where appropriate. Within the state mechanisms would have to be created to accomodate the autonomy needed to put "internal

self-determination" into practice.

In the Canadian context the indigenous peoples have claimed all of the aspects of self-determination generally reserved to states. Some of these claims, and especially those related to self-government, have cited self-determination, which others have not had a cohesive theoretical basis. However, if all the native claims to autonomy in political, economic, social and cultural spheres are viewed as a whole, then it appears more like a claim for "internal self-determination". Further, it is suggested that "internal self-determination" provides a framework for the conflicting interests of the indigenous minorities and Canada. As long as Canada's territorial integrity and national unity are preserved then the principle can be applied to allow indigenous groups an opportunity to fulfill their self-worth and potentials as distinct peoples.

d. Benefits of "Internal Self-Determination"

President Woodrow Wilson said in 1918,

> "...National aspirations must be respected; people may now be dominated and governed by their own consent. "Self-determination" is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their own peril." (422)

All inter-group conflicts will not lead to violence but the dangers refered to by Wilson are always present on the domestic as well as the international scene. The stress created within a society by one group's perception that the state leadership does not represent its views is potentially dangerous. The process can lead to the simultaneous breakdown of the association with the state and its replacement by the disaffected

group by some smaller territorial version which addresses the perceived needs of the minority.

> "When a particular political group constitutes the power apparatus by which a given body politic controls its territory and inhabitants, its authority is derived from the community's expectations regarding its appropriateness as a decision maker. Demands for a separate public order system by a sub-group which has a territorial base within the existing territorial community result from a loss of authority within the broader association or a transformation of the sub-group's expectations regarding who is entitled to govern whom"(423)

Of course, the consequences of disassociation from existing authority structures will vary in each case. In some, however, it will be violent if authorities are unwilling to acknowledge and address the concerns of the minority.

> "..Every group which acts as a proto-state does not seek to become a revolutionary regime. Yet, in some cases, the process at work produces that result. Violence is the essential cutting edge that creates and maintains ecological separation between integrated social organizations."(424)

It is self-evident that the dangers to a state posed by inter-group conflicts will depend on the relative strengths of the groups.

From the perspective of the preservation of world order and intra-state harmony, the principle of self-determination takes on a vital role. Its satisfaction is imperative as a mechanism to resolve inter-group conflicts. Law is the organized resolution of conflicts to prevent their spread through society, and self-determination is essential to the process. Robert Freidlander wrote,

> "...Self-determination becomes operative whenever a given people is willfully prevented or coercively impeded from adhering to its traditional beliefs and societal values, or from exercising its customary practices on territory it inhabits.... The right to self-determination is therefore born out of conflict between two collectivities, which have opposing value orientations and competing ideologies. The implication is that whenever a serious conflict arises and is not channeled through existing authority structures,

then self-determination becomes

(a) the remedy relied upon by the oppressed group, and

(b) the right which grants to the non-dominant party the choice of an uncoerced determination."(425)

In the context of the independent state it is advocated that "internal self-determination" presents a solution to both parties in conflict - the majority dominant structure and the disaffected minority. The territorial integrity of the national majority is preserved because "internal self-determination" would not allow secession. The aspirations of the minority would be accomodated to the extent that it does not endanger the territorial integrity of their home state. The benefit to both sides would be a mechanism to diminish conflict and remove the danger of violence in their relations.

The international dimension is satisfied in that world order is maintained:

(a) by the avoidance of domestic conflict which can escalate into violence with its inherent danger of regional involvement in a conflict, and

(b) through the preservation of the integrity of the state, which lessens the dangers of instability posed by the collapse of a member in the international community.

In the case of dispersed peoples like some of the natives of Canada the danger of territorial secession is slight. However, the danger of conflict is actually increased in the Canadian context exactly because there is no possible remedy for dissatisfaction through a secessionist movement. In such a case "internal self-determination" addresses the needs of dispersed peoples and defuses potential conflict. It provides a mechanism to address the concerns of scattered peoples who are barred

from traditional formulations of self-determination which require a cohesive territorial base for a nation.

In conclusion, "internal self-determination" meets the requirements of the principle of self-determination and international law in general. It does not seriously threaten the existing international order while it provides a mechanism for the resolution of intra-state conflict between peoples. This does not, of course, translate the proposal into a principle of law, but self-determination presently has that status. The section which follows examines the law of self-determination to determine whether it is capable of admitting a concept such as the one suggested.

2. "INTERNAL SELF-DETERMINATION" IN INTERNATIONAL LAW

a. International Agreements

(1) United Nations Charter

Self-determination in the Charter occurs in the context of the development and maintenance of friendly relations among nations. Both the current formulation and the proposed definition of self-determination serve to provide mechanisms for inter-group conflict resolution. Therefore, the proposed definition of "internal self-determination" would not function in a manner contrary to the existing legal principle.

Article 2(4) obliges Member States to refrain in their international relations from the "threat or use of force against the territorial integrity or political independence of any state." If current self-determination does not allow the right to secession, then neither can "internal self-determination" contain such a right. The danger that self-determination could be exploited in international relations to encourage secessionist movements was recognized early in United Nations practice and resulted in the statements on territorial integrity. Without the right of secession the danger of "internal self-determination" being exploited to endanger another State's unity and consequently world order would be reduced or removed entirely.

The universal nature of self-determination is an integral component of the principle as expressed in the Charter. The references to self-government or independence are restricted to colonial peoples while the general discussion of the principle in Article 1(2) has no such restriction. Therefore, "internal self-determination" as a component of

the principle of self-determination, is not available to all peoples.

Article 2(7)'s prohibition of interventions in "matters...essentially within the domestic jurisdiction" of Members does not prevent a theory of "internal self-determination". The article's prohibition has been circumvented several times in the United Nations' history and most frequently in the field of human rights.(426) These were interventions in the sense of international criticism and the discussion of a state's domestic policies. However, they can be explained as the appreciation by the world's states that gross domestic violations of human rights can contribute to the destabilizing of world order and peace. They are also recognitions that the protection of human rights is no longer a matter "essentially within the domestic" sphere and has been elevated to an international concern. A similar argument justifies the examination of domestic policies in "internal self-determination":

> (a) the maintenance of international stability, order and peace, and
>
> (b) the recognition that man's individual and collective rights are no longer a matter solely of the State's discretion but now have an international dimension.

(11) Human Rights Covenants

Perhaps even more clearly than the Charter, Article 1 of the two international conventions on human rights recognize the universal character of the right - "all peoples have the right to self-determination". The obligation to promote the realization of the right lies on all State Parties to the treaties rather than only states responsible for colonial territories. The Human Rights Committee, created by the conventions to supervise their implementation, has

interpreted Article 1's reference to self-determination as applicable to non-colonial peoples who are in a minority position within an independent state. This has occurred at least once with Columbia, when the Committee in its questions concerning that state's 1980 report asked whether domestic legislation allowed the Indians the enjoyment of their right to self-determination.(427) The conventions impliedly acknowledge the close connection between collective and individual rights. "Internal self-determination" is a collective right and its denial reduces the value of the individual's rights.

Article 1 makes no reference to territorial integrity but this requirement could be considered as implicit in the term "self-determination" itself based on other instruments and United Nations resolutions and declarations. It would appear that nothing in the words of Article 1 prevents the existence of an "internal" form of the principle in the domestic policies of states. In addition, the international character of the principle buttresses the arguments for its application on the domestic scene. In its March 1979 report under the Covenant Canada tersely stated that it "subscribed to the principles set forth in this article".(428)

There is an express prohibition under Article 27 of the International Covenant on Civil and Political Rights of policies designed to prevent the enjoyment of individual rights of language, religion, and culture which are essential to a minority's survival. It does not, however, proscribe a State's attempts to grant greater protection to a minority or to acknowledge some degree of "internal self-determination". It is suggested that Article 27 should be seen as a minimum rather than a maximum standard for the protection of minorities.

In conclusion, the two Human Rights Covenants:

(a) do not prevent "internal self-determination" from being formulated and put into practice, and

(b) may actually buttress the argument for the process by their acknowledgement of the universal character of self-determination.

b. United Nations General Assembly Declarations

(1) Universal Declaration of Human Rights

The Universal Declaration of Human Rights does not specifically mention self-determination. Article 2(3), however, states that "the will of the people shall be the basis of the authority of government". This expresses a liberal democratic concept of government authority which is entirely in keeping with the proposed "internal self-determination".

A denial of self-determination potentially creates a loss of government authority. This occurs when a people perceive that the government no longer represents them or addresses their needs. One argument in support of "internal self-determination" is that it prevents such a disassociative process. The Declaration, therefore, reflects this major philosophical base of "internal self-determination".

(ii) Declaration on Colonial Peoples and Countries

The Declaration on the Granting of Independence to Colonial Peoples and Countries was adopted in 1960. It recognized the importance and urgency of the need to end colonialism when it clarified two important concepts; the universality of self-determination and secondly, the incompatibility of "partial or total disruption of national unity and territorial integrity" with the Charter. The question of territorial integrity has already been addressed. It is suggested that "internal self-determination" does not threaten national unity. Instead it may prevent such destruction by contributing to the creation of harmonious domestic conditions. It could diffuse tensions which endanger national unity and fulfill the requirements of the Declaration.

(iii) Declaration on Friendly Relations Among Nations

The 1970 Declaration on Friendly Relations and Co-operation Among States reinforces the universal character of self-determination. It concentrates on one violation of the principle - the "subjugation of peoples to alien subjugation, domination or exploitation".(429) The passages in the Declaration which recognize the universal character have already been discussed. The importance of "national unity and territorial integrity" is identified in the text. For the reasons noted above it is suggested that these goals are not adversely affected by "internal self-determination".

c. United Nations General Assembly/ECOSOC Resolutions.

Self-determination has emerged as a principle of international law. This is due in part to its recognition in treaties and State practice evidenced through the resolutions of the General Assembly and other inter-governmental organizations. Such inter-governmental resolutions provide useful guides to determine the content of self-determination.

General Assembly Resolution 1541(XV) of 15 December 1960 set out the principles to guide Members in determining whether or not they were obliged to transmit information under Article 73(e) of the Charter. That article deals with non-self-governing territories which have not yet attained a "full measure of self-government". The resolution identified the modes in which political self-determination could be achieved for these territories.(430) One mode, free association, noted the retention by the peoples involved of the "freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes." Another mode, integration into an existing state, is described in terms which suggest that there is no retained right of secession. This is consistent with the principle of self-determination. However, even with full integration the peoples involved retain the right to "equal rights and opportunities for representation and effective participation" in all aspects of government. The third mode identified by the resolution was the emergence of the territory as a sovereign and independent state.

The terms of free association and full integration anticipate the continued existence of a "people" in the newly formed state. Due to the nature of free association the right to secede from the union is implicit in the mode of exercising self-determination. Integration does not allow

such a right but it also assumes the continued existence of the people as a separate entity within the union by their possession of the right to be meaningfully represented within authority structures. Thus both modes of self-determination acknowledge that the new State may not always be synonymous with its constituent peoples.

The economic dimension of self-determination was discussed by General Assembly Resolution 1803 (XVII) of 14 December 1962 entitled "Permanent Sovereignty over Natural Resources." It identified a number of principles consistent with economic self-determination. The first principle was;

> "(1) The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of national development and of the well-being of the people of the State concerned."(431)

It should be read in conjunction with the statement in the resolution that

> "...it is desirable to promote international co-operation for the economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination".

The resolution recognizes the importance of economic development to fulfill self-determination. In addition, it reinforces the need for cooperation to ensure balanced development throughout the world. The resolution does not specificially consider the problems of unequal development within a state. However, its statements are equally important to the domestic situation of states like Canada where certain regions and social groups suffer from under-development. The use of natural resources for the development of a state's population is stated in terms of an obligation by the principle quoted above.

With Resolution 3201 (S-VI) of 1 May 1974 the General Assembly

adopted the Declaration on the Establishment of a New International Economic Order. The new order is founded on respect for a number of principles. One of them is:

> "(a) sovereign equality of States, self-determination of all peoples, inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other States;"(432)

The Declaration speaks of the "right of every country" to adopt its particular economic and social order, while elsewhere it refers to the "right of all States, territories and peoples under foreign occupation, alien and colonial domination or apartheid" to restitution for exploitation and depletion of natural resources. The General Assembly drew a distinction between the recipients of some rights and the beneficiaries of other rights.

The first principle of the 1962 resolution suggests that economic self-determination is subject to the following considerations

(a) all peoples have the right to economic self-determination by virtue of which they have permanent sovereignty over their natural wealth and resources

(b) such sovereignty must be exercised for the benefit of all members of the State in the interest of national development

(c) the right to restitution for depleted resources belongs only to States and peoples entitled to national independence under current self-determination ie peoples subject to alien or foreign domination, colonialism, or apartheid

(d) the right to determine the internal and external economic relationships of a country is an expression of the concept of the state as the fulfillment of a people's right to self-determination.

In terms of "internal self-determination" the question of economics

is obviously important since even a minimun of self-government is empty rhetoric without an economic basis. In the case of many indigenous peoples their claim for economic self-determination involves the granting of land as the basis of economic development. However, within the domestic context the refusal of a minority to allow economic development on its lands may be unjustified if the national interest and implicitly national unity demands it. Such a priority should not, of course, affect the right of such a minority to compensation for the development of its lands.

In the case of many minorities the model is difficult to visualize but for the aboriginal peoples of Canada it offers a practical alternative to present arrangements. As mentioned above each group's claim to some aspect of self-determination must be balanced and addressed within the practical parameters of their circumstances. The over-riding importance of the State in the area of economic development is clearly enunciated by the Charter of Economic Rights and Duties of States in General Assembly Resolution 3281 (XXIX) of 12 December 1974 which makes no reference to the rights of peoples or nations. Economic unity and development of a State as a whole is given equal importance to territorial and national unity.

In the area of social self-determination reference can be made to the 1969 Declaration on Social Progress and Development.(433) It describes the right of social self-determination as

> "the right and responsibility of each State and, as far as they are concerned, each nation and people to determine its own objectives and social development, to set its own priorities and in conformity with the principles of the Charter of the United Nations the means and methods of their achievement without any external interference."

The text appears to contemplate the possibility of some form of distinction between the means of social self-determination of a state and the peoples which constitute it. However, it should be noted that Article 3 of the resolution which enunciated the Declaration set out the conditions for social self-determination. These included the respect for the sovereignty and territorial integrity of States. It is submitted, however, that these requirements are not inconsistent with some form of "internal" social self-determination to allow parallel but separate developments for different peoples within a single State.

It is recognized that there would be certain limitations on such "internal" arrangements in the sense that:

(a) separate social development would have to be subject to practical parameters such as the cost to the state of separate social institutions

(b) a gross divergence between the paths of social development of adjacent or intermingled peoples would pose considerable problems for national unity and efforts would have to be directed at minimizing serious differences.

These two points are not explicitly mentioned in the Declaration but can be taken to be implicit in the preservation of national unity and other limits inherent in self-determination. The parameter of national unity was expressed in the 1970 Declaration on Friendly Relations and the 1969 Declaration merely repeats earlier expressions when it refers to territorial integrity.

Cultural self-determination was discussed by the General Assembly in Resolution 3148 (XXVIII) entitled "Preservation and Further Development of Cultural Values". The resolution affirms the right of the State to

> "...formulate and implement, in accordance with its own conditions and national requirements, the policies and measures conducive to the enhancement of its cultural values and national heritage."(434)

The resolution recognizes

> "...that the value and dignity of each culture, as well as the ability to preserve and develop its distinctive character, is a basis right of all countries and peoples."

The inherent right to survival of a culture was also expressed in a 1973 report of the Director-General of UNESCO to the Secretary-General of the United Nations,

> "...In the individual nation, as in the world as a whole, any living culture is entitled to be preserved so that it may realize its full human potentialities, for a culture is essentially a certain way of living as a human being and the decline of a culture, unless is it absorbed into a new culture that takes its place, entails an impoverishment of mankind as a whole."(435)

The separate cultural development of a people from the majority usually poses little danger to either national unity or territorial integrity. Canada has officialy adopted a policy of multi-cultural development.(436) The value of individual cultures was advocated by UNESCO's 1966 Declaration on the Principles of International Cultural Cooperation.(437) This is not to say that the State's interest have been neglected as shown by the General Assembly's resolutions on cultural values in 1973 and 1976.(438) However, all of these instruments acknowledge that the State's importance should not be interpreted to mean only the survival of a State-identified or majority "national" culture.

National unity is threatened less by cultural self-determination that any of the other forms. Arguably this could allow wider parameters for the expression of some internal form of the principle. Certainly Canada has shown with its multi-culturalism policy that national unity is promoted and internal strains reduced when the competition among cultures

is minimized,

d. Judicial Decisions.

The International Court of Justice has dealt with the question of self-determination on several occasions either directly or indirectly. The Permanent Court of Justice did not consider the matter although there is an Advisory Opinion from the Judicial Committee of the League of Nations which is discussed below. These cases demonstrate the evolving nature of self-determination.

The earliest judicial body to address the question was the Judicial Committee of the League. It was asked to resolve a dispute between Sweden and Finland over the Aaland Islands. The inclusion of self-determination as a principle of several Soviet treaties in the same period was raised in relation to the linguistic rights of the Swedish speaking minority. The Committee commented

> "...The recognition of the principle in a certain number of treaties cannot be considered as sufficient to be put upon the same footing as a positive rule of the Law of Nations. Positive international law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of the right, any more than it recognizes the right of other States to claim such a separation."(439)

Since the decision in the Aalands Island case the successor of this early effort at judicial determination of international legal questions, the International Court of Justice, has addressed the issue on three occasions.

(i) South West Africa case

In the 1966 decision of the South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) the International Court of Justice considered the application of the two complainants that South Africa had failed to comply with its duties under the Namibian mandate. The Court declined to address the application of the two states. However, the dissenting opinion of Judge Nervo commented on the "sacred trust". He implied that the mandate system was an early attempt to impose self-determination on the colonial policies of the mandate holders.

> "...The sacred trust of civilization...is a legal principle and a mission, where fulfillment was entrusted to more civilized nations until a gradual process of self-determination makes the people of the mandated territory able to stand by themselves in the strenuous conditions of the modern world."(440)

(ii) Namibia case

Namibia was also before the Court in a 1971 Advisory Opinion requested by the General Assembly on the legal consequences for states of the continued presence of South Africa in the territory. The Court's comments on self-determination indicate its acceptance in international law:

> "...the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded in all "territories whose peoples have not yet attained a full measure of self-government..."(441)

The separate opinion of Judge Ammoun interpreted the Court's opinion and stressed that the Court was not an "unmoved witness" to the evolution

of modern international law. He stressed that the Court had considered not only the stipulations of the Mandate for the termination of the legitimacy of South African rule but also two other grounds,

> "By referring, like Resolution 2145(XXI), to the Charter... and the Universal Declaration of Human Rights, the Court has asserted the imperative character of the right of peoples to self-determination and also of the human rights whose violation by the South African authorities it has denounced..."(442)

(iii) Western Sahara case

In the Advisory Opinion on the Western Sahara given in 1975 the Court considered the status of the territory which Spain planned to decolonize. The major issue before the Court was whether the legal ties between the region and the Empire of Morocco and the "entity" which had preceded modern Mauritania. The Court held that the ties were with both the Empire and the entity, but further held that these ties were insufficient to affect the decolonization process or to restrict the right to self-determination of the area's inhabitants.

Judge Ammoun concurred in the decision but gave a separate opinion in which he described self-determination as a "general principle" within Article 38(1)(b) of the Court's Statute. He further commented

> "...As for the 'general practice' of States to which one traditionally refers when seeking to ascertain the emergence of customary law, it has in the case of the right of peoples to self-determination, become so widespread as to be not merely 'general' but universal since it has been so enshrined in the Charter of the United Nations...and confirmed by the texts that have just been mentioned; pacts, declarations, and resolutions, which taken as a whole, epitomize the unanimity of States in favour of the imperative right of peoples to self-determination..."(443)

(iv) Conclusion

The three decisions of the International Court of Justice which relate to self-determination dealt exclusively with cases of colonialism, alien domination, or apartheid. In addition, the most urgent problem before the Court in both the Namibia and Spanish Sahara cases was the question of political self-determination. In this sense the issue of an "internal" form of the principle has never been addressed.

In the area of political self-determination, the Court has recognized the value of the "sacred trust of civilization" as a "principle and a mission" of the advanced States towards the less advanced peoples, particularly those under colonialism. Its evolution into modern anti-colonial theory is indicated in the opinions of individual judges like Judge Ammoun.

It cannot be said that the Court has supported an idea like "internal" self-determination but the concept is somewhat of a tabula rasa at the moment. It is submitted, however, that their recognition of the continued importance of the "sacred trust" supports to some degree native claims to greater autonomy.

e. "Internal" Self-determination and State Practice

The discussion which follows considers the domestic situation of four States with indigenous populations - the Union of Soviet Socialist Republics, the United States, Canada, and Denmark(Greenland). Particular attention will be given to policies designed to give greater self-control over internal affairs to minority communities.

(i) Union of Soviet Socialist Republics

The Soviet Union's policies towards minorities is important for two reasons. It is a large multi-national state which is also a major world power. In addition, the Soviet Union put into practice socialist theories and has strongly influenced other states' practices in a variety of matters. This discussion will concentrate on the theoretical basis for the Soviet Union's minority policies as it applies to self-determination.

During the 19th century socialist thought acknowledged the role of "progressive" nationalist movements in the international proletarian revolution. Marx, initially hostile to nationalism as an artifical barrier to worker cooperation, later tempered his views as revolution failed to spontaneously erupt in Europe.(444) Lenin, faced with the multi-national Russian Empire, built upon the Marxist foundation to develop a theory of nationalism compatible with international socialism. He argued that support for bourgeois nationalism was warranted insofar as it remained "progressive" and hastened the collapse of feudalism.

Lenin divided the world into

(1) advanced capitalist states where bourgeois national movements had exhausted their "progressive" tendancies and obstructed international

proletarianism

(2) less advanced areas like Russia and Eastern Europe where bourgeois nationalism was still in progress

(3) colonial territories where nationalism led by men like Sun Yat-sen could still constitute a 'progressive" force.(445

In his 1914 work "The Right of Nations to Self-determination" Lenin wrote

> "If we want to learn the meaning of self-determination of nations... by examining the historical and economic conditions of national movements, we shall inevitably reach the conclusion that self-determination of nations means the political separation of these nations from alien national bodies, the formation of an independent state."(446)

After the Bolshevik seizure of power the official policy of the Russian Social Democratic Labour Party was stated at its 7th All-Russia Conference by Joseph Stalin, the People's Commissar for Nationalities,

> "(a) the recognition of the right of peoples to secession
> (b) regional autonomy for peoples who remain in a given state
> (c) specific laws guaranteeing freedom of development for national minorities
> (d) a single indivisible proletarian collective body, a single party for the proletarian of all the nationalities in a given state."(447)

Once the Bolsheviks were in power the new government issued its "Proclamation to all the Peoples and Governments of all the Belligerent Nations". In it the Russian government proposed an immediate peace without annexations or conquest of foreign territory. Furthermore, it stated that annexation included the retention of any nation force within the borders of another State without the ability to decide its fate by a free vote.(448) Soon afterwards, in 1918, the Council of People's Commissars led by Lenin issued the "Declaration of the Rights of the Peoples of Russia" which stated inter alia

> "...the Council of People's Commissars has resolved to establish as a basis for its activity in the questions of nationalities the following principles:
> (1) the equality and sovereignty of the peoples of Russia
> (2) the right of the peoples of Russia to free self-determination even to the point of separation and the formation of an independent state
> (3) the abolition of any and all national and national-religious privileges and disabilities
> (4) the free development of national minorities and ethnological groups inhabiting the territory of Russia..."(449)

The definition of people as evolved by socialists in the 19th century was more limited than the liberal-democratic ideals of nationalism.(450) Liberal-democratic thought relied heavily on linguistic ties and common aspirations as the basis for a nation although this was influenced by the preponderance of German and Italian writers.(451) A different approach was advocated in a 1913 Bolshevik position paper by Joseph Stalin

> "A nation is a historically evolved stable community of language and territory, economic life, and psychological make-up manifested in a community of culture."(452)

The materialist bias of the Bolsheviks led to a more objective definition of nationalism than other socialists.(453) Bolsheviks like Stalin denounced attempts to use "ethnic affinity" to define a nation as confusing the terms "nation" and "tribe".

The Soviet definition of "nationality" required the presence of several characteristics:

(1) community of language

(2) community of territory

(3) community of economic life

(4) community of psychological make-up.

The "ethnic affinity" definition of a nation was rejected for divorcing the nation from its soil and converting it into an "invisible

self-contained force...mystical, intangible, and supernatural."(454) The Soviets shifted to a territorial definition of a people which then required the other elements traditionally found in a "nation".

The evolution of the Soviet "nationality principle" is most evident in the changing terms of the Constitution (Fundamental Law) of the U.S.S.R. The first Constitution adopted in 1918 for the Russian Socialist Federated Social Republic states that

> "...soviets of those regions which differentiate themselves by a special form of existence or national character may unite in autonomous regional unions ruled by the local congress of soviets and their executive organs."(455)

In 1923, the first Constitution of the newly formed Union of Soviet Socialist Republics stated that the new federation would

> "...guarantee the sovereignty of each and every constituent Republic of the Union. Except as delegated in the herein Constitution the sovereign rights of the several Republics constituting this Union shall not be restricted or impaired...Each of the constituent Republics shall have the right to withdraw freely from the Federal Union."(456)

Through a series of amendments and new Constitutions, most notably the 1936 version, the Soviet Union ostensibly evolved into a federation of 15 Union Republics each with the right to secede. Almost all Union Republics contain Autonomous Soviet Socialist Republics and Autonomous Regions or Areas which are granted a degree of self-government to compact nationalities within the boundaries of a Union Republic. In theory the Union Republics are completely autonomous except for those matters over which they have granted jurisdiction to the Federal Union. The other units have decreasing powers of self-government in the order noted above.

In the most recent Constitution adopted in 1977 there are 15 Union Republics, 20 Autonomous Soviet Socialist Republics, and 8 Autonomous Regions or Areas.(457) It is interesting to note, however, that unlike earlier versions the new Constitution describes the Union as an

"integral, federal, multinational state" based on the principles of socialist federalism, "free self-determination of nations", and voluntary association.(458) To varying degrees the U.S.S.R.'s nationality policy has influenced other socialist states, notably the People's Republic of China.(459)

Regretfully, Soviet practice as regards self-determination during the 20th century has been selective, to say the least.(460) However, within certain political parameters the new Soviet regime attempted to accomodate the interests of national groups. The right to secession was accorded to Finland and Poland, though the Ukraine and Trans-Caucus in the 1920's, and the Baltic States in the 1940's, were ushered back to the Soviet fold.

Within the Soviet Union there are conflicting policies at work. Underdeveloped national groups are aided to modernize their languages and cultures to remain viable in the modern world. In addition, elaborate systems exist to ensure minority access to authority structures. However, critics state that the Soviet system encourages the use of Russian in daily life, that demographic policies are detrimental to minorities, and that minority cultures are only encouraged within narrow political parameters.(461)

(ii) United States

The Americans inherited from the British the colonial practice to recognize indigenous nations as distinct political entities. The nations were characterized as "dependent" and subject to the will of the sovereign, or its successor in the American context, the Congress. However, this susceptibility to the "irresistible power of the sovereign"

did not automatically strip indigenous nations of their right to self-government in American domestic law.(462) In the absence of statutory provisons by the plenary power of the Congress or treaty agreements to the contrary, the indigenous nation retained inherent powers of "internal" sovereignty.

During the 19th century, in a process which has already been described, the relationship towards these "dependent" nations came to be based on the "sacred trust". At the same time assimilationist policies undermined the collective nature of land ownership and several indigenous governmental structures were destroyed.(463)

After the 1920's the process was reversed and the government introduced legislation in 1934 to protect collective ownership of land and to recognize the inherent power of the Indians to rule themselves.(464) They were encouraged to adopt the American style of constitutional government with judicial, legislative, and executive branches. The period spawned the Indian tribal court system and the various legal codes for different Indian nations.

In 1975 the Congress enacted the Indian Self-determination and Education Assistance Act.(465) The statute dealt with educational programes formerly administered by the federal government which were transferred to Indian tribes along with necessary funding. The reference to self-determination in the title is somewhat misleading since it is used in reference to an individual's right to determine his educational destiny. However, the Congressional statement of findings which accompanied the statute makes several interesting points about the relationship between the United States and the Indians. The Congress found that

> "..(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons...
> ...(b) The Congress further finds that-
> (1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;.."(466)

The Congressional declaration of policy which also accompanied the statute, although neither it nor the statement of findings were actually enacted as part of it, stated that the Congress "...recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination..."(467) Based on that obligation the Congress declared its commitment to the maintenance of

> "...the Federal Government's unique and continuing relationship with and responsiblity to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services."(468)

While the United States Constitution does not grant a special status to the Indian nations, American polices over many decades have acknowledged a special status for them. All aspects of self-government, from the legislative to the enforcement of laws, are given a place among the laws of the states and the federal government. In its domestic conduct the United States acknowledges the existence of a different people and acknowledges their claims to self-control, to separate development within the practical parameters of the Constitution, and their right to remain different.

(iii) Canada

The pattern of Canada differs to some degree from the American experience and has already been discussed in considerable degree. In the past 15 years there has been a major change in Federal policy towards the indigenous minorities with respect to self-government, aboriginal rights, and land claims. At the most recent Constitutional Conference in March 1984 the Prime of Minister of Canada spoke of self-government in these terms

> "There is nothing revolutionary or threatening about the prospect of aboriginal self-government. Aboriginal communities have rightful aspirations to more say in the management of their affairs, to exercise more responsibility for decisions affecting them. These functions are normal, and essential to the sense of self-worth that distinguishes individuals in a free society. The Government of Canada remains committed to the establishment of aboriginal self-government..."(469)

The importance of socio-economic development as a component of any plan for self-government was recognized in the Penner Report discussed above and the March 1984 Conference's Agenda. Mr. Trudeau commented

> "...As our aboriginal peoples take their affairs into their own hands increasingly in the years to come, federal and provincial governments, in close concert with the aboriginal peoples, must work together to put in place the socio-economic infrastructures that will enable them to fulfill their reasonable expectations as citizens of Canada."(470)

With respect to cultural development Mr. Trudeau's speech noted the importance of self-governing institutions to provide

> "..bulwarks for culture and language. The design of the necessary social, cultural and economic programs and services can be tailored so as to protect and enhance aboriginal cultures and languages."(471)

Although the March 1984 Conference was unable to reach an agreement on the structures to be used the Canadian government has announced that

it will grant a wide range of powers to indigenous groups in order for them to achieve some degree of self-government.(472) The Canadian plan represents "internal self-determination" in all of its aspects:

(1) political -self-government of a people within an independent State, subject to its laws but also able to pursue their intrinsic goals so long as territorial integrity is not threatened

(2) economic -the provision of an economic base for a people to ensure a financial basis for their self-government and to allow them to exercise self-control over their economic development

(3) social -self-control of social development both through setting goals and by the provision and guidance of mechanisms for social progammes

(4) cultural -the protection and development of cultural traits of a people in a manner which they choose in order to enhance and develop their language and culture for the future.

(iv) Denmark (Greenland)

Greenland was colonized by the Danes in the 19th century and commercial exploitation rather than settlement was involved. As a result there are 42,000 Inuit in a total population of 50,000.(473) It is difficult to speak of "internal self-determination" in the sense of a special regime for a minority in the case of Greenland since the Greenlandic people are a majority in their land. However, for many years Greenland was ruled as an integral part of the Danish Kingdom, with its affairs dealt with by the Greenland Affairs Office in Copenhagen. On May 1,1979, after many years of pressure by Greenlanders, the island was granted Home Rule based on an Administration elected by general

suffrage.(474)

The Home Rule government will progressively enlarge its jurisdiction in all areas affecting the local citizens except foreign affairs and defence. By the summer of 1983 it possessed full jurisdiction over education, religion, social services, and communications. Equally important was the commitment of assured financial revenues from the Danish government.(475) As part of the process of greater self-control Greenland requested the Danish government to present its desire to withdraw from the European Economic Community (E.E.C.). In 1983 a rapporteur appointed by the E.E.C. recommended that the withdrawal be allowed and Greenland be granted status as an Overseas Country and Territory.(476)

The process of home rule in Greenland more closely resembles the decolonization of an overseas territory. However, it is important to note that the territory originally exercised self-determination to become an integral part of the Danish State. This did not, however, prevent the Danish government from granting Greenland special status within the Kingdom akin to an exercise of "internal self-determination".

3. Indigenous Populations as Beneficiaries of "Internal Self-determination"

The concept of "people" has evolved over the centuries in tandem with the changing nature of self-determination itself. In the 19th century the principle was primarily concerned with European liberal nationalism aimed at independent statehood or at least the protection of minorities in multi-national states. This led to the rather ethnocentric definition of people in Europe based on historical development, economic ties, linguistic identity, religious allegiances, cultural traits, and in most cases an identifiable territorial base.(477)

As the 20th century progressed the term "people" has come to mean the inhabitants of a particular political unit. For example, the people of Nigeria are made up of many different ethnic groups but under current definitions of self-determination there is only one indivisible Nigerian people. It is submitted, however, that "internal self-determination" allows for a return to more traditional definitions of a people. By removing the power to disrupt territorial integrity and national unity there is less need to rely on a political definition of "people". In the case of indigenous peoples, this is particularly useful since they were denied the right to anti-colonial self-determination by the circumstances of history, and a single people could be divided between two countries.

There is little doubt that despite centuries of contact with European settlers the indigenous peoples of Canada have retained a remarkable degree of racial cohesion. This is due in part to government policies which have served to isolate them from urban centers, and discrimination which has discouraged intergration based on equality. In the case of the Metis it was inter-marriage which led to their formation,

but they have created and retained a degree of cohesiveness since the 19th century.

While broken into numerous linguistic groups, and after centuries of assimilation, there still remains a sense of "nationhood" in many indigenous groups, due in part to feelings of common history. Perhaps the process was aided by the absence of a transfer program similar to the United States experience. In Canada this has allowed most natives to remain close to their traditional lands and left historical ties intact.

Culture is not a static concept, and the cultures of the indigenous peoples have evolved in the face of new challanges and opportunities presented by European technology. Traditional culture has survived unevenly across Canada with some groups adopting radically different life-styles while other retain traditional forms, although adapted to new technologies. There is a similar situation with indigenous languages which have retained their vigour in some areas such as the North, but have nearly died out in daily use elsewhere. However, in many groups there is renewed interest in traditional language as a binding force for a people and indigenous language classes are being integrated into school curriculum.

As for an integral territorial base it is only in the North that large tracts of land remain in the possession of indigenous peoples. For the most part their lands are scattered across the country in small packets although substantial reserves do exist in several provinces. Traditional views of a "people" required a cohesive land base but it is submitted that "internal self-determination" allows for some degree of self-control even for dispersed peoples since the basis for self-government could be racial or cultural rather than territorial. Clearly there must be some base of land for jurisdiction but the size

does not neccesarily have to be large.

The 1983 Penner Report asserted that

> "...as a principle that it is the rightful jurisdiction of each Indian First Nation to determine its membership, according to its own particular criteria..."(478)

Self-identification is obviously a vital part of the delineation of a people. With the creation of regional and national political organizations to lobby for their interests it is clear that the indigenous groups of Canada are able to identify themselves. In addition, recent events have demonstrated the will to survive of indigenous peoples in Canada.

An important requirement of both the traditional and proposed forms of self-determination is the effective ability of a people of exercising the right. However, with territorial secession removed from the principle, "internal self-determination" allows any people to achieve a special relationship with the dominant society which best suits its needs and abilities. In the case of Canada, the indigenous peoples have proven themselves capable to exercise self-rule, control of their economic resources, and to preserve their cultural and social structures. This is not to say, however, that the achievement has been an easy one in the face of hostile or apathetic government policies over many decades. Given given the opportunity to exercise a meaningful autonomy, natives will be able to take their place as equal members of Canadian society.

IV. CONCLUSIONS

The concerns posed in the introduction constantly return to the need for a theoretical basis to analyse the conflicts between minorities and their home states. This is particularly true for indigenous peoples whose current claims do not always adapt easily to domestic law. The domestic legal situation of the indigenous peoples of Canada highlights the need for a new framework. At the same time the government of Canada and its native peoples have embarked without such a framework on a course with uncertain goals and consequences.

It is submitted that the international law of human rights establishes minimum standards for the treatment of minorities and their individual members. In terms of indigenous peoples these standards have continued to evolve as states have considered the peculiar problems which face these groups. It is suggested that these standards, woven from a variety of sources and dealing with a wide range of matters, can be drawn together into a cohesive framework.

The human rights standards are based on the inherent dignity of the individual, and the right to existence of the collective identity of individuals. Inherent in the right to exist is the right to preserve and develop the characteristics which make a people unique. From these principles flow all of the rights to political autonomy, economic, social, and cultural development.

In this discussion the framework has been called "internal self-determination". It should not be confused with self-determination as currently formulated in international law though they share many philosophical and legal roots. Instead it is proposed as a mechanism for the resolution of conflicts between minorities and majorities which can

serve to ultimately preserve the unity of independent states. At present several states have in place or are proposing mechanisms within their domestic laws which bear close resemblance to the one suggested.

In conclusion, it is suggested that the concerns of indigenous populations are common to most minorities. The solutions created to deal with their particular problems may have far-reaching potential in other situations. For these reasons the participants in the process of evolving new forms of interaction, both the indigenous peoples and their states, should be aware of the larger issues involved in what may seem at first to be strictly a domestic concern.

FOOTNOTES

1. Constitution Act, 1982, sec.35(2), as enacted by the Canada Act, 1982, c.11, (U.K.), which entered into force on 17 April 1982.

   Section 91(24), British North America Act, 1867, 30-31 Vict., c.3, (U.K.) (now Constitution Act, 1867) identifies "Indians, and Lands Reserved for Indians" as a matter within the Federal Parliament's exclusive legislative authority.

   The Inuit people of northern Canada are considered to be "Indians" for the purpose of Federal legislative authority. See:
   Re Eskimos [1939] S.C.R. 313 and Sigeareak El-53 v. the Queen [1966] S.C.R. 45

2. See, for example, the Dene Declaration of 1975 which states:
   "We the Dene of the Northwest Territories insist on the right to be regarded by ourselves and the world as a nation. Our struggle is for the recognition of the Dene Nation by the Governments and peoples of Canada and the peoples and governments of the world... What we seek then is independence and self-determination within the country of Canada. This is what we mean when we call for a just land settlement for the Dene Nation."
   Full text at M.Watkins (ed.), Dene Nation-The Colony Within (1977) at pp.3-4.

   See also the 1976 and 1979 proposals of the Inuit Tapirisat of Canada for an Inuit province called 'Nunavut' in the Northwest Territories. The Committee for Original People's Entitlement presented to the Canadian government in May 1977 their land claim which claimed on behalf of the Inuvialuit of the Western Arctic the establishment of the Nunavut Territory for Inuit areas in the Arctic.
   Committee for Original People's Entitlement, Inuvialuit Nunungat, (1977)

   See also "III. Metis Self-Government", at pp.2-3, Summary of Metis National Council on Metis Rights in the Constitution, Metis National Council (1984), Doc. 840-293/004, Federal Meeting of Officials on Aboriginal Constitutional Matters, Edmonton, Alberta, January 11-12,1984.

   See also Proposal of the Union of Nova Scotia Indians for the Revision of the Indian Act, 2 August 1979 [1979] 3 C.N.L.R.1.

   Native claims to autonomy, particularly when formulated as "self-determination" as that term is understood in international law, do not always enjoy support by international jurists. See, for example, the reservations expressed by L.C.Green, "Aboriginal Peoples, International Law, and the Canadian Charter of Rights and Freedoms", (1983) 61 Can.Bar Rev. 339.

3. See: P.Tennant, "Indian Self-Government: Progress or Stalemate", (1984) X:2 Can.Public Policy 211, at p.212

Also see J.A.Long et al, "Federal Indian Policy and Indian Self-Government in Canada: An Analysis of a Current Proposal", (1982) VIII:2 Can.Public Policy 189

For a general discussion of the historical relationship between natives and governments in Canada see, M.Jackson, "The Articulation of Native Rights in Canadian Law",(1984) 18:2 U.B.C.L.Rev. 255

4. See note 2,supra

5. Canada, Indian and Northern Affairs, Response of the Government to the Report of the Special Committee on Indian Self-Government (1984)

Canada, Minister of Indian Affairs and Northern Development, "Towards Self-Government", Minister's Letter-A Newsletter to Indian People on Current Issues (1984)

Canada, Indian and Northern Affairs, Transcript of Remarks by the Honorable Douglas C.Frith, P.C.,M.P., Minister of Indian Affairs and Northern Development to the Assembly of First Nations, Montréal,Québec, 18 July 1984.

6. See N.Zlotkin, "The 1983 and 1984 Constitutional Conferences: Only the Beginning," [1984] 3 C.N.L.R. 3 and,

M.Mason, "Canadian and United States Approaches to Indian Sovereignty", (1983) 21:3 Osgoode Hall L.J. 422, at p.438

7. United Nations, Special Study of Racial Discrimination in the Political, Economic, Social, and Cultural Spheres (1971) Special Rapporteur Hernan Santa Cruz, U.N.Doc.No. E/CN.4/Sub.2/307/Rev.1 at para.366-367

8. For background on the problems faced by Brazilian Indians see S.Davis, Victims of the Miracle: development and the Indians of Brazil, (1977) and Aboriginal Protection Society, Tribes of the Amazon Basin in Brazil: 1972, (1973)

9. See discussion at pp. 28-32 regarding the historical and legal origins of the Indian reserves of Canada

10. Canada, Indian and Northern Affairs, Indian Conditions: A Survey (1980) at pp.46-47 (hereinafter Indian Conditions)

11. United Nations, op.cit. note 7, para.370

12. Indian Conditions, supra, at pp.40 and 82. Major changes in Federal government polices since 1950 have included the "...elimination of legislation and administrative practices which previously suppressed Indian language and cultural expression", at p.40.

13. ibid, at p. 82

14. See, for example, F.Prucha, American Indian Policy in Crisis: Christian Reformers and The Indian 1865-1900, (1976), at p.104 G.Margadant, "Official Mexican Attitudes Towards the Indian: An Historical Essay", (1980) 54 Tulane L. Rev. 964

15. Canada, Indian and Northern Affairs, Statement of the Government on Indian Policy (June 1969) (hereinafter White Paper)

See also the speech of Prime Minister Trudeau in the same year which elaborated on the rationale of the proposed policy. Full text at H.Cardinal, The Unjust Society (1969)

One writer has described the 1969 White Paper in these terms,

"...[the White Paper] proposed a fundamental change in the relationship of Indian people to Canadian society, including amendment of the British North America Act and repeal of the Indian Act to eliminate legal distinctions between Indians and other citizens. The Indian Affairs Branch would be phased out and an effort would be made to place Indians on equal footing with other Canadians, in terms of government services, property rights, and legal status. Consistent with this liberal concept of equality, Indian claims were considered to be of only limited significance, at least in so far as they tended to emphasize special rights or special status within the society:

> "[Aboriginal rights claims] are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through policy and program that will end injustice to Indians as members of the Canadian community..." Canada, Indian and Northern Affairs, by Richard Daniel, A History of Native Claims Processes in Canada 1867-1979 (1980), at p.154 (quote from 1969 speech of Prime Minister Trudeau). Also see discussion of the post-war period at pp.319-320 of D.Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 Can.Bar Rev. 314

As noted, negative reaction to the 1969 White Paper on Indian Policy led to its withdrawl in 1971. The early 1970's saw movement by the Federal government in a number of areas considered to be important by the natives; a re-newed government commitment to a land claims policy (see discussion at note 72); the unsuccessful discussions with the National Indian Brotherhood to amend the Indian Act on "surrendered lands, taxation, Indian government, education and anachronisms within the Act" (Canada, House of Commons, Indian Self-Government in Canada: Report of the Special Committee, 1983, at p.20); the endorsement by the Federal government of the proposal that Indians take greater responsibilities for education (see discussion at note 173).

16. S.Weaver, "A Commentary on the Penner Report", (1984) X:2 Can.Public Policy 215, at pp.215-6

17. United Nations, op.cit. note 7, para.373-375

18. ibid, para.380.

19. See P.E.Goy, "Justice for the Indian in 18th Century Mexico", (1968) 12 Am.J. Legal History 41 for an hypothesis that Spanish colonial policies in Mexico contributed to the fusion by ensuring the separate but equal development of the Indians and the colonists.

20. Canada, First Ministers' Conference, Ottawa, March 8-9,1984, Discussion Papers, Canada's Aboriginal Peoples (1984). See also Northwest Territories, Minister for Constitutional Affairs, Aboriginal Peoples and Political Institutions: The Experience and Direction of Canada's Northwest Territories (1984), Doc.800-18/015 First Ministers' Conference, where the Metis are described as "A vigorous entrepreneurial people, they moved north and west with the river trade which was the first major economic basis of Canada's modern development. The role of mediator between the two cultures, aboriginal and European, was one they could not escape."

21. A. Combes, "Hacia la autogestion indigena", in Siete Ensayos Sobre Indigenismo, Insituto Nacional Indigenista de Mexico (1976) pp.29-49, cited in United Nations, Study of the Problems of Discrimination Against Indigenous Populations, Chapter IX (1983) Special Rapporteur Jose Martinez Cobo, U.N. Doc.No. E/CN.4/Sub.2/1983/21/Add.1

22. See discussion at pp.16-19 (Indians), p.19-21 (Metis), and pp.21-22 (Inuit).

    See also C.Chartier, "'Indian': An Analysis of the Term as Used in Sec.91(24) of the British North America Act,1867", (1983)43 Sask.L.Rev. 37

    National policies around the world rely on a variety of means to determine if individual is indigenous including ancestry, culture, language, group consciousness, residence in a certain part of the country, acceptance by an indigenous community, registration or "status", or a combination of criteria. For a survey of national policies to define indigenous populations see United Nations, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Chapter V. "Definition of Indigenous Populations" Study of the Problem of Discrimination Against Indigenous Populations (1982) Special Rapporteur José Martinez Cobo U.N.Doc.No. E/CN.4/Sub.2/1982/2/Add.6

23. Canada, House of Commons, Indian Self-Government in Canada: Report of the Special Committee (hereinafter Penner Report) (1983) at p.54-56

24. See Chartier, supra, note 22

25. Indian Act, R.S.C., 1970, C.I-6, section 6 creates a General List for "every person who is not a member of a band and is entitled to be registered" as an Indian under the terms of the legislation.

26. See, for example, the proposals contained in the Penner Report at pp. 55-56.

See also the mechanisms for determining membership under the Cree-Naskapi Act S.C. 1984, c.18, sections 17-20.1.

See also the mechanisms for membership under the proposed legislation for Indian self-government entitled An Act Relating to Self-Government for Indian Nations (Bill C-52, 2nd Session, 32nd Parliament, 32-33 Eliz.II, 83-84) which was not passed by the House of Commons before the end of the session, and under the proposed amendments to the Indian Act in An Act to Amend the Indian Act (Bill C-31, 1st Session, 33rd Parliament, 33-34 Eliz.II, 84-85)

27. See discussion of the issue of "Indian blood" in terms of characterization of an individual as Indian (pp.16-19) or Metis (pp.19-21)

28. The term "racial" is used in this context to describe native claims to political institutions based on traditional "tribes" or "nations", which by their definition are racial in nature.

29. In Canada the Federal government has responded to both the Dene and Inuit by rejecting racially defined territorial jurisidictions outside of Indian reserves as a solution to native claims for self-determination. The Drury Commission, created to consider the future options of the Northwest Territories, reported in 1980 but its recommendations were unaccepatble to both native groups and the territorial government.
Canada, Privy Council, Constitutional Development in the Northwest Territories, Report of the Special Representative (1980)
cited by D.Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in Institute of Canadian Affairs, Canada and the New Constitution (1981)

This does not mean, however, that the Federal government does not acknowledge the relationship between settlement of land claims and political development in the North. The government has stated that division of the Northwest Territories is contingent upon the settlement of claims as well as the prior reaching of concensus amongst northerners on such issues as boundaries and distribution of power. Such political development is seen in terms of representative government for all citizens of the region.
Canada, Indian and Northern Affairs, Federal Government Response on Land Claims: Policies and Processes (1984)

30. For example, the James Bay and Northern Québec Agreement, Editeur officiel du Québec (1976), identifies in Section 3 persons who qualify for benefits as those Cree or Inuit who reside in the Territory (the area covered by the agreement) on 15 November 1974.

It should be noted, however, that the agreement combines racial, residency and other requirements, so that residency alone does not necessarily guarantee access to benefits.

31. ibid, Section 3.2.1 (Cree) and 3.2.4. (Inuit)

32. ibid, Sections 3.2.2. and 3.2.3. (Cree) and Sections 3.2.5. and 3.2.6. (Inuit).

33. K.Crowe, "A Summary of Northern Native Claims in Canada: The Process and Progress of Negotiations", (1979)3:1 Etudes/Inuit/Studies 31

Canada, Indian and Northern Affairs, Native Peoples and the North: A Profile (1982) at pp.23-26

Canada, Indian and Northern Affairs, Federal Government Response on Land Claims: Polices and Processes (1984)

34. Canada, Office of the Prime Minister, Political Development in the Northwest Territories, (1977) at p.6, which notes that while the Federal government rejects lengthy residency requirements in the N.W.T. of 10-15 years for political participation it is "..willing to consult with northern leaders about instituting some degree of residence requirements for specified political purposes."

Canada, Northwest Territories, Territorial Legislative Assembly, Priorities for the North (1977) which urges that constitutional and political development should be treated separately from the issue of native claims.

Canada, Yukon, Office of the Commissioner, Meaningful Government for All Yukoners, (1975) which is based on a 'one government' position but with the possiblity of structures designed to ensure greater native participation.

cited at C.Hunt, "Approaches to Native Land Settlements and Implication for Northern Land Use and Resource Management Policies", (unpublished paper presented to Canadian Arctic Resource Committee, Edmonton,1978)

35. For example, the Indian Act created a base population and then determined which descendants would be recognized as status Indians. See Sub-sections 11(1)(c)-(e) of the Act.

36. In Canada legislation has not linked indigenous character to any particular cultural trait. However, the Indian Act section 109 provides for the enfranchisement of individual Indians, or an entire band by section 112. The person ceases to be an Indian for purposes of the Act, or any other law, upon an order of enfranchisement made by the Governor in Council.

37. See An Act to Amend and Consolidate the Laws Respecting Indians (Indian Act), 1876, 39 Vic.c.18, Statutes of Canada, (1876) Enfranchisement was encouraged as a means to "remove intelligent and successful Indians from the reserves";see G.Gould and A.Semple, (eds.), Our Land - The Maritimes, (1980) at p.77.

The dangers were further increased by the power of government to forcibly enfranchise individual males and their families who were

deemed to be sufficiently assimilated; see Indian Act Amendments, 10-11 Geo.V.c.50, Statutes of Canada, (1920)

38. See, for example, the Inuvialuit Land Rights Settlement, Final Agreement (1984) sec. 5(1) states,

"The Inuivialuit are best able to determine who should be eligible under the Inuivialuit Land Rights Settlement, but there should also be objective criteria by which an individual may have his or her right to be a beneficiary determined." See sections 5(2)-(12) for more detailed discussions of elibility criteria under the Agreement.

The James Bay and Northern Québec Agreement, Section 3.2.1(c) includes as eligible for enrollment as beneficiaries "...persons of Cree of Indian ancestry who are recognized by one of the Cree comunities as a member". The equivalent section for the Inuit is Section 3.2.4.(b).

39. Canada, House of Commons, Indian Self-Government in Canada: Report of the Special Committee (Penner Report) (1983)

40. It should be noted, however, that there is nothing intrinsically wrong with a "status" system to identify indigenous persons. Historically the Federal government has relied upon it to identify persons subject to the Indian Act's terms. With more recent land claim settlements both aboriginal groups and the government rely on some definition of "status" to identify beneficiaries.

41. Indian Act, section 9 provides for the appointment of a Registrar to investigate protests about the deletion or addition or an individual to the Band or General Lists. His decision is final and conclusive.

James Bay and Northern Québec Agreement, Editeur officiel du Québec (1976), Section 3.4 creates the Québec Native Appeals Board to deal with the "ommission, inclusion, exclusion or deletion of the name of a person" to or from the lists of beneficiaries.

42. Constitution Act, 1982, sec. 35(2) as enacted by the Canada Act, 1982, (U.K.) 1982, c.11, which entered into force on 17 April 1982.

43. For a discussion of policies towards the Indians under the French and British colonial administrations see:

B.Slattery, French Claims in North America 1500-59, Studies in Aboriginal Law, University of Saskatchewan (1980)

H.Brun, "Les droits des Indiens sur le territoire du Québec", (1969) 10 Les Cahiers du Droit 415

Leading examples of early references to the Indians, either specifically or containing references to them, are:

The acts for the establishment of La Compagnie des Cents Associes de la Nouvelle France (1664) and La Compagnie des Indies Occidentales

(1664) cited at Brun, supra, p.429. See also discussion at Canada, Indian and Northern Affairs, by William Henderson, Canada's Indian Reserves: Pre-Confederation, (1983), at pp.2-5

For examples of lands granted to 3rd parties by the French King with certain rights and benefits to the Indians see:

Corinthe et al v. Ecclesiastics of the Seminary of St.Suplice [1910] 38 C.S. 268 (Que.S.C.); revd. [1911] 21 B.R. 316 (Que.C.A.); Ct.Ap. affirmed [1912] 5 D.L.R. 263 (P.C.)

Lazare et un autre c. St Lawrence Seaway Authority et Procurateur-General de la Province du Québec [1957] C.S. 5 (Que.S.C.)

Mowat and Casgrain v. Pinsonneault (1897) 6 Que.Q.B. 12 (Que.C.A.)

For early references to the natives in English policy see:

Royal Charter of Hudson's Bay Company of 2nd May 1670, 22 Charles II (Letters Patent)

Privy Council Proclamation of 1761. See text at P.Cummings and N.Mickenburg (ed.) Native Rights in Canada (2nd ed. 1972), at pp.68-69.

Royal Proclamation of 1763, Appendix II, Constitutional Documents, R.S.C. 1970

Maritime Treaties (18th c.). See texts of examples at Indian and Eskimo Association of Canada, Native Rights in Canada, (1970), Appendix 3 and Cummings and Mickenberg, supra, at pp.295-312. Also see the documents relating to Maritime natives at pp.161-193 of Gould and Semple, supra, for the period 1725-1844.

44. D.Smith, Canadian Indians and The Law: Selected Documents 1663-1972, (1975) at p. xviii

45. An Act to Provide for the Instruction and Permanent Settlement of the Indians, 1842, Statutes of Nova Scotia, c.XVI

46. An Act Concerning Indian Reserves 1859, Statutes of Nova Scotia, c.XVI; see also An Act to Regulate the Management and Disposal of the Indian Reserves in this Province, 1844, Statutes of New Brunswick, c.XLVII

46'. Gould and Semple, op.cit.note 37, discussing pre-Confederation colonial statutes in the Maritimes.

47. Act for the Better Protection of Lands and Property of the Indians in Lower Canada 1850, 13-14 Vic.c.74, Consolidated Statutes of the Province of Canada (Quebec), (1859)

48. Act for the Protection of Indians in Upper Canada from Imposition and the Property Occupied or Enjoyed by Them from Tresspass of Injury 1850, 13-14 Vic.c.74, Consolidated Statutes of the Province

of Canada (Ontario), (1859)

49. An Act to Repeal in Part and to Amend An Act Entitled "An Act for the Better Protection of the Lands and Property of the Indians of Lower Canada", 14-15 Vic.c.59, Consolidated Statutes of Canada (Quebec), (1859)

50. An Act Providing for the Management of Indian and Ordinance Lands 1868, 31 Vic.c.42, Statutes of Canada, (1868)

51. An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Expand the Provisions of Act 31 Vict.c.42 1869, 32-33 Vic.c.6, Statutes of Canada, (1869)

52. Gould and Semple, op.cit. note 37, at p.95

53. An Act to Amend and Consolidate the Laws Respecting Indians, 1876, 39 Vic., c.18, Statutes of Canada, (1876)

54. ibid, sec.3

The issue of illegitimate children as defined under the Act continues to be an issue to the present: see Martin v. Chapman (1984) 150 D.L.R. (3rd) 638 (S.C.C.)

55. Indian Act, S.C., 1951, c.29

56. Gould and Semple, op.cit. note 37, at pp.90-99

57. Canada, Statistics Canada, Statistics Canada Daily, (February 1983) Based on the 1981 Census of Population 491,000 Canadians reported themselves as aboriginal in the following categories:
    (1) over 25,000 Inuit
    (2) close to 293,000 Status Indians
    (3) over 75,000 Non-status Indians
    (4) over 98,000 Metis

Population across Canada varies with natives constituting 2% of the national population. In the Maritimes the aboriginal peoples are less than 1% while they are 6.5% in Manitoba, 17.5% in the Yukon, and 58% in the Northwest Territories. However, there was considerable controversy over the question used by the census to determine ancestral background since it reportedly discouraged many thousands of Metis from identifying themselves as 'aboriginal'.

In the proposed legislation for Indian self-government (An Act for Indian Self-Government, Bill C-52, 2nd Session, 32nd Parliament, 32-33 Eliz.II, 1983-84) the Canadian government demonstrated its willingness to correct the problem by allowing Indian Nations to create their own "membership code" so long as they were not inconsistent with the "Canadian Charter of Rights and Freedoms, and with international covenants relating to human rights signed by Canada, and that respects rights to registration, and to band membership, acquired under the Indian Act". (See section 6(b)(ii) of the proposed legislation) A similar willingness to accord native

wishes to a degree can be seen in An Act to Amend the Indian Act (Bill C-31, 1st Session, 33rd Parliament, 33-34 Eliz.II, 1984-5)

58. This was not always the case, and some writers claim that where early legislation dealing with Indians did not define the term "Indian", then administrative practice made no distinction between pure and mixed-blood individuals. See, with respect to the 1842 and 1859 statutes of Nova Scotia concerning Indians and their reserves, G.Gould and A.Semple (eds.), Our Land- the Maritimes (1980)

59. See footnote 49

60. Gould and Semple, op.cit. note 58

61. The mixed-bloods' lack of acceptance as "Indians" by legislation became more important as the 19th century proceeded. Initially, the question of "status" determined the right to collect benefits or annuities under treaty or legislation. The right to reside on an Indian reserve, presuming the acceptance of the mixed-blood by the Indian community, was initially unaffected. Later, "status" for some mixed-bloods was dependent on residency on the reserves. See, for example, the 1850 Quebec (Upper Canada) Indian legislation which required persons with one Indian parent to actually reside "amongst such Indians" in order to qualify as an Indian.

    The most important changes with regards to mixed-bloods came in 1876 with the first comprehensive Indian Act. Section 11 stated that

    "No person, or Indian other than an Indian of the band, shall settle, reside or hunt upon, occupy or use any land or marsh, or shall settle, reside upon or occupy any road, or allowance for road running through any reserve belonging to or occupied by such band."

    Section 12 gave the Superintendent-General of Indian Affairs the power to remove persons contravening section 11. The result was that persons who were denied "status" now lost their right to use and occupy reserve lands.

62. See, for example, Metis Betterment Act, R.S.Alberta 1980, c.M-14

63. See for example C. Stanley, Birth of Western Canada (1975) and T.Flanagan, Louis David Riel (1979)

64. Although it can certainly be argued that the "half-breed" scrip was only issued as a political compromise to the events in the Red River Settlement, statutory provisions of the period suggest that there was also a legal consideration for the scheme. See Manitoba Act, Statutes of Canada, 33 Vic. 1870, c. 3, sec 31,

    "And whereas, it is expedient, towards the extinguish of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extend of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that under regulations to be from time to time made by the Governor General in Council, the

Lieutenant-Governor shall select such lots or tracts of such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine."

Although passed nearly a decade later, also see Dominion Lands Act, Statutes of Canada, 42 Vic. 1879, c.31, sec.125(e),

"To satisfy any claims existing in connection with the extinguishment of the Indian Title, preferred by half-breeds resident in the Northwest Territories outside of the limits of Manitoba, on the fifteenth day of July, 1870, by granting land to such persons, to such extent and on such terms and conditions, as may be deemed expedient."

Section 125 implicitly excluded the Manitoba settlers whose "rights of common and of cutting hay" had been dealt with by sec. 32(5) of the Manitoba Act, and the Red River half-breeds whose interests were accomodated by sec.31 set out above.

See also, W.P.Filmore, "Half-Breed Scrip", (1973) 39:1 Manitoba Bar News 124 for a more historical perspective on the question of Metis claims to Indian title.

It can be argued that the initial land distribution scheme, and the subsequent "scrip" system, which followed the rebellion in Manitoba was a political solution, rather than the legal acknowledgement of an aboriginal title in the Metis. However, the continuation of the policy beyond the Red River settlement Metis argues for a legal basis for the policy, at least after the initial "scrip" issue to Red River half-breeds. See:
P.Cummings and N.Mecklenberg (eds.), Native Rights in Canada, (2nd edition 1972) at pp.200-204

It is certainly the position of some Western Metis that they possessed, and continue to possess, unextinguished aboriginal title. See H.Daniels, The Forgotten People - Metis and Non-Status Indian Land Claims (1979)

65. Similar arrangements existed in the United States. See M.Orfield, Federal Land Grants to the States, (1915) at p.196, P.Gates, Fifty Million Acres, (1954), at p.39, and S.Dana et al., Minnesota Lands, (1960) at pp.107-108

66. See for example Treaty No.3 - Adhesion by Half-breeds of Rainy Lake and River reproduced at pp.319-320 of Cummings and Mecklenberg, op.cit. note 64

67. Metis Betterment Act, R.S.A. 1980, c. M-14, sec.1(b) defines a Metis as a "...person of mixed white and Indian blood having not less than one-quarter Indian blood, but does not include either an Indian or a non-treaty Indian as defined in the Indian Act (Canada)."

68. G.Rivard, A Comparative Study of the Status of Indigenous Persons in Australia, Canada, and New Zealand, (unpublished paper, York University, Toronto, 1975)

69. Constitution Act 1867 (British North America Act), sec.91(24). See also Re Eskimos [1939] S.C.R. 313 and Sigeareak E1-53 v. The Queen, [1966] S.C.R. 45

70. See discussion of the growth of Canadian interest in, and hence bureaucratic interaction with, the Inuit in the 19th and early 20th centuries. Diamond Jenness, Eskimo Adminstration in Canada (1964). For a brief survey of the Québec policies towards the Inuit in Nouveau Québec see the discussion at Danielle Burman, Les droits linguistiques des Amerindiens et Inuit du Québec (unpublished paper, Facultué des études supérieurs, Université de Montréal, 1977)

71. K.Harper, "Inuktitut Interpreting and Translating", in Canada, Indian and Northern Affairs, (1983) 53 Inuktitut 103

For a review of the situation of aboriginal languages in Canada, see M.K.Foster, "Canada's Indian Languages: Present and Future", (1982) 7 Language and Society 7

72. Canada, Indian and Northern Affairs, by Richard Daniel, A History of Native Claims Processes in Canada 1867-1979 (1980) at pp.132-155 which discusses in detail the movement of Canadian policy after World War II towards establishing mechanisms to settle native land claims. Mr.Daniel's analysis is that all Canadian governments since the war were interested in, or actively engaged in creating, a mechanism not dissimilar from the United States Indian Claims Commission established in 1945.

The first draft legislation to establish an equivalent Canadian institution to the American I.C.C. was prepared during 1961-62, but before it could be introduced to Parliament the Diefenbaker government was defeated in the House of Commons (pp.143-44). Under the new Liberal government of Lester B. Pearson, the Canadian government was not hostile to the idea but desired further study of the matter before introducing the legislation. It was re-introduced, studied, amended and then died on the order paper with the dissolution of Parliament in 1965.

Mr.Daniel summarizes the events of the late 60's leading to the 1969 White Paper in these terms, at pp.151-152,

"The government remained committed to the principle of a Claims Commission through 1968, and was probably aware that it could not wait much longer for positive developments in B.C. without risking all credibility. As late as December 1968, the new [Indian Affairs] Minister, Jean Chrétien, was assuring the House of Commons that legislation was being considered by the Cabinet Committee on Health, Welfare and Social Affairs.

Although Chrétien's statement that the Indian claims policy was in the hands of a Committee of the Cabinet may have seemed of little significance at the time, it does offer some clues concerning

the shift in policy which was taking place. Pierre Trudeau had been sworn in as Prime Minister on 19 April 1968, and almost immediately called an election in which his Liberal government was returned with a comfortable majority. One of the immediate effects of the change in leadership from Pearson to Trudeau was a change in the process by which policy was formed in all areas of government activity, including Indian Affairs."

By the winter 1968-1969, the legislation to create a mechanism to settle native land claims was suspended, ending concrete efforts by the Department of Indian Affairs and Northern Development which Mr.Daniel describes "had been going on since 1961".For a discussion of the 1969 policy see the discussion at note 15.

For a discussion of the change in Federal government policy in relation to native land claims since 1969 see:
- J.Edmond, "Book Review- Making Indian Policy: The Hidden Agenda 1969-70" (1982) U.Toronto Fac.L.Review Vol.40:107 and -R.Bowles et al., The Indian: Assimilation, Integration, or Segregation, (1972) at pp.71-72.

Also see the review of government policies since World War II at Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 Can.Bar Rev. 314

73. Calder et al. v. The Queen 74 W.W.R. 481, 13 D.L.R. (3rd) 64 (B.C.C.A.); affirmed [1973] S.C.R. 313, 34 D.L.R.(3rd) 145 (S.C.C.)

The previous movements of the Canadian government towards a settlement of native land claims, and particularly in the 1960's, argues against viewing Calder as the only factor in changing the government position on land claims after 1969. However, the decision was important to hasten the change in the government's attitude, even if it was not soley responsible for it.There were some indications even before the decision that the government's attitude to land claims was softening.

See Canada, Indian and Northern Affairs, by Richard Daniel, A History of Native Claims Processes in Canada, 1867-1979 (1980), at pp.221-222,

"The first sign of a relaxation of the opposition to claims based on native title came in August 1971 when the Prime Minister authorized [the Indian Claims Commissioner] to hear arguments concerning matters previously consdiered to be beyond his terms of reference... The Prime Minister acknowledged the significance of the decision [Calder] by conceding that the Indians might have more rights than had been recognized in the drafting of the White Paper. Then, in August 1973, the Minister of Indian Affairs and Northern Development, the Hon.Jean Chrétien, added substance to this concession by announcing the government's willingness to negotiate what he referred to as "comprehensive claims" - where rights of traditional use and occupancy had not been extinguished by treaty or superseded by law..."

For a summary of the Federal government's since the spring 1973 decision in Calder see Canada, Indian and Northern Affairs, Perspectives in Native Claims Policy (1983), at pp.3-4,

"...A re-examination of policy by the government at that time led to the statement made by the Minister of Indian Affairs and Northern Development on August 8,1973, in which the government outlined its willingness to negotiate settlements with native groups in those areas of Canada where native rights based on traditional use and occupancy of the land had not been dealt with by treaty or superceded by law. Because of the broad nature of the native demands associated with these claims - land, money, access to resources and other benefits - they came to be known as "comprehensive claims".

Outside of claims settlements in northern Quebec and an Agreement-in-Principle with the Inuivialuit of the Western Arctic, substantive progress was generally lacking in the implementation of the 1973 policy. Added to this were two federal elections in 1979 and 1980 which gave cause for reflection on government directions. Consequently an extensive policy review was carried out by the government during the later part of 1980, taking into account the need for a clearer sense of direction as well as the views and concerns of the native people. While the government reaffirmed its commitment to the equitable settlement of comprehensive claims through negotiation, it did so within a framework of newly enunciated guidelines."

These included,

"...Claims settlements are intended to protect and promote the Indian and Inuit peoples' sense of identity while providing for meaningful participation in contemporary society and economic development on native lands..."

"...Constitutional development cannot be decided within the claims negotiating forum since all citizens affected must be involved but settlements may include self-government on a local basis.."

"...The thrust of the policy is to exchange undefined aboriginal land rights for concrete rights and benefits.."

74. Chief Robert Kanatawat et al. v. James Bay Development Corp.et al. (unreported, CSM 5-04841-72, 15 November 1973, Que.S.C.); injunctions suspended until determination of appeals on the orders (unreported, CA 09-00890-73, 22 November 1973, Que.C.A.); appeal from suspensions dismissed (1973) 41 D.L.R.(3rd) 1 (S.C.C.)

On the merits see: Quebec Hydro-Electric Commission et al. v. Chief Robert Kanatawat [1975] C.A. 166 which reversed the interlocutory injunction. An appeal was filed in the Supreme Court of Canada, but the action was later withdrawn pursuant to the James Bay and Northern Quebec Agreement, section 2.4.

Also reported under the name Chief One Max 'One-Onti" Gros Louis et.al. v. James Bay Development Corp.et al [1974] R.P. 38 (Quebec

Superior Court)

Richard Daniel, writing in A History of Native Claims Processes in Canada, 1867-1979, supra, at pp. 223-224, describes the Federal government as maintaining an "alert neutrality" during the negotiations between natives and the government of Québec during the early 1970's, and even after the 15 November 1973 injunction was awarded. He writes that it was only after the injunction that the Canadian government was invited by Québec to participate, and one year later natives and the governments of Québec and Canada entered into an agreement.

75. For example, under the James Bay and Northern Quebec Agreement (JBA), the Cree collective "controls" the agreement benefits in the sense that certain lands (Category 1A lands) are collectively owned by the Cree communities. However, individuals are the primary beneficiaries through the right to reside on such lands. It is the group's recognition of the individual's membership which allows the residency. (sec.9.0.1 (e), JBA) Similarly, the harvesting of natural resources such as fish, birds, and fur-bearing animals is the right of the individual, but the collectivity, by determining membership as a beneficiary, decides who may exercise the right to harvest. (Sec.24.3.1, JBA)

76. For example, the core "beneficiaries" under both the JBA (Cree) and the Northeastern Quebec Agreement (Naskapi) are the status populations under the Indian Act. By the Cree-Naskapi Act S.C. 1984, c.18 these populations retain their rights, but the agreements then augment these core groups by their own particular membership mechanisms.

Sections 13 and 15 of the Act state that the Cree and Naskapi band under the Indian Act cease to exist while their "rights, titles, interest, assets, obligations and liabilities" vest in new bands created by sections 12 and 14. Section 17 (Cree) and section 20 (Naskapi) state that members of the new bands are persons enrolled or entitled to be enrolled under section 3 "Eligibility" of the James Bay and Northern Quebec Agreement, and for the Naskapi, members of the Naskapi band. Status Indians who are not eligible under the agreements are deemed to be members of the successor bands for most, though not all, purposes of the Act. (section 18, Cree; section 20.1, Naskapi)

The Indian Act no longer applies to the new Cree bands and the Naskapi band, nor to Category 1A or 1A-N lands, except for the purpose of determining which of the Cree and Naskapi beneficiaries are "Indians" within the meaning of the Indian Act. (sec.5)

77. More specifically the James Bay and Northern Québec Agreement was to "agree upon the terms and conditions of the surrender of the rights" of the natives referred to in the 1912 Québec Boundaries Extension Acts which had transferred the area, along with whatever burden aboriginal title constituted, from the Federal to Québec government.

78. Québec, Editeur Officiel du Québec, James Bay and Northern Quebec Agreement, (1976). The James Bay Agreement was approved by Federal and Provincial legislation to provide that it prevails over all other legislation to avoid conflicts or inconsistencies- S.C. 1976-77,c.32, S.Q. 1976,c.46.
The North Eastern Quebec Agreement was approved by Federal Order in Council pursuant to the James Bay Act and by Provincial legislation- P.C. 1978-502, 23 Feb.1978, S.Q. 1978, c.98.

They have already generated litigation in which Courts have upheld native rights and interests under the agreements: see Commission Scolaire Kativik v. Procureur General du Quebec [1982] 4 C.N.L.R. 54 (Que.S.C.). However, also see Grand Council of Crees v. the Queen [1982] 1 F.C. 599, [1982] 2 C.N.L.R. 81 in which the Federal Crown was held to be immune from injunctive relief based on their suspension of Federal social services to the territory covered by the agreements. For a more detailed discussion of local government mechanisms under the agreement see note 205.

79. James Bay and Northern Québec Agreement, ibid, sec.5 (Cree) and sec.7 (Inuit)

80. The Northeastern Quebec Agreement required the amendment of the earlier James Bay and Northern Quebec Agreement (JBA) due to the existence of lands with overlapping resource use by the beneficiaries of the two agreements. Sections 23 and 24 of the JBA were amended to reflect this fact, and incorporate the Naskapis into pre-existing administrative structures. Sec.3 of the agreement for Northeastern Quebec defines the Naskapi beneficiaries with the same formula used earlier by the James Bay Cree in their agreement.

81. Inuvialuit Land Rights Settlement, Final Agreement (1984) sec 5 deals with eligibility for enrollment as a beneficiary and commences by stating:
"The Inuvialuit are best able to determine who should be elibible under the Inuvialuit Land Rights Settlement, but there should also be objective criteria by which an individual may have his or her right to be a beneficiary determined."

See Canada, Indian and Northern Affairs, The Western Arctic Claim: A Guide to the Inuivialuit Final Agreement (1984) at p.2

82. M.Woodward and B.George, "The Canadian Lobby in Westminister 1979-82", (1983) 18:3 J.Can.Studies 119.

Also see decision of the English Court of Appeal answering an application by Canadian natives seeking the English Crown's intervention on their behalf in the Constitutional negotiations, based on their claim that all previous arrangements had been with the Imperial Crown and not its successor in Canada; Queen v. The Secretary of State for Foreign and Commonwealth Affairs Ex Parte: The Indian Assoc.of Alberta, Union of New Brunswick Indians, and Union of Nova Scotia Indians [1981] 4 C.N.L.R. 86.

A similar appication in the English Court of Chancery by

Saskatchewan natives was dismissed for stating no reasonable cause of action: see Manuel v. Attorney-General [1982] 3 W.L.R. 821, [1982] 3 C.N.L.R. 13.

83. Subsequently, the Assembly of First Nations, which represents status Indians and which had blocked agreement with the government on the amendments, passed a resolution agreeing in principle to the changes.
Assembly of First Nations, Resolutions Passed at AFN Special Legislative Assembly Held on May 16-18,1984, Edmonton, Alberta (1984)at p.2

However, the amendments to the Indian Act proposed in 1984 by the government created new controversy with disagreements between the government and native organizations on which individuals should have their status reinstated. (June 23,1984, La Presse, Montreal, p.A-16; June 23,1984, The Gazette, Montreal, p.B-12). As of March 1985 the government is attempting to gather support for the revised legislation recently introduced into Parliament to amend the offending section of the Indian Act. (An Act to Amend the Indian Act, Bill C-31, 1st Session, 33rd Parliament, 33-34 Eliz.II, 1984-5)

84. Canada, Indian and Northern Affairs, The Elimination of Sex Discrimination from the Indian Act, (1982)

The Bill to accomplish, at least in part, the amendments to the Act was introduced for first reading on 18 June 1984. It was entitled Bill C-47, An Act to Amend the Indian Act, (Bill-C 47, 2nd Session, 32nd Parliament, 32-33 Elizabeth II, 1983-84). The Bill was passed by Parliament but the necessary unanimous consent in the Senate was denied by one vote. Due to the end of the parliamentary session the Bill was not reintroduced into Parliament.

The present Canadian government indicated its willingness to reintroduce some form of legislation to remove the discrimination. Canada, Minister of Justice, Equality Issues in Federal Law - A Discussion Paper (January 1985)

The Bill to achieve the amendment of the Indian Act was introduced one month before the next Constitutional Conference on Aboriginal Matters in April 1985. The new Bill differs from Bill C-47 in that it:
(a) whereas C-47 automatically reinstated women who lost their rights under sec.12(1)b of the Indian Act, and their 1st generation children, Bill C-31 returns both status and Band membership to the women, but automatically returns only status to the children. The question of membership for these 1st generation children is dealt with in this manner; Bands will be given up to two years to decide whether they wish to determine future membership matters themselves, or leave the question with the government. If the Band decides to take over membership decisions, then it can decide on membership for the 1st generation children. If the Band decides to leave matters with the government, in the vast majority of cases the children will be granted Band membership as well as status.
(b) this means that while the Federal government will retain the

power to determine "status" for purposes of its programs, increased powers are to be given to Bands who choose to acquire them to determine their membership, with its effect on the important question of residence on reserve lands.
See An Act to Amend the Indian Act (Bill C-31, 1st Session, 33rd Parliament, 33-34 Elizabeth II, 1984-85)

85. Canadian Charter of Rights and Freedoms, sec.32(2) Constitution Act 1982, as enacted by Canada Act 1982, (U.K.) 1982, c.11

86. Canada, First Ministers' Conference on Aboriginal Constitutional Matters, 1983 Constitutional Accord on Aboriginal Rights, First Ministers' Conference on Aboriginal Constitutional Matters; (Doc.800-17/041, revised,1984). It was signed at Ottawa on 16 March 1983 by Canada, all of the provinces with the exception of Quebec, and six native organizations. It envisioned the Constitutional Amendment Proclamation, 1983 of which section 4 guarantees aboriginal and treaty rights "equally to male and female persons". The 1983 Accord has been adopted by the required number of provinces and became the first amendment to the new Constitution on June 21,1984.

87. An Act to Amend the Indian Act (Bill C-47, 2nd Session, 32nd Parliament, 32-33 Eliz.II, 1983-4) (see comment regarding the Bill at note 83)

88. Canada, House of Commons, Report of Special Committee on Indian Self-Government (1984) at pp.55-56, Recommendations 9-10.

Many key recommendations of the Penner Report were incorporated into the legislation drafted by the Federal government to give increased autonomy to Indian nations. An Act relating to self-government for Indian Nations (Bill C-52, 2nd Session, 32nd Parliament, 32-33 Eliz.II, 1983-4) had its first reading on 27 June,1984. Its introduction into Parliament only days before the end of the session was probably intended as a gesture to the next Parliament. The Bill was interesting in several respects, not the least being the wide powers over membership granted to the Indian Nations. In addition, there were inovative mechanisms for transfer payments to the new units and powers of local taxation and legislation.

89. Canada, Indian and Northern Affairs, Response of the Government to the Report of the Special Committee on Indian Self-Government (March 1984)

"...The Government agrees with the argument put forward by the Committee that Indian communities were historically self-governing and that the gradual erosion of self-government over time has resulted in a situation which benefits neither Indian people nor Canadians in general...The Committee specifically recommended that the amendment of the Indian Act and an approach styled "Indian Band Government Legislation" developed by the Department of Indian Affairs and Northern Development be rejected as approaches to Indian First Nation Government. The Federal government accepts these recommendations." (at p.1)

"...In the immediate future, the Government is prepared to proceed with the primary thrust of the Special Committee's recommendations, that the Government, in concert with Indian First Nations, and in consultation with Provincial Governments, develop legislation to provide for the recognition of the status and power of Indian First Nation Governments." (at p.2)

"...After the appropriate discussions with representatives of the Indian peoples to work out the specific contents, the Government intends to introduce in Parliament legislation...to establish a framework for these Indian First Nations that wish to govern themselves and their lands in a way that is not possible under the Indian Act." at p.3

90. On the more specific question of membership, the government of Canada agreed that one power of the Indian First Nations would be

"to establish its own membership code, in accordance with the Charter of Rights, international covenants and respect for acquired rights. The Indian Act would no longer apply, except in particular instances to supplement provisions of the legislation." (supra, at p.5)

91. An Act to Amend the Indian Act (Bill C-31, 1st Session, 33rd Parliament, 33-34 Elizabeth II, 1984-85)See discussion at note 84 concerning the details of the new proposal.

92. E.E.Rich, The History of the Hudson's Bay Company, 1670-1870 (Volume 1), cited at pp.36-37, P.Hutchins, Legal Status of the Inuit (unpublished LL.M. paper, London School of Economics, London, 1971)

93. Johnson and Graham's Leasee v. McIntosh (1823) 8 Wheaton 543 (United States), at pp.544-5,

> "...relations which were to exist between the discovers and the natives, were to be regulated by themselves [the Europeans]. The rights thus acquired being exclusive, no other [European] power could interpose between them.
>
> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely abrogated; but were necessarily, to a consideration extent, impaired. They [the natives] were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, use it according to their own discretion..."

See also Worchester v. State of Georgia (1832) 31 U.S. 350, 6 Pet.515 (United States) at Pet.520,

> "The general law of European sovereigns, respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things in time of peace. It was sometimes changed in war. The consequence was, that [the Indians'] supplies were derived chiefly from that nation, and their trade confined to it...What

was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, and from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was benefitial to themselves- an engagement to punish aggressions to them. It involved practically no claim to their lands, no dominion over their persons. It merely bound the nation to the British Crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character."

In Delbert Guerin et al. v. the Queen (unreported, S.C.C., November 1,1984) Mr.Justice Dickson, concurred in by three other justices for his reasons, and with the Court unanimous in the result, states at pp.22-23,

"...The principle of discovery which justified these claims [European nations to American territory] gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' right in the land was obviously diminished; but their rights of occupancy and possession remained unaffected."

94. H.Brun, "Les droits des Indiens sur le territoire du Quebec", (1969) 10 Cahiers du Droit 415

95. G.LaForest, "Property in Indian Lands", at pp.108-133, Natural Resources and Public Property under the Canadian Constitution (1969), at p.108

P.Cummings and N.Mickenberg (eds.), Native Rights in Canada (2nd ed. 1972) at pp.65-69

96. Cummings and Mickenberg, supra, at p.68

97. LaForest, supra, at p.109
Cummings and Mickenberg, supra, at pp.69-70

98. Cummings and Mickenberg, supra, and,

N.Ayers, "Aboriginal Rights in the Maritimes", [1984] 2 C.N.L.R. 1

99. Cummings and Mickenberg, supra, at p.73

100. For example, the use of treaties to gain Indian surrender of traditional lands in the territories of the Hudson's Bay Company. The Proclamation expressly stated that it did not apply to those regions granted to the Company by the Royal Charter of 2nd May 1670.

101. Under the French regime, lands close to established settlements were granted to third parties, generally religious orders, for the use of the Indians. The purpose was to attract natives to a more settled existence where they could be educated and Christianized. The policy

existed from as early as the start of the 17th century, and lasted until the Conquest in 1760. See sources at note 43 and Brun, op.cit. note 87.

See also Canada, Indian and Northern Affairs, by William Henderson, Canada's Indian Reserves: Pre-Confederation, (1983), at pp.2-5 (French regime), pp.8-15 (Upper Canada after 1791), pp.16-19 (Lower Canada after 1791), and pp.20-28 (Maritimes), and

Canada, Indian and Northern Affairs, by R.J.Surtees, Indian Land Surrenders in Ontario 1763-1867, (1984)

102. See, for example, Report of Commissioners for Treaty No.8 (1899), at p.2,

"Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.

We assured them that the treaty would not lead to any forced interference with their mode of life..."

cited at pp.94-98, D.Sanders, Cases and Materials on Native Law (3rd edition 1976)

103. Chief Justice Marshall stated in Worchester v. State of Georgia (1832) 6 Peter 515 (U.S.S.C.), at p.582,

"...The language used in treaties with the Indians should never be construed to their prejudice. If the words be made use of which are susceptible of a more extended meaning than their plan import, as connected with the tenor of the treaty; they should be considered as used only in the latter sense..."

Similar statements have been made by many American courts, and most recently the United States Supreme Court stated in State of Washington et al. v. Washington State Commercial Passenger Fishing Vessel Assoc. et al (1979) 443 U.S. 658 (U.S.S.C.), at pp.676-677,

"...it is the intention of the parties, and not solely that of the superior side that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptive superior negotiating skills and superior knowledge of the language in which the treaty is recorded,

has a responsibility to avoid taking advantage of the other side.

> "...the treaty must therefore be considered, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians"
> (Jones v. Meehan (1899) 175 U.S. 1, 11)

For a review of the American jurisprudence on the interpretation of treaties and agreements relating to Indians see C.Decker, "The Construction of Indian Treaties, Agreements and Statutes" (1983) Am.Indian L.Rev. 299.

Recently, in speaking of the interpretation of statutes with respect to taxing Indians' incomes, Mr.Justice Dickson, speaking for the Supreme Court of Canada, stated in Norwegijick v. the Queen (1983) 144 D.L.R. (3rd) 193 (S.C.C.) at p.198,

"...It seems to me...that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favor of the Indian. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favored over a more technical construction which might be available to deny exemption. In Jones v. Meehan...it was held that

> "Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians."

104. R.Bartlett, "Indian Reserves on the Prairies", [1980] 3 C.N.L.R. 3.

105. ibid

106. For the history of reserves for natives in Quebec, Ontario, and the Maritimes see:

G.Gould and A.Semple (eds.) Our Land - the Maritimes (1980) at pp.29-70 (Maritimes)

H.F.McGee (ed.), The Native Peoples of Atlantic Canada (1974) (Maritimes)

P.Cummings and N.Mickenberg (eds.), Native Rights in Canada (2nd ed.1972) at pp. 93-105 (Maritimes), pp.107-118 (Southern Ontario), and pp.75-92 (Québec)

Henri Brun, "Les droits des Indiens sur le territoire du Québec", (1969) 10 Les Cahiers du Droit 415 (Québec)

107. See discussion at pp. 16-18 on the recognition of individuals as indigenous, and the provisions of the Indian Act, R.S. 1970, I-6 which require that an individual possess "status" in order to reside on reserve lands.

108. Hamlet of Baker Lake et al. v.Min.Indian Affairs et al. (1980) 107 D.L.R. (3d) 513. (F.C.)

For a comment on the case and aboriginal title in the North in general see:

J.Bichenbach, "The Baker Lake Case: A Partial Recognition of Inuit Aboriginal Title", (1980) U.T.Faculty L.Rev. 232

R.Pugh, "Are Northern Lands Reserved for the Indians?"(1982) 60 Can.Bar Rev. 36

R.Thompson, "Aboriginal Title and Mining Legislation in the Northwest Territories", Studies in Aboriginal Rights No.6, University of Saskatchewan Native Law Centre (1981)

For a review of the claims see Canada, Indian and Northern Affairs, Federal Government Response on Land Claims: Policies and Processes (1984)

109. For example, see the most recent agreement, the Inuvialuit Final Agreement which deals with the Western Arctic:
Canada, Indian and Northern Affairs, The Western Arctic Claim: A Guide to the Inuvialuit Final Agreement (1984)

The region was not subject to the Royal Proclamation of 1763. See:
Hamlet of Baker Lake et al. v. Minister of Indian Affairs et al. (1980) 107 D.L.R. (3rd) 513 (F.C.), and

Sigeareak E1-53 v. the Queen [1966] S.C.R. 45

110. Island of Palmas, (1928) U.N.R.I.A.A. 824; Scott, Hague Court Reporter (2nd) 83

111. ibid.

See also the recent decision of the Supreme Court of Canada in Delbert Guerin et al. v. the Queen (unreported, S.C.C, November 1,1984). Mr.Justice Dickson, concurred in by three other justices for his reasons, and with the Court unanimous in the result, states at pp.22-23

"...The principle of discovery which justified these claims [European nations to American territories] gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' right in the land was obviously diminished; but their rights of occupancy and possession remained unaffected."

112. See, for example, the comments of the British Columbia Court of Appeal in Calder, supra, note 73.

Davey, C.J.B.C.at 66 D.L.R.,

"...I see no evidence to justify a conclusion that the aboriginal

rights claimed by the successor of these primitive peoples are of a kind that it should be assumed the Crown recognized them when it acquired the mainland of British Columbia by occupation. These considerations effectively distinguish the Lagos line of cases in which the territory of a people was ceded to the British Crown following conquest."

Tysoe, J.A. at 73 D.L.R.,

"...I think it is necessary to keep in mind the clear distinction between mere policy of a sovereign authority and rights of natives conferred or expressly recognized by statute of the sovereign authority or by treaty or agreement having statutory effect..."

and 76 D.L.R.,

"...I think it is clear...that whatever rights the Nishga Indians may think they have under Indian title are not enforceable in the Courts as they have not been recognized and incorporated into municipal law."

However, the Supreme Court of Canada's decision in the case leaves little doubt that Indian title and other interests, despite the difficulty to define them and their susceptibility to extinguishment by the Crown, did survive the initial process of discovery and occupation.

113. See for example the description of the decision in Calder v. the Queen, at note 140. Also see Hamlet of Baker Lake et al. v. Minister of Indian Affairs et al., op.cit., note 108, and the cases listed at note 133.

More recently see the Supreme Court of Canada decision in Guerin op.cit.note 111, in which Mr.Justice Dickson states at pp.23-24 of his judgement

"...The principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants was approved by the Privy Council in Amodu Tijani v. Secretary of State, Nigeria.... That principle supports the assumption implicit in Calder that Indian title is an independent legal right, which although recognized by the Royal Proclamation of 1763, nonetheless predates it."

114. In the Calder decision, Hall,J. at 386 S.C.R., quoting the United States Supreme Court's 1946 decision in United States v. Alcea Band of Tillamooks (1946) 329 U.S. 40 (United States), at p.45,

" "...As against any but the sovereign original Indian title was accorded the protection of complete ownership but was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will....Something more than sovereign grace prompted the obvious regard given to aboriginal Indian title."

The same consideration applied in Canada..."

See also the words of Mr.Justice Dickson in the decision of Guerin cited above at note 110.

While the existence of agreements with the natives in New Zealand which deal specifically with the recognition of their property rights lessens the value of its jurisprudence for Canadians, two comments, one by the Judicial Council and the other by the New Zealand Court of Appeals, are noteworthy:

"...Their Lordships are somewhat embarassed by the form in which the third question is stated. If it refers to the perogative title of the Crown, the answer seems to be that title is not attached, the native title of possession and occupancy not being inconsistent with the seisin in fee of the Crown. Indeed, by asserting his native title, the appellant impliedly asserts and relies on the radical title of the Crown as the basis of his own title of occupancy or possession."
Tamaki v. Baker [1901] A.C. 561, at p.574 (J.C.P.C. from New Zealand)

"...The Crown is bound, both by the common law of England and its own solemn engagements to a full recognition of Native proprietary rights. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it..."
In re "The Lundon and Whitaker Claims Act, 1871" (1872) 2 C.A. 41 (New Zealand C.A.)

115. See the comments of Hall,J. in Calder, op.cit.note 73, at 200 D.L.R., 390 S.C.R., and of Judson,J. at 156 D.L.R., 328 S.C.R.

116. The words "irresistible force" were used by Chief Justice Marshall in the case of Worchester v. State of Georgia (1832) 6 Peters 515,8 L.Ed.483 (United States)

117. Campbell v. Hall, (1774) 1 Cowp. 204, 98 E.R. 1045 (J.C.P.C.)

118. Amadu Tijani v. Secretary of State for Nigeria, [1921] Appeals Cases 399 (J.C.P.C.) at pp.409-410,
"No doubt there was a cession to the British Crown, along with the sovereignty, of the radical or underlying title to the land in the new colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place. The general words of cession are construed as having related primarily to sovereign rights only."

119. ibid

120. Recognition of prior native property interests should not, however, be equated in all cases with British recognition of communal title to land. The cases below are examples where British courts acknowledged the survival of property interests despite a change of

sovereignty to the colonial Crown. However, they also acknowledged that such rights could not resist the Crown's power to expropriate or to change the laws relating to property. In addition, they did not generally recognize a truly communal title to property in most jurisdictions.

(1) Africa
Attorney-General of Southern Nigeria v. John Holt Co.Ltd. et al. [1915] A.C. 599(J.C.P.C.)
Cook and another v. Spring [1899] A.C. 572 (J.C.P.C.)
In Re Southern Rhodesia [1919] A.C. 211(J.C.P.C.)
Adeyinka Oyekan and others v. Musendiku Adele [1957] 1 W.L.R. 876, [1957] 2 All E.R. 785(J.C.P.C.)

(2) India
Sec.of State for India v. Kamacheee Boye Sahaba (1859) 13 Moo.P.C. 22, 15 E.R.9(J.C.P.C.)
Sec.of State for India v. Bai Rajbai (1915) L.R. 42 Ind.App. 229(J.C.P.C.)
Vajesingji Joravasingji v. Sec.of State for India (1924) L.R. 51 Ind.App. 357

(3) New Zealand
For historical reasons New Zealand has since the 1860's recognized communal native title by statute.

(4) Australia
For a complete survey of Australian jurisprudence on both native title and the doctrine of communal title see:
Milirrpum v. Nabalco Pty.Ltd. et al (1971) 17 F.L.R. 141 (NTSC)
which held that communal native title had never formed part of Australian law.

121. New Windsor Corp. v. Mellor [1975] 1 Chancery Reports 380 (C.A.)

122. The leading issues in "aboriginal title" have been:
(1) source of the title
(2) the title's contents
(3) survival and adverse government policies.

Similar problems will face any court cases which attempt to show the existence and survival of native self-government. See for example Michell v. Dennis [1984] 2 W.W.R. 449 (B.C.S.C.) in which an adoption by native customary law was held not to confer legal rights under provincial legislation.

Isaac et al. v. Davey et al. (1974) 51 D.L.R.(3rd) 170 which involved the unsuccessful attempt by the supporters of the traditional structures of native government to displace the band council elected under the terms of the Indian Act.

Logan v. Attorney-General of Canada [1959] O.W.N. 361, 20 D.L.R. (2nd) 416 (Ont.H.C.)

123. St.Catherine's Milling and Lumber Co. v. the Queen (1885) 10 O.R. 196 (Ch.); affirmed (1885) 13 O.A.R. 148 (Ont.C.A.); (1886) 13 S.C.R. 577 (S.C.C.); (1889) 14 App.Cas.46 (J.C.P.C.)

The characterization of the Indian title by Boyd,J. in the Chancery Division was summarized by William Henderson as

"...the Indians had a right of occupation which attached to them in their tribal character. They could not transfer it to any stranger but it was capable of being extinguished." Canada, Indian and Northern Affairs, Indian Reserves: the Usufruct in the Constitution (1980) at p.5

A critical decision in the case was whether "lands reserved for Indians" under the British North America Act,1867 meant "unsurrendered lands reserved for the use of Indians" rather than only lands where Indian title has been wholly extinguished but a reserve established for them. In the Chancery decision Boyd,J. spoke of a pre-surrender "right of occupancy", while the post-surrender reserves provided the Indians with, at p.230 (1885) 10 O.R.,

"...[a] legally recognized tenure of defined lands, in which they they have a present right to the exclusive and absolute usufruct, and a potential right of becoming individual owners in fee after enfranchisement."

The decision was affirmed by both the Court of Appeal and the Supreme Court of Canada, although Strong,J. dissented in the Supreme Court by viewing "lands reserved for Indians" as including "unsurrendered lands, or, in other words, all lands reserved for the Indians and not merely a particular class of such lands." (1885) S.C.R. at p.622.

The Judicial Committee of the Privy Council declined to define definitively the Indian title, and indicated that the Indian interest of possession was solely attributable to the Royal Proclamation, that the lands in dispute were provincial since by British North America Act,1867 sec.109 they were lands previously subject to the Indian title, and that the Federal government's interest derived only from section 91(24), and once the lands were surrended by the Indians the Federal power was exhausted, and the benefits went to the province. It should be noted that the Supreme Court of Canada has stated in a recent judgement that it has expressly departed from the St.Catherine's decision, and has held that the Indian interest does not arise from the Royal Proclamation: see Delbert Guerin et al. v. the Queen et al. (unreported, Supreme Court of Canada, November 1,1984). See comments of Mr.Justice Dickson.

In a related decision, Boyd,J. commented that "lands reserved for Indians" included

"...all wild and waste lands in which the Indians continue to enjoy their primitive right of occupancy, even in the most fugitive manner...no doubt the phrase does include a treaty reserve."

At p.395, Ontario Mining Co.v. Seybold (1899) 31 O.R. 386 (Ch.); affirmed (1900) 32 O.R. 301 (Div.Ct.); (1901) 32 S.C.R. 1 (S.C.C.); [1903] A.C. 73 (J.C.P.C.)

124. See also Attorney-General for Quebec v. Attorney-General for Canada [1921] 1 App.Cas. 401 at pp.406-408 (J.C.P.C.) (Star Chrome case)

Dominion of Canada v. Province of Ontario [1910] App.Cas. 637 at p.644 (J.C.P.C.)

125. Constitution Act, 1867, section 109 by which "lands, mines, minerals and royalties" belonging to the Provinces of Canada, Nova Scotia, and New Brunswick prior to the union were transferred to the new Canadian provinces of Ontario, Quebec, Nova Scotia and New Brunswick

"...subject to any Trusts existing in respect thereof, and any Interest other than that of the Province in the same."

The British North America Act (1930) 21 George V., c.26 (U.K.) [now Constitution Act, 1930], placed the four Western provinces in the same situation as the original provinces.

126. St.Catherine's, supra, note 123, at p.54

127. ibid, at p.58

128. Star Chrome, supra, at note 125

See also the comments of Boyd,J. in the Chancery decision in St.Catherine's at p.230, cite at footnote 123, concerning the attributes of the Indian interest in the reserves established after surrender of aboriginal title.

129. St.Catherine's (J.C.P.C.), supra, Lord Watson described the "...tenure of the Indians [as] a personal and usufructory right, dependent upon the good will of the Crown." With respect to British policy around the time of the 1763 Royal Proclamation he commented, at A.C.596,

> "So far as respected the authority of the Crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the King, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the King had a right to grant, or to reserve for the Indians."

Speaking of native title in New Zealand, the Privy Council stated in the judgement of Lord Davey in Tamaki v. Baker [1901] A.C. 561 (J.C.P.C. from New Zealand), at p.579,

> "Their Lordships think that the Supreme Court are bound to recognize the fact of the "rightful possession and occupation of the natives" until extinguished in accordance with law...The Court is not called upon in the present case to ascertain or

define against the Crown the exact nature or incident of such title, but merely to say whether it exists or existed as a matter of fact, and whether it has been extinguished according to law...The Lordships...think that if the appellant can succeed in proving that he and the members of his tribe are in possession and occupation of the lands in dispute under a native title which has not been lawfully extinguished, he can maintain this action to restrain an unauthorized invasion of his title."

As noted elsewhere the United States, following the extensive jurisprudence developed since Chief Justice Marshall's decisions in the 1830's, has also dealt with the nature and consequences of native title. Mr.Chief Justice Vinson of the United States Supreme Court considered a phrase in a statute creating the Court of Claims which spoke of "original Indian title, claim or right in the lands" in the case of United States v. Alcea Band of Tillamooks et al. (1945) 103 Ct.Claims 494, 59 F.Supp. 934 (Ct.Claims); (1946) 329 U.S. 40 (United States). At p.47 he commented,

"It has long been held that by virture of discovery the title to lands occupied by Indian tribes vested in the sovereign. This title was deemed subject to a right of occupancy in favour of Indian tribes because of their original and previous possession. It is within the context of this right of occupancy, this original Indian title, that we are concerned with.

As against any but the sovereign, original Indian title was accorded the protection of complete ownership (United States v. Santa Fe Pacific Railway Co., (1941) 314 U.S. 339 (United States), but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will. Termination of the right by sovereign action was complete and left the land free and clear of Indian claims...The Indians themselves [could not] prevent a taking of tribal lands or forestall the termination of their title."

As for the nature of the title, the lower court in the case had spoken of the "original Indian use and occupation title", at Ct.Claims 556, while Chief Justice Vinson spoke of the "Indian right of occupancy".

In another United States Supreme Court decision, Mr.Justice Reed described the assumption of sovereignty by the British and its effect on native title in rather restrictive terms, in Tee-hit-ton Indians v. United States (1954) 348 U.S. 272 (United States), at p.280,

"...the tribes who inhabited the lands of the states held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownershp by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty" as we use that term. This is not a property right but amounts to a right of occupancy

which the sovereign grants and protects against intrusion by third parties but which right of occupation may be terminated and such lands fully disposed of by the soverign itself without any legally enforceable obligation to compensate the Indians."

Turning to more recent Canadian jurisprudence which discusses native title, Mr.Justice Norris of the British Columbia Court of Appeal in R.v. White and Bob (1965) 52 W.W.R. 193 (B.C.C.A.); affirmed 50 D.L.R. (2nd) 213 (S.C.C.) considered the claim of the two native respondents that they had a "right as Indians to hunt on unoccupied lands lying within the ancient tribal territories of the Nanaimo Indians." He noted that

"The aboriginal right is a very real right and is to be recognized although not in accordance with the ordinary conception of such under British law."

At p.241, he summarized a review of previous jurisprudence by stating,

"(1)...aboriginal rights existed in favour of Indians from time immemorial
(2)...upon the British attaining sovereignty...the British Crown held a substantial and paramount estate - a proprietary estate in the territory, the tenure of the Indians being a personal and usufructory right (the aboriginal right) dependent on the good will of the sovereign
(3)...the right of the Indian respondents to hunt and fish on unoccupied lands was such a right."

In essence the case turned upon the existence of an agreement with the natives which the Court termed a "treaty" which confirmed pre-existing rights. The Supreme Court of Canada merely agreed with the finding of the treaty as being within the meaning of sec.87 of the Indian Act [R.S.C. 1952, c.149].

In the Supreme Court of Canada decision in Frank Calder et al. v. the Queen [1973] S.C.R. 313, at p.328, Mr.Justice Judson speaks about native title in these terms,

"...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 and usufructory right". What [the native claimants] are asserting in this action is that they had a right to continue to live on their 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 goodwill of the Sovereign".

Mr.Justice Hall, speaking of the "nature of the title of the interest", at p.552,

"When asked to state the nature of the right being asserted and

for which a declaration is being sought, counsel for the appelants [Nishgas] described it as "an interest which is a burden on the title of the Crown; an interest which is usufructory in nature; a tribal interest inalienable except to the Crown and extinguishable only by legislative enactment of the Parliament of Canada." The exact nature and extent of the Indian right or title does not need to be expressly stated in this litigation...The Nishgas do not claim to be able to sell or alienate their right to possession except to the Crown. They claim the right to remain in possession themselves and to enjoy the fruits of that possession."

Recently the Supreme Court of Canada considered the interest which Indians have in reserve lands, and particularly whether it is subject to creating a trust on the Federal government in terms of its disposition, in Delbert Guerin et al. v. the Queen et al. (unreported, Supreme Court of Canada, November 1,1984). The Court reached a unanimous decision on the outcome, with the judgement written by Mr.Justice Dickson (concurred in by Beetz, Chouinard, Lamer, JJ.), Madame Justice Wilson (concurred in by Ritchie, McIntyre, JJ.) concurring in the result only, and Mr.Justice Estey also concurring in the result only. Mr.Justice Dickson, at p.20 of his reasons, described the Calder decision as holding that Indian or aboriginal title was a "legal right derived from the Indians' historic occupation and possession of their tribal lands." At pp.22-23, he described how the process of European discovery diminished the sovereignty of the natives, and

"In that respect at least the Indians' rights in land were obviously diminished; but their rights of occupancy and possession remained unaffected."

Mr.Justice Dickson noted the principle of Amadu Tijani v. Secretary of State, Nigeria [1921] 2 A.C. 399 (J.C.P.C.) that a change in sovereignty does not affect the presumptive title of the inhabitants, and stated at p.24 of his reasons,

"That principle supports the assumption implicit in Calder that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it."

It is noteworthy that on the distinction between the Indian interest in reserves and lands where unextinguished aboriginal title survived, he states at pp.24-25 of his reasons,

"It does not matter, in my opinion, that the present case is concerned with the interest of an Indian band in a reserve rather than with unrecognized [sic?] Indian title in traditional tribal lands. The Indian interest in land is the same in both cases: see Attorney General of Quebec v. Attorney General of Canada, [1921] 1 A.C. 401 at pp.410-411 (the Star Chrome case). It is worth noting, however, that the reserve in question here was created out of the ancient tribal territory of the Musqueam band by the unilateral action of the Colony of British Columbia, prior to

Confederation."

On the nature of Indian title, at pp.29-31 of his reasons, Mr.Justice Dickson addresses the debate whether the native interest is a usufruct or a beneficial interest,

> "It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it as a personal, usufructory right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has nonetheless arisen because neither case is the categorization quite accurate.
>
> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. Their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land in personal in the sense that it cannot be transferred to a grantee, but it is also ture, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians' in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading." (emphasis added)

Madame Justice Wilson in her reasons adopted the definition of the Indian interest in reserve lands proposed in St.Catherine's and Government of Canada v. Smith (1983) 47 N.R. 132 (S.C.C.) that the "tenure of the Indians [is] a personal and usufructory right."(at p.16 of reasons) Mr.Justice Estey, at pp.2-3 of his reasons, commented that

> "The Indian Act, R.S.C. 1952, c.149, as amended, the Constitution, the pre-Confederation laws of the colonies in British North America, and the Royal Proclamation of 1763 all reflect a strong sense of awareness of the community interest in protecting the rights of the native population in those lands to which they had a longstanding connection. One feature in all these enactments is relected in the present-day provision in the Indian Act, s.37, which requires anyone interested in acquiring ownership or some lesser interest in lands set aside for native

populations, from a willing grantor, to do so through the appropriate level of government, now the Federal Government."

130. See: St.Catherine's, op.cit. note 123

Ontario Mining Co.Ltd. v. A.G.Canada [1903] A.C. 73 (J.C.P.C.).

A.G.Canada v. Giroux and Bouchard (1916) 53 S.C.R. 172 (S.C.C.)

A.G.Quebec v. A.G.Canada (1921) 1 A.C. 401 (J.C.P.C.)

For more recent discussions see also: R.v.Tennisco (1981) 131 D.L.R.(3rd) 96 (Ont.H.C.) and R.v. Wesley (1932) 4 D.L.R. 744 (Alberta C.A.)

131. Mr.Justice Duff of the Supreme Court of Canada in Attorney-General of Canada v. Giroux et al. (1916) 53 S.C.R. 172 considered lands set aside in Lower Canada which vested in the Commissioner of Indian Lands for the use of Indians. At S.C.R. 195 he commented that the Commissioner's interest "amounted to ownership", which the "Indian interest amounted to benefitial ownership."(S.C.R. 197) In Attorney-General of Québec v. Attorney-General of Canada (1921) 1 A.C. 401 (Star Chrome) which dealt with the Indian interest in reserves created by a pre-Confederation statute Mr.Justice Duff described the interest recognized by the statute, at A.C. 408, as a "usufructory right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown."

The interest of the Indians in their reserves, and the duties of the Federal Crown towards them, were discussed in a recent case which concluded that the native interest is capable of being the subject of a trust. It should be noted that while the Court was unanimous in the result of the case, there were three judgements written by Mr.Justice Dickson, Mr.Justice Estey, and Madame Justice Wilson. The three judgements, each adopted by different members of the bench, approached the reasoning for the finding of a trust in different ways. See: Delbert Guerin et al. v. the Queen (unreported, Supreme Court of Canada, November 1,1984)

For a general discussion of both the Federal government and Indian interests in reserves see:
Canada, Indian and Northern Affairs, by William Henderson, Land Tenure in Indian Reserves, (1984).

Also see the debate which exists about the jurisdiction over the reserves, and more specificially the application of provincial game and other laws to them.
D.Sanders, "Indian Hunting and Fishing Rights", (1974) 38 Sask.L.Rev. 45

D.Brown, "Indian Hunting Rights and Provincial Law: Some Recent Developments", (1981) 39 U.T.Fac.L.R. 121

R.Bartlett, "Indian and Native Law - Survey of Canadian Law", (1983) 15:2 Ottawa L.R. 431.

Canada, Indian and Northern Affairs, by William Henderson, Canada's Indian Reserves: Legislative Powers, (1983).

132. See the discussion of the Resource Transfer Agreements at LaForest, op.cit. note 95, at p.87

133. Calder v. the Queen, supra, note 73

Joe et al. v. Findlay (1980) 87 D.L.R. (3rd) 239 (B.C.S.C. in Chambers); revsd. (1981) 122 D.L.R. (3rd) 377 (B.C.C.A.)

R.v. Michel and Johnson (1980) 88 D.L.R. (3rd) 705

Hamlet of Baker Lake et al. v. Minister of Indian Affairs et al. (1979) 107 D.L.R. (3rd) 513 (F.C.); interlocutory junction issued (1978) 87 D.L.R. (3rd) 342 (F.C.)

Re Paulette et al. and Registrar of Titles (1973) 39 D.L.R. (3rd) 45 (N.W.T.S.C.); and Re Paulette et al. and Registrar of Titles (No.2) (1973) 42 D.L.R. (3rd) 8 (N.W.T.S.C.); revd. (1975) 63 D.L.R. (3rd) 1 (N.W.T.C.A.); C.A.affd. (1976) 72 D.L.R. (3rd) 161 (S.C.C.)sub.nom. Paulette et al v. the Queen

In the recent Supreme Court of Canada decision in Delbert Guerin et al. v. the Queen et al (unreported, S.C.C., November 1,1984) Mr.Justice Dickson (concurred by JJ.,Beetz, Chouinard, and Lamer) made these comments, at pp.20-22 of his decision

"....In Calder... this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. Judson and Hall JJ.were in agreement...that aboriginal title existed in Canada (at least where it had not been extinguished by appropriate legislative action) independently of the Royal Proclamation)...In recognizing that the Proclamation is not the sole source of Indian title the Calder decision went beyond the judgment of the Privy Council in St.Catherine's Milling and Lumber Co. v. the Queen (1888), 14 App.Cas. 46. In that case Lord Watson acknowledged the existence of aboriginal title but said it had its origin in the Royal Proclamation. In this respect Calder is consistent with the position of Chief Justice Marshall in the leading American cases of Johnson v.McIntosh (1823) 8 Wheaton 543, and Worchester v. State of Georgia (1832) 6 Peters 515, cited by Judson and Hall JJ. in their respective judgments."

For a discussion of the common law basis for aboriginal title see:

K.M.Narvey, "The Royal Proclamation of 7 October 1763, the Common Law, and Native Rights to Land within the Territory Granted to the Hudson's Bay Company", (1974) 38 Sask.L.R. 123

P.Cumming and K.Aolto, "Inuit Hunting Rights in the Northwest Territories", (1974) 38 Sask.L.R. 231

J.Gagne, "The Content of Aboriginal Title at Common Law: A Look at the Nishga Claim", (1983) 47 Sask.L.R. 309

R.Pugh, "Are Northern Lands Reserved for Indians", (1982) 60 Can. Bar R. 36

R.Bartlett, "Aboriginal Land Claims at Common Law", [1984] 1 C.N.L.R. 1

G.Bennett, "Aboriginal Title in the Common Law: A Stony Path through Feudal Doctrine", (1978) 27:4 Buffalo L.Rev. 617

H.Berman, "The Concept of Aboriginal Rights in the Early Legal History of the United States", (1978) 27:4 Buffalo L.Rev. 637

134. W.Henderson, "Canada's Indian Reserves: The Usufruct in Our Constitution", (1980) 12 Ottawa L.Rev. 167

135. See Henderson, ibid, at pp.187-88 discussing the McKenna-McBride Agreement of 1912 (British Columbia) and Constitution Act, 1930. Also see Alberta Natural Resources Act, S.C. 1930-1, 20-21 Geor.V, c.3, sec.10, Saskatchewan Natural Resources Act, S.C. 1930-1,20-21 Geor.V, c.41, sec.10-12, and Manitoba Natural Resources Act, S.C. 1930-31, 20-21 Geor.V, c.29, sec.11

For example, the Imperial Order-in-Council which brought British Columbia into Confederation (May 16,1871, Schedule, s.13) refers to the "charge of the Indians and the trusteeship and management of the lands reserved for their use and benefit" being assumed by the Federal level of government. The 1912 McKenna-McBride Agreement, and the legislation which put it into effect (S.B.C. 1919, c.32; S.C. 1919-1920, c.51), were intended to resolve the long-standing dispute between the province and Canada over title in Indian reserves. However, it was only in 1936 that the province finally transferred title in the reserves to the Federal government in an Order-in-Council which refers to the lands being "in trust for the use and benefit of the Indians of the Province of British Columbia".(B.C.Order-in-Council 1036, July 29,1936)

136. See Joe et al v. Findlay (1981) 87 D.L.R. (3rd) 239 (B.C.S.C. in Chambers); revsd. (1981) 122 D.L.R. (3rd) 377 (B.C.C.A.)

137. For example, Chief Justice Marshall in Johnson v. M'Intosh (1832) 21 U.S. (8 Wheat.) 681 (United States), at p.692 spoke of the Crown's absolute title "...subject only to the Indian right of occupancy." Boyd,J. in R.v. St.Catherine's Milling and Lumber Co. (1885) 10 O.R. 196 (Ch.) refered to a right of occupancy. In Ontario Mining Co.v. Seybold (1899) 31 O.R. 386 (Ch.) Boyd,J. refered to the Indians' "primitive right of occupancy" on "wild or waste lands."

See the comments at LaForest, op.cit. note 95, at p.113, who interprets the Privy Council's decision in St.Catherine's "...to imply that the interest is related to Indian habits and modes of life. Their usufructory interest would not seem to give Indians the right, for example, to conduct large-scale mining operations on the

land." He goes on to acknowledge, however, that the matter is not clear, and gives the example of provisions for Indian benefits from mineral royalties on reserve lands under the Dominion-provincial resource agreements.

When considering the cases it is possible to interpret them to limit Indian title or interests to possession and traditional resource use. The concentration on these points by the Courts can also be explained as a consequence of the kinds of rights being claimed by the natives. For many cases the interests being defended were traditional resource uses against provincial or Federal fish and game laws, or as in the early period when disputes arose over ownership or jurisdiction in lands where native title had been extinguished, they were the only use of the lands by natives of the time.Arguments can also be made that an interpretation of native land use to traditional resource uses in overly restrictive. See for example the comments of C.J.Marshall in the case of Worchester v. State of Georgia (1832) 31 U.S. 350, 6 Pet.515 (United States). It considered the terms of a treaty between the United States and the Cherokees after the Revolutionary War which made reference to "hunting grounds" in terms of drawing the border between the "Indians and the citizens of the United States". Chief Justice Marshall stated, Pet.553,

> "...with respect to the words "hunting grounds". Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved. To the United States it could be a matter of no concern whether their whole territory was devoted to hunting grounds, or whether an occasional village, and an occasional corn field interrupted, and gave some variety to the scene."

138. Hamlet of Baker Lake et al. v. Minister of Indian Affairs et al., supra, note 133

139. Calder et al. v. The Queen, op.cit. note 73

140. To summarize the positions adopted by the Court:

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

(1) the Royal Proclamation of 1763 did not, and does not, apply to the territory of British Columbia
(2) whatever property right may have existed in the Nishgas was extinguished by colonial and provincial government laws and policies
(3) the Federal government's negotiation of Treaty No.8 in north-eastern British Columbia did not constitute recognition of aboriginal rights elsewhere in the province.

Hall,J., Spence and Laskin,JJ. concurring:

(1) aboriginal title flows from the occupation and use since time immemorial by the natives, and is not automatically extinguished by

conquest or discovery
(2) the Royal Proclamation of 1763 does apply to modern British Columbia
(3) aboriginal title survived subsequent government laws and polices in the absence of a specific expression that they were intended to extinguish native rights
(4) a fiat is not required for proceedings seeking only declaratory or equitable relief, and furthermore the absence of a fiat is not fatal for actions to declare pre-Confederation laws ultra vires.

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

in the absence of a fiat from the provincial Lieutenant-Governor, the Court has no jurisdiction to grant a declaration impugning the Crown's title to land.

141. ibid

142. Comments of Judson,J. at 152 D.L.R., 322 S.C.R.,

"...I do not take these reasons to mean that the Proclamation was the exclusive source of Indian title..."

and 156 D.L.R., 328 S.C.R.,

"...Although I think that it was 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....to call it a "personal and usufructory right". What they are asserting in this action is they had the right to continue to live on their lands as their forefathers had lived and that this right had never been lawfully extinguished.
There can be no question that this right was "dependent on the goodwill of the Sovereign"..."

See comments of Hall,J. at 200 D.L.R., 390 S.C.R.,

"...The aboriginal Indian title does not depend on treaty, executive order or legislative enactment..."

143. See discussion at note 140.

144. See the review by province and territory contained at P.Cummings and N.Mickenberg (eds.), Native Rights in Canada (2nd ed. 1972)

145. Peters v. R. in right of B.C. (1983) 42 B.C.L.R. 373 (B.C.S.C.), at p.377 which adopts Mr.Justice Pigeon and the three judges represented by Mr.Justice Calder as the majority in the Calder case.

However, also see R.v. Dennis and Dennis (1974) 56 D.L.R. (3rd) 397 (B.C.Prov.Ct.) in which a Provincial Court judge in British Columbia declares the matter of aboriginal title to remain open in light of the absence of a clear majority in Calder, and implicitly

adopts the reasoning used by Mr.Justice Hall.

146. See sources discussing the common law basis for aboriginal title discussed at footnote 133

147. Examples of cases which have expressly assumed the survival of aboriginal interests in land after discovery, or implicitly by looking to evidence of its subsequent extinguishment, are set out at note 133. The author accepts the position that in this respect the decision in Calder did not radically change Canadian jurisprudence. However, the comments of both Mr.Justice Hall and Mr.Justice Dickson suggesting the common law recognition of these interests eases the burden of native claimants. While the acknowledgement of the interests in statutes, treaties or other instruments assists in the proof of their survival, it can now be argued that the interests exist at common law, and the burden of proof lies on the Crown to show their extinguishment occurred.

148. Canada, Indian and Northern Affairs, Outstanding Business- A Native Claims Policy (1982)

The present Federal policy towards specific claims is discussed in terms of "lawful obligations", at p.20,

"The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation" ie. an obligation derived from the law on the part of the federal government.

A lawful obligation may arise in any of the following circumstances:

(i) the non-fulfillment of a treaty or agreement between Indians and the Crown

(ii) a breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder

(iii) a breach of an obligation arising out of government adminstration of Indian funds or other assets

(iv) an illegal disposition of Indian land.

In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:

(i) failure to provide compensation for reserve lands taken damaged by the federal government or any of its agencies under authority

(ii) fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated."

However, at p.9 of the document, after reviewing briefly the Royal Proclamation and early agreements with the natives, it comments,

"...As Upper Canada began to feel the effects of settlement after the American War of Independence....many land cession treaties were made with the Indian people for the surrender of their interest in land. Initially these involved one time cash payments, but in later surrenders, such as the Robinson-Huron and Robinson-Superior Treaties of 1850, the Crown undertook to set aside reserves, and to grant annuities and other considerations for the benefit of the Indian people."

In essence this means that the vast majority of agreements signed with the Indians before Confederation are outside the ambit of the policy. It is not intended as a means to re-open the treaties, only to ensure that whatever was agreed to by earlier governments would be honoured.

149. See, for example, Worchester v. State of Georgia (1832) 31 U.S. 350, 6 Pet.515 (United States), Marshall,C.J., at Pet.548 et seq., discussing early British treaties with American Indians in the 18th century in terms of "a compact formed between two nations or communities having the right of self-government". For a discussion of American jurisprudence on the characterization and interpretation of Indian treaties see C.Decker, "The Construction of Indian Treaties, Agreements, and Statutes" (1977) Am.Indian L.Rev. 299.

For Canadian sources see for example R.v. Wesley (1932) 4 D.L.R. 744 (Alberta C.A.) where McGillivray,J.A. stated at p.788,

> "Assuming as I do that our treaties with the Indians are on no higher plane than other formal agreements yet this in no wise makes it less the duty and obligation of the Crown to carry out the promises contained in those treaties with the exactness which honor and good conscience dictate, and it is not to be thought that the Crown has departed from those principles which the Senate and the House of Commons declared in addressing Her Majesty in 1867, uniformly governed the British Crown in its dealings with the aborigines."

See also Re Paulette et al. and Registar of Titles (No.2) (1973) 42 D.L.R. (3rd) 8 (NWT-S.C.); revsd. 63 D.L.R. (3rd) 1 (NWT-C.A.); C.A. affmd. (1976) 72 D.L.R. (3rd) 161 (S.C.C.) where the lower court urged the importance of determining the natives' understanding of treaty terms at the time of signing without going into detail on the characterization of the treaties. It is noteworthy that Marrow,J. stated at 42 D.L.R. p.31,

> "In examining agreements such as treaties where as in the present case one side, the Indians, were in such an inferior bargaining position, it is perhaps well to remember the cautionary words of Mr.Justice Matthews in Choctaw Nation v. United States (1886) 119 U.S. 1, where at p.28 he said:
> The recognized relation between the parties to this controvery, therefore, is that between a superior and an inferior, and

whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally suject to the same laws."

See also R.v. Johnston (1966) 56 D.L.R. (2d) 752 and R.v.White and Bob (1965) 50 D.L.R. (2d) 613

In Pawis v. the Queen (1980) 2 F.C. 18, Marceau,J. of the Federal Court's Trial Division, discussed the 1850 treaty with the Ojibway Indians which had given the natives the right to hunt and fish "as they have heretofore been in the habit of doing". The action had been brought by the Indians against the Crown for breach of contract and trust because of provincial game laws. The Court commented,

"...It is obvious that the Lake-Huron Treaty, like all Indian treaties, was not a treaty in the international law sense. The Ojibways did not then constitute an "independent power", they were subjects of the Queen. Although very special in nature and difficult to precisely define, the Treaty has to be taken as an agreement entered into by the Sovereign and a group of her subjects with the intention to create special legal relations between them. The promises made therein by Robinson on behalf of Her Majesty and the "principal men of the Ojibewa Indians" were undoubtedly designed and intended to have effect in a legal sense and a legal context. The agreement can therefore be said to be tantamount to a contract, and it may be admitted that a breach of the promises contained therein may give rise to an action in the nature of an action for breach of contract...It is common ground that the Lake-Huron Treaty is still binding on the Crown; it has not been renegotiated or repudiated by the Crown."

150. Worchester v. State of Georgia, (1832) 6 Peters 515, 8 L.Ed.483 (United States). See also Cherokee Nation v. State of Georgia, (1831) 30 U.S. 1, 5 Peters 1(United States)

151. Canada, Indian and Northern Affairs, Outstanding Business - A Native Claims Policy (1982)

For a discussion of the history behind the Canadian government's claim mechanisms, both for specific treaty and comprehensive land claims, see sources at note 72.

152. See Indian Act, R.S.C., 1970, c.I.-6, sec.88 for basis of the Federal protection of treaty rights against provincial laws.

153. For example, some status Indian organizations regard their bilateral relationship with the Federal government as vital to protect their interests. This is based in part on the Federal roles in the treaty process and its power to administer Indian lands.

See the comments of Lord Denning in Queen v. Sec.of State for Foreign and Commonwealth Affairs et al. [1980] 4 C.N.L.R. 13, p.90

> "By the Treaty the Indians ceded and surrendered much of their lands to the Crown and in return the Crown undertook the obligations to the Indians specified in the Treaty. So the Crown by the treaty obtained a 'plenum dominium' in the lands. That 'plenum dominium' was distributed between the Dominion and the Province...But the administration of the lands was left to the Dominion. The obligations under the Treaty remained the obligations of the Crown."

154. On application of Provincial laws see:

R. v. Isaacs (1975) 13 New Ser. Rep.(2d) 460,

R. v. Sutherland, Wilson et al.v. Attorney-General of Canada (1980) 113 D.L.R. (3d) 374, 35 N.R. 361

R. v. Mousseau (1980) 111 D.L.R.(3d) 443, and

Kruger and Manual v. The Queen [1978] 1 S.C.R. 104

On application of Federal laws see:

R. v. Sikyea (1962) 40 W.W.R. 492 (N.W.T.Terr.Ct.), rev'd nom. Sikyea v. the Queen (1964) 43 D.L.R. (2d) 150 (NWT C.A.); aff'd [1964] S.C.R. 642

R. v. George [1966] S.C.R. 267,

R. v. Derriksan (1976) 60 D.L.R. (3d) 140 (B.C.C.A.); aff'd (1977) 71 D.L.R. (3d) 159 (S.C.C.)

For a discussion of the conflict between provincial law and the Federal jurisdiction over lands reserved for Indians see:

P.Hughes, "Indian Lands Reserved for the Indians: Off-limits to the Provinces?",(1983) 21:1 Osgoode Hall L.J. 82

K.Lysyk, "The Unique Constitutional Position of the Canadian Indian", (1967) 45 Can.Bar.Rev. 513

D.Sanders, "Hunting Rights-Provincial Laws-Application on Indian Reserves", (1973-4) 38 Sask.L.Rev. 234,and

R.Bartlett, "Indian and Native Law- Survey of Canadian Law", (1983) 15:2 Ottawa L.R. 431.

155. Kruger and Manual v. Regina (1978) 1 S.C.R. 104

156. Sikyea v. the Queen (1964) 43 D.L.R. (2d) 150(N.W.T.Terr.Ct.)

157. R. v.Wesley,(1932) 4 D.L.R. 774 (167)

158. Pawis, McGregor et al v. The Queen (1980) 2 F.C. 18

159. R. v. White and Bob (1965) 52 W.W.R. 193 (B.C.C.A.)

R.v.Johnston (1966) 56 D.L.R. (2nd) 752

R.v. Taylor and Williams [1980] 1 C.N.L.R. 83 (Ont.S.C.-Divisional Ct.)

However, even where Courts have acknowledged that treaties should be construed liberally, there may problems because the language of the agreement does not provide specifically for the preservation of any native rights to possess land or use resources. See, for example, R.v. Polchies et al. (1982) 43 N.B.R. (2nd) 449, 113 A.P.R. 449 (N.B. C.A.) where Mr.Justice LaForest, speaking for the Court, states "I agree that Indian treaties should be liberally construed...", although he went on to hold that the treaty in question could not under a "reasonable construction" support the native claimants' position in the case.

160. See, for example, R.v. Taylor and Williams [1980] 1 C.N.L.R. 83 (Ont.S.C.-Division Ct.), at pp.87-88,

"In interpreting the treaty, as favourably as possible to the Indians, these consideration should have been followed:

(1) The words used should be given their widest meaning in favour of the Indians.

(2) Any ambiguity is to be construed in favour of the Indians.

(3) Treaties should be construed and interpreted so as to avoid bringing dishonour to the government and Crown.

(4) The right to hunt and fish is aboriginal in nature and was confirmed by the Proclamation of 1763; the intention of the Sovereign to extinguish Indian title or any aspect of it, must be by clear language, and the onus of establishing extinguishment is upon the Crown...

(5) The right of Indians to hunt and fish for food on unoccupied Crown land has always been recognized in Canada - in the early days as an incident of their ownership of land, and later by the treaties by which the Indians gave up their ownership right in these lands. See R. v.Sikyea, 43 D.L.R. (2d) 150, at p.152"

Also see R.v. Sutherland, Wilson, et al. and Attorney-General of Canada (1980) 113 D.L.R. (3rd) 374, 35 N.R. 361. Mr.Justice Dickson, speaking for the Court, at p.373 N.R., made this comment in the

context of the interpretation of an Indian "right of access" under the Manitoba Natural Resources Transfer Agreement,

"If there is any ambiguity in the phrase "right of access" in paragraph 13, the phrase should be interpreted so as to resolve any doubts in favour of the Indians..."

161. Norwegijick v. The Queen (1983) 144 D.L.R. (3d) 193 (S.C.C.)

162. State of Washington et al v. Washington State Commercial Passenger Fishing Vessels Association et al (1979) 443 U.S. 658 (United States). See also United States et al v. Michigan et al. (1980) 7 I.L.R. 3090 (United States)

163. Montana v. United States (1981) 450 U.S. 544, 67 L.Ed.(2d)493 (United States)

164. Calder v. the Queen, op.cit. note 72, at pp. 390-396

165. R.v.Sikyea (1962) 40 W.W.R. 494 (NWT S.C.); revsd. (1964) 46 W.W.R. 65 (NWT C.A.); Ct.A.affirmed [1964] S.C.R. 642 (S.C.C.)

166. (1964) 46 W.W.R. at p.74 (C.A.), judgement of Mr.Justice Johnson

167. See R.v.George [1966] S.C.R. 267(S.C.C.)

R.v. Daniels [1968] S.C.R. 517 (S.C.C.)

R.v. Francis (1970) 10 D.L.R. (3rd) 189

R.v. Derriksan (1976) 60 D.L.R. (3rd) 140 (B.C.C.A.); aff'd (1977) 71 D.L.R. (3rd) 159 (S.C.C.)

168. Cardinal v. A.G.Alberta [1974] S.C.R. 695, 40 D.L.R.(3rd) 553 (S.C.C.)

169. ibid, at p.703 S.C.R., p.560 D.L.R. However, the Supreme Court of Canada has not hesitated to strike down offending provincial game laws where they are not of general application. See R.v. Sutherland, Wilson, et al. and Attorney-General of Canada (1980) 113 D.L.R. (3rd) 374, 35 N.R. 361.

The Sutherland decision is also noteworthy because the judgement, delivered by Mr.Justice Dickson, agreed with lower Courts that the lands in question were occupied Crown lands. The Manitoba Natural Resources Act S.C., Geor.VI 1930, c.29, para.13 provided an Indian right to hunt for food on unoccupied Crown lands and "any other lands to which the said Indians may have a right of access". The Court reiterated the point made earlier in Frank v. R. [1978] 1 S.C.R. 95, 15 N.R. 487 . The case had considered an equivalent provision in the Saskatchewan Natural Resource Transfer Agreement, and the Court commented that its purpose was, at p.100 S.C.R [Frank]

"...to effect a merger and consolidation of the treaty rights theretofore enjoyed by the Indians but of equal importance was

the desire to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food."

Mr.Justice Dickson in the Sutherland decision stated at p.370 N.R. that paragraph 13 "should be given a broad and liberal construction. History supports such an interpretation as do the plain words of the provision", and at p.373 N.R.,states that any ambiguity in interpretation should be resolved in favour of the Indians.

170. Kruger and Manuel v. the Queen, supra, note 154

171. Canada, Indian and Northern Affairs, Native Claims in Canada- A Summary (1980). See also Canada, Indian and Northern Affairs, Outstanding Business - A Native Claims Policy (1982) at p.13

At present the Federal Office of Native Claims has entered into agreements in principle with the Inuvialuit of the Western Arctic Region and the Yukon Indians. Negotiations are proceeding with respect to the Dene and Metis of the Mackenzie Valley, the Nishga Tribal Council of British Columbia, the Labrador Inuit Association, the Naskapi Montagnais-Innu Association of Labrador, le Conseil Attikamak-Montagnais du Quebec, the Inuit Tapirisat of Canada for the Inuit of the Central and Eastern Arctic, and in British Columbia the Kitwancool, Kitamaat Village, and Gitksan-Carrier Tribal Council.
Canada, Indian and Northern Affairs, Office of Native Claims, Fact Sheets on Native Claims (1983)
Federal Government Response on Land Claims Policies and Processes (1984)
Perspectives in Native Land Claim Policy (1983)

172. The terms of the agreements vary according to the particular claim, but large claim settlements such as the one for the Western Arctic are similar in essence to the agreements for the James Bay Cree and Northern Quebec Inuit.

173. The following agreements now exist:

(1) Agreement dated 27 April 1983 between Canada, Ontario, the Anishnabek, Nishnawbe-Aski, Alai, Grand Council Treaty No.3, and the Six Nations Bank on native food fishing and conservation.

(2) Inuvialuit Land Rights Settlement Agreement in Principle was signed 31 October 1978 between Canada and the Committee for Original Peoples' Entitlement representing the Inuivialuit of the Western Arctic. The Final Agreement was ratified by the beneficiaries in May 1984.

Canada, Indian and Northern Affairs, The Western Arctic Claim: A Guide to the Inuvialuit Final Agreement (1984)

(3) An Agreement in Principle to settle the claim of 5,500 Yukon Indians has been signed by the parties and approved by the Federal Cabinet. Recent difficulties in gaining approval of the beneficiaries has now raised some doubts about the agreement.

Canada, Indian and Northern Affairs, Cabinet Approves Yukon Indian Claim Agreement in Principle, Doc.1-8403 (1984)

174. The inclusion of mechanisms for self-government in the lands claim process may be re-examined in future by the Federal government as part of the ongoing review of the claims policy. Recently the Honorable David Crombie, Minister of Indian Affairs, stated in December 1984 before the House of Common's Indian Affairs Standing Committee that "...the reason the land claim needs to be reviewed is because it began in an historic time prior to the constitutional amendment, prior to the [House of Common's Special Committee on Self-Government] report, prior to the court cases; and since it was the only ball game in town for gaining control over their lives, Indian communities basically packed into land claims as much as they could because there was no other forum, no other vehicle for obtaining self-government, for obtaining rights..." at p.1, "Land Claims - Conservatives Planning Changes?", Jim Manly, M.P., NDP Native Network (February 1985) Vol.14

For a general discussion of land claims see:

R.Bartlett, "Making Lands Available for Native Land Claims in Australia: An Example for Canada" (1983) 13:1 Manitoba Law.J. 73

C.Hunt, Approaches to Native Land Settlements and Implications for Northern Land Use and Resource Management (unpublished paper, presented to Canadian Arctic Resources Committee, 1978)

P.Chartrand, "The Status of Aboriginal Land Rights in Australia" (1981) 3 Alberta L.Rev. 426

H.Feit, "Negotiating Recognition of Aboriginal Rights: History, Strategies, and Reactions to the James Bay and Northern Quebec Agreements" (1980) 1:2 Canadian J.of Anthropology, 154

K.Lysyk, "Approaches to Settlement of Indian Title Claims: The Alaskan Model" (1973) 8 U.B.C.L.Rev. 321

K. Crowe, "A Summary of Northern Native Claims in Canada: The Process and Progess of Negotiations" (1979) 3:1 Etudes/Inuit/Studies, 31

175. Canada, Indian and Northern Affairs, Indian Conditions: A Survey (1980), at p.125,

"...since the early 1970's there has been an initiation of Indian control of education. This began in 1973 and is continuing with the formation of Indian school boards and the transfer of Indian schools to band control. A further transfer of schools involving about 50% of teaching staff is planned during the next 3 years."

In 1978-79 DIAND's capital expenditures on Indian education to the end of the secondary level were about $23 million for schools operated by the Department in reserves, and over $10 million for schools operated by Indian bands on reserves. Adult education, also

funded by DIAND on the community level, was nearly $6 million for the same period. (supra, pp.124-125)

The current encouragement of greater Indian control over education has not always occurred. A non-governmental publication describes the development of the current policy in these terms,

> "In the 1960's federal Indian education policy was aimed at the integration of Indian children into provincial public school systems with the idea of providing equal opportunities for native Canadians. In the early 1970's, however, realizing the potential of this policy for assimilating their children, the Indian community demanded a new federal approach to Indian education."
> (p.12, Canadian Education Association, Recent Developments in Native Education (1984)

The same publication attributes a change in government policy in response to the Indian Brotherhood of Canada's position paper entitled Indian Control of Indian Education (1972), and states that most of the native goals were accepted in the June 23,1973 policy statement of the Honourable Jean Chretien in a speech to the Council of Ministers of Education. In 1976 the Brotherhood again proposed changes to the educational arrangement and urged that direct control of the programs be transferred from DIAND to themselves. The Department and the Brotherhood were not, however, able to reach agreement on the issue. A 1982 report of the Department (Indian Education Paper Phase I) reviewed the situation of Indian education, concentrating on the relationship between educational quality and local control. For the present, however, the objectives of the Department can be summarized as:

> "(1) to assist and support Indian and Inuit people in having access to educational programs and services which are responsive to their needs and aspirations, consistent with the concept of Indian control of Indian education
> (2) to assist and support Indian and Inuit people in preserving, developing and expressing their cultural identity with emphasis upon their native languages
> (3) to assist and support Indians and Inuit to developing or in having access to meaningful occupational opportunities consistent with their community and individual needs and aspirations."
> (p.13, Canadian Education Association, supra).

With regards to health services,

> "In 1979 the federal government issued an Indian Health Policy designed to promote and encourage Indian involvement in the provision of health servies. To demonstrate its commitment to this policy, the Department of National Health and Welfare began a process of devolution whereby many health services would be administered at the band level. At present over $20 million is provided to bands through contribution agreements for band administered services."
> (pp.33-34, Penner Report, 1983)

> "The Medical Services Branch of the Department of Health and Welfare provides public health services to Indians to cover

uninsured health services as well as the cost of premiums and direct services. The expenditure amounts to about é310 per Indian per year. Indian bands are increasingly assuming responsiblity for directly administering health programs. The program also involves the use of Indian health workers at the band level to provide liason with the health services system."
(p.21, Indian Conditions, 1980)

Also see Canada, Indian and Northern Affairs, Report of the Advisory Commission on Indian and Inuit Health Consultations (1980) by the Honourable Mr.Justice Thomas Berger

176. See Indian Conditions, supra, at pp.45-80 (economic development) and pp.84-89 (financing Band administration).

Canadian government policies to encourage native economic development and autonomy have been criticized as insufficient in contrast with the development of native lands in New Zealand: see P.G.McHugh, "The Economic Development of Native Land: New Zealand and Canadian Law Compared" (1982-83) 47:1 Sask.L.Rev. 118

177. With respect to the possibility of lump-sum transfer payments from the Government of Canada to structures of native autonomy, the Federal government's response to the Penner Report stated,

"Consistent with the Committee Report, the primary purpose of the legislation is to establish a new relationship between the Federal Government and Indian First Nations. The legislation would be based on the following elements....

9. Indian First Nations could negotiate funding arrangements with the Federal Government to cover one-time preparation and negotiation costs and multi-year operating costs after recognition." (pp.3-4, Canada, Indian and Northern Affairs, Response of the Government to the Report of the Special Committee on Indian Self-Government (1984)

In the legislation introduced in June 1984 into Parliament, which reflected the Penner Report and the Federal goverment's response to it did not survive that Parliament, but is noteworthy that section 55 stated

"55. The Minister may, with the approval of the Governor in Council, enter into an agreement with an Indian Nation that is recognized under which

(a) funding would be provided by the government of Canada to the Indian Nation over such a period of time, and subject to such terms and conditions, as are specified in the agreement;"

(Bill C-52, 2nd Session, 32nd Parliament, 32-33 Eliz.II, 1983-4)

178. Canada, Indian and Northern Affairs, Perspectives in Northern Native Land Claims (1983) at p.16

179. For a general discussion of the issue, and the historical development of the reserve system of government under the Indian

Act, see Canada, Indian and Northern Affairs, by W.Daugherty and D.Madill, Indian Government under Indian Act Legislation 1868-1951, (1983)

180. 1984 Constitutional Conference of First Ministers on the Rights of Aboriginal Peoples (Ottawa, March 8-9,1984). The major native organizations in attendance were:
(a) Assembly of First Nations
Organization of status Indians established in April 1982 to replace the earlier National Indian Brotherhood
(b) Inuit Committee on National Issues
Created at general meeting of Inuit Tapirisat of Canada in 1979 which represented Inuit from across Canada through seven regional member organizations
(c) Native Council of Canada
Established in 1970 from regional member associations to represent the Metis and non-status Indian peoples across Canada
(d) Metis National Council
Founded in 1983 by the Metis organizations of Alberta, Manitoba, and Saskatchewan for their joint representation.

181. Canada, Indian and Northern Affairs, Federal Government Proposes Legislation for Indian Self-Government (Doc.1-8354, 1984). See comments of former Minister of Indian and Northern Affairs, the Honorable John Munro.

See also the 1982-3 Parliament's Bill to accord self-government to Indian First Nations: An Act relating to self-government for Indian Nations (Bill C-52, 2nd Session, 32nd Parliament, 32-33 Elizabeth II, 1983-4) although the Bill was not adopted before the end of the parliamentary session.

182. For example, see:
Canada-New Brunswick-Indian Child and Family Services Agreement (24 May 1983). Text at [1983] 4 C.N.L.R. 1

Lesser Slave Lake Indian Regional Council-Canada-Alberta Child Welfare Agreement (3 June 1983). Text at [1983] 4 C.N.L.R. 19

Canada-Manitoba-Indian Child Welfare Agreement (22 February 1982). Text at [1982] 4 C.N.L.R. 1

183. These are the areas in which there are native claims based on unextinguished aboriginal title being actively considered by the Federal government. Canada, Indian and Northern Affairs, Perspectives in Native Land Claims Policy (1983)

184. "Comprehensive land claims negotiations in the provinces require provincial government involvement since many elements of the claims such as land and natural resources pertain to provincial jurisdiction. Negotiations in these areas, therefore, depend largely on provincial policies and positions. In 1976, the Province of British Columbia agreed to participate in discussions leading toward settlement of the claim of the Nishga Tribal Council but deferred its participation indefinitely on other comprehensive claims. The

provincial government has taken the position that its involvement in the Nishga claim reflects its desire to improve the delivery of programs and services to Indians rather than recognition of any historical justification for comprehensive land claims in the Province. The type of settlement that would result from the Nishga negotiations is seen by the Province of British Columbia as a pathfinder for the settlement of other comprehensive claims in B.C. Several additional claims have nethertheless, been accepted for negotiation by the federal government with claimants having been advised that such negotiations are subject to the participation of the Province. Meanwhile, discussions between the federal and provincial governments are being pursued at both the minsterial and officials' level with the objective of seeking agreement on common ground which can form a firm basis for tripartite negotiations with native claimant groups. Experience gained to date in the Nishga claim is being taken into account in this regard.

Bilateral discussions are also taking place between the federal government and the Government of Newfoundland on identifying the roles and responsibilities of each government in respect to the pending negotiations of Inuit and Naskapi-Montagnais claims in Labrador. In Quebec, the government has agreed to participate with the federal government in a negotiated settlement with the Conseil Attikamek-Montagnais du Québec and the two governments have recently agreed with the claimants on the negotiating process."

(ibid, at pp.13-14)

185. The positions adopted by the various governments were reviewed by the Inuit Committee on National Issues in its publication entitled ICNI Newsletter (1984) Vol.1:3 as follows:
British Columbia "stated the need for more preparatory work and called for prudence and caution. B.C. would reject any amendment which they consider to be unclear or ambiguous...wants to see the federal government's intentions are in terms of legislative programs, models for self-government, financial assistance, delivery of services,etc... B.C. strongly hinted that they do not believe that constitutional amendments are needed to resolve the many issues facing the aboriginal peoples. They suggested that problems can be handled by legislation and programs at the local level."(pp.6-7)

Alberta "stated that they beleive that current constitutional processes indicates that legislation, programs and policy means are the best way to accomodate the aspirations of the aboriginal peoples..." (p.7)

Saskatchewan "was not prepared to support any amendments to the Constitution saying that more time was required for the full consideration of all the implications and ramifications...they were open to discussion on Indian governments at the community level only if provincial and municipal jurisdictions are recognized and taken into account..." (p.7)

Manitoba "supports the entrenchment of the aboriginal peoples' right to self-government subject to the Constitution and within the

federation...to facilitate progress, Manitoba was proposing a political accord with the following objectives:

to recognize the desirability of the right of self-government
to recognize the integral role of the provincies in discussions on self-government
to deal with fundamental issues including the legal status of self-governments, constitutional barriers to self-government, the applicability of the Charter of Rights to self-governments, the scope of legislative authority of self-government..."(p.8)

Ontario "...proposed the entrenchment of the following broad principles that aboriginal peoples:

are distinct peoples with unique cultures and languages
require opportunities to benefit economically from land and resources
are entitled to institutions of self-government within the federation
have the opportunity to participate in resource development

Ontario also wanted to continue with a process of resolving issues related to programs and services offered to aboriginal peoples, and establish objectives for community negotiations on self-government which would then be constitutionally protected." (pp.8-9)

Québec "...wanted to see the conference "achieve real gains" in the area of aboriginal self-government, but they warned that any commitments on this matter must take into account the sovereignty of the Quebec National Assembly and the integrity of the Quebec territory...Quebec uses the word "co-existence" to describe their realtionship with the aboriginal peoples. They also stressed Quebec efforts in negotiating agreements which will provide the aboriginal peoples with provincial legislative rights." (p.10)

New Brunswick "supported the immediate entrenchment of the right of the aboriginal peoples to self-government within the Canadian federation..." (p.10)

Nova Scotia "was not ready to support the entrenchment of self-government explaining that they still had many questions concerning the application of self-government..." (p.11)

Prince Edward Island "...supported an accord with a statement of principles concerning self-government, language, culture and access to resources. This accord would service as a framework for further discussions and would allow negotiations to begin at the community level." (p.11)

Newfoundland "...supported the community negotiation process as the best way of defining the parameters of self-governing institutions." (p.12)

The opening statement Prime Minister Trudeau suggested that the various governments recognize:

"that the aboriginal peoples have the right to self-government; that this right needs to be negotiated by the federal, and when

necessary, the provincial authorities; that the governments should implement any agreement made with the aboriginal peoples, in the form of legislation, and that the cultural heritage of the aboriginal peoples and their right to educate their children in their own language be preserved and respected." (p.5)

186. Canada, Indian and Northern Affairs, Treaties and Historical Research Group, The Historical Development of the Indian Act, (1978) at pp.13-37.

One writer notes,

"The policy of the Government toward the Indian people in the post-Confederation period was twofold and somewhat contradictory. One the one hand, it continued the protective or guardianship policy of the colonial period; on the other it proposed to assimilate the Indian, hopefully on a basis of equality, into the mainstream of society. A major facet of this program of assimilation was to be the introduction of the democratic, elective process, considered at that time to be a mark of progress and civilization. It was thought by the Government that the introduction of elective government would lead the Indians to abandon their traditional tribal political systems, which varied throughout the country and were considered impediments to the Indians' progress..."
Canada, Indian and Northern Affairs, by W.Daugherty and D.Madill, Indian Government under Indian Act Legislation 1868-1951, (1983), at p.2

From the earliest versions of the Indian Act there were provisions for the introduction of elective government onto the reserves with powers for the Band Councils. The Indian Advancement Act, S.C. 1884, c.28 , 47 Vic. was a slightly more sophisticated form whch intended to transform tribal regulation into municipal type government. The act was later merged into the Indian Act in 1906. At present,the Indian Act, R.S.C. 1970, c.I-6, contains sections 74-80 which deal with the elections of Chiefs and Band Councils and sections 81-86 which are concerned with the Band Council powers.

187. See: M.Mason, "Canadian and United States Approaches to Indian Sovereignty", (1983) 21:3 Osgoode Hall L.J. 422, at pp. 429-430

Canada, Indian and Northern Affairs, Indian Conditions (1984), at p.82,

"...Before 1950, government relationships with Indians were custodial and protective, operating within legislation that contained a repressive attitude toward Indian cultures. The 1951 Indian Act introduced measures that allowed band councils to exercise many local government functions. Nonetheless, in the 1950's and 1960's:

-Most Indian communities were administered rather than self-governing. Bands had neither staff nor institutional structures for administration

-Adminstration was carried out by "Indian Agents" who were employees

of the government and not the band. While band councils existed, they operated more or less under the government officials rather than under the direction of their elected or traditionally appointed chiefs."

188. Indian Act, S.C. 1951, c.29.

See Mason, supra, at p.430,

"The Indian Act of 1951 purported to give Indians more self-government. It removed Indian Agents from the chairs of the band councils and gave Indian women the band franchise, but the Act consolidated power in the DIA (Department of Indian Affairs). The Governor-in-Council, through the Minister of Indian Affairs and Native Development (the Minster), continued to control the form of band government, band council powers, band financial affairss, and land allocation and use. Bands had an advisory capacity in some areas but rarely could they prevent or effect change..."

189. Indian Act, R.S.C. 1970, c.I-6, section 2 defines "council of the band" as

"(a) in the case of a band to which section 74 applies, the council established pursuant to that section

(b) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band."

Section 74 states

"(1) Whenever he deems it adviseable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this act."

190. ibid

191. ibid, section 2

192. The majority of status Indians did not openly resist the system of government provided by the Indian Act. However, in some cases, the form of the Act was fulfilled while political decisions were still made by customary practices. See R.Barlett, "The Indian Act of Canada", (1978) 27 Buffalo L.Rev. 581 at pp.592-3.

In other cases there was outright rejection of the elective system, as evidenced by poor voter participation or court challanges of the validity of Band Councils elected under the Act. See:
Logan v. A.G.Canada [1959] O.W.N. 361, 20 D.L.R. (2nd) 416 (Ont.H.C.)

Isaac et al.v. Davey et al. (1974) 51 D.L.R. (3rd) 170

193. For a discussion of the changes of Inuit society as social services arrived in the North see Diamond Jenness, Eskimo Administration in Canada (1964). It should be noted, as chronicled by Jenness, that the arrival of government institutions in the North with daily contact with the Inuit is fairly recent ie. the 20th century. Perhaps the most important non-native-Inuit interaction before that period was the religous missions, and it could be argued that it was their influence, rather than later government policies, which altered traditional Inuit customs in the area of laws and government.

194. Canada, Indian and Northern Affairs, Indian Conditions: A Survey (1980) at p.86

"The government provides support to band administration. This includes core funding grants (started in 1972) to cover the cost of band council activities, band administration contributions for general band administration (including the band office, band manager and support staff), and program administration funding to cover the costs of administering specific activities (including support for training and band financial management)."

In the 1978-79 fiscal year the Department of Indian and Northern Affairs' budget was $658.6 million, which included $227.2 million administered by the bands themselves. However, this direct funding should be compared to the relatively meager amounts produced by the bands themselves, and held as band funds by the government.

Ibid, at p. 85,

"Section 69 of the 1951 Indian Act allows bands to assume, with the Minister's approval, control over band funds. Band funds are the revenue and capital gained through the use of community (reserve) resources (eg. capital from the sale of non-renewable resources or revenue from the sale of renewable resources). These have expanded rapidly since about 1972 to an aggregate for all bands of about $120 million. The number of bands using this provision has increased almost threefold since 1967."

A logical alternative to goverment funding is for the bands to exercise taxation powers over their reserve lands, and the individuals or corporations which reside on them. The bands can acquire this capacity under section 83 of the Act by "assessment and taxation" or by licencing fees. However, for many bands this is an illusory source of funding since their reserves do not attract either the funds or businesses which would give the section meaning. Ibid, at p.85

195. It is noteworthy that although the number of bands passing by-laws has tripled since 1966, less than 20% of all bands pass such by-laws. In addition, the six top subjects dealt with under band by-laws are respectively traffic, disorderly conduct and curfews, garbage disposal, water supply, pounds, and fish and game. Ibid, at p.85.

196. Indian Act, section 82(2) requires that a copy of any council by-law must be received by the Minister within 40 days of its adoption and

entry into force, and he is then able to disallow it if he chooses.

197. Indian Conditions, supra, at pp.107-132

198. See the agreements described at footnote 173, supra.

With regards to education, the Department of Indian and Northern Development's Education Program is based on a set of principles including:

"...The responsibility for delivering Indian education programs is transferred to the education authorities of the bands in cases where the bands request the transfer, where suitable financial agreements or arrangements are reached and where bands have had the opportunity to develop the necessary managerial skills....According to the financial agreements or arrangements, Indian education authorities represent the parents in their communities and are responsible to them for setting the educational policies, planning and carrying out the education programs and ensuring the quality of the eduction....The Department supports a more authoritative role for the Indian community in provincial education systems and greater interaction of Indian and provincial education authorities."

Canada, Indian and Northern Affairs, Indian Education - Choosing for the Future (1980)

"From about 1960 to 1970, emphasis was placed on developing arrangements with schools in provincial systems. From about 1970, emphasis has been on developing schools in Indian communities, ideally operated by Indian bands..."

Canada, Indian and Northern Affairs, Indian Conditions: A Survey (1980), at p.50

199. Patterson v. Seneca Nation (1927) 157 N.E. 734 (New York)

More recently the United States Court of Appeals (10th Circuit) in the case of Santa Clara Pueblo et al. v. Martinez et al. (1978) 436 U.S. 49 (United States) reviewed American jurisprudence and stated, at pp.55-58,

"Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government...Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relationships."...They have power to make their own substantive law in internal matters...(membership)...and to enforce that law in their own forums...

As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus, in Talton v.Mayes, 163 U.S. 376 (1896), this Court held that the Fifth Amendment did not "operat[e] upon""the powers of local self-government enjoyed" by the

tribes...In ensuing years the lower federal courts have extended the holding in Talton to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment.

As the Court in Talton recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess...

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers...This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit"..."

See also S.Brakel, American Indian Tribal Courts, (1978), at p.6,

"The theory behind the self-government power of the American Indian tribes, including the power to regulate their affairs through an adjudicative system, is that this power derives from an original sovereignty, which, though limited through wars, treaties, constitutional language, and congressional action, has never been fully extinguished."

200. M.Wax and R.Buchanan, Solving the "Indian Problem":The White Man's Burdensome Business, (1976)

201. For a survey of the extensive American jurispurdence in the area of inherent powers of self-government see: W.C.Canby, American Indian Law (1981) at pp.32-156.

202. Indian Civil Rights Act, 1968, 25 U.S.C. c.1301-1303; For a detailed discussion of the legislation's impact see the decision in Santa Clara Pueblo et al v. Martinez 436 U.S. 49 (1978) (United States).

For comments on the decision see:

V.Lindstrom,"Constitutional Law: Santa Clara Pueblo v. Martinez: Tribal Membership and the Indian Civil Rights Act", pp. 205-217, and

A.Pearldaughter, "Constitutional Law: Equal Protection- Sexual Equality under the Indian Civil Rights Act", pp. 187-203, both (1978) 6 Am.Ind.L.Rev.

203. For example, the Potlaches of the West Coast Indians were regarded as a means of political consensus, but were forcibly supressed. Another example is the Elders' Councils of the Six Nations in a case were the elected form of government under the Indian Act was imposed in the face of a more traditional mode of government. Cited at Penner Report, at p.13

204. For example see Inuit Committee on National Issues, Opening Remarks, Federal-Provincial Meeting of Officials on Aboriginal Constitutional Matters, Working Group 4 - Aboriginal or Self-Government, (Doc.840-290/008, Ottawa, Dec.15-16, 1983), and

David Nahwegahbow, "Aboriginal Sovereignty and a Constitutional Basis for Self-Government", at pp.176-191, Canadian Bar Association

(Ontario Section) Current Issues in Aboriginal and Treaty Rights (1984). A related article in the same publication considers some of the unique caselaw which may arise in future under the Constitution Act, 1982 in relation to natives, and discusses a recent decision of the British Columbia Court of Appeal where the hunting of a deer was argued to be a religious act protected by the Charter of Rights and Freedoms; Ann Hayward, "R.v.Jack and Charlie and the Constitution Act, 1982 - Religious Freedom and Aboriginal Rights in Canada", at pp.14-50.

For a general discussion of native interests under the Constitution Act,1982 see B.Slattery, "Constitutional Guarantees of Aboriginal Rights and Freedoms", (1983) 8 Queen's L.J. 232.

205. See review of positions adopted by the provincial and territorial governments towards the entrenchment of aboriginal government at the 1984 Constitutional Conference at pp.6-12, (1984) 1:3 ICNI Newsletter.

206. For a general discussion of current issues in native self-government see: J.Long, L.Littlebear, and M.Boldt, "Federal Indian Policy and Indian Self-government in Canada: An Analysis of a Current Proposal", (1982) VIII:2 Can.Public Policy 189, and

L.Littlebear, J.Long, and M.Boldt, Pathways to Self-Determination: Canadian Indians and the Canadian State (1984)

207. There are a few isolated cases in the 19th century jurisprudence which suggest that some native customary law survived the introduction of French and English law into Canada. See for example.

Woolrich and Johnson et al. v.Connolly (1867) 11 Lower Can.Jur. 197; 3 U.C.L.J. 14, (U.C.Q.B.) at p.214, where Mr.Justice Monk speaking of Rupert's Land, stated

"The [Hudson's Bay] Charter did introduce the English law, but not at the same time make it applicable generally or indiscriminately, it did not abrogate the Indian laws and usages. The Crown has not done so. Their laws of marriage existed and did exist."

See also R.v. Nan-e-quis-a-ka (1889) 1 Terr.L.R. 211, 1 (No.2) N.W.T.R. 21 which held that the introduction of English law to Rupert's Land did not affect the validity of marriages contracted by native customary law during the 19th century.

However, also see Doe d.Sheldon v. Ramsay (1852) 9 U.C.Q.B. 105 (U.C.Q.B.) which stated that Indian laws regarding property were superceded by the common law after the reception of English law.

More recent cases have suggested the same problem where native customary and Canadian laws come in conflict. See for example

Mitchell v. Dennis [1984] 2 W.W.R. 449 (B.C.S.C.) in which an adoption by native customary law was held not to confer rights

recognized by provincial legislation.

Logan et al. v. Davey et al. (1974) 51 D.L.R. (3rd) 170 (Ont.S.C.) which involved the unsuccessful attempt by the supporters of the traditional structures of native government to displace the band council elected under the terms of the Indian Act. For an earlier case on a similar issue see Logan v. Attorney-General of Canada [1959] O.W.N. 361, 20 D.L.R. (2nd) 416 (Ont.H.C.)

Aboriginal groups which intend to rely on section 35 of the new Constitution to argue for their inherent right to self-government should note that the section protects only "existing" treaty and aboriginal rights. There is no agreed upon interpretation of the term among either the parties to the Constitution or the courts. However, some Courts have already interpreted the term to protect only rights legally recognized when the Constitution entered into force on 17 April 1982. : see R. v. Eninew [1984] 1 D.L.R. (4th) 595 (Sask.Q.B.)

208. James Bay and Northern Quebec Agreement, Editeur Officiel du Quebec (1976)(hereinafter JBA)

Category 1A lands ("set aside for the exclusive use and benefit of the respective James Bay Cree bands") are subject to Cree local government based on band councils and band custom as set out in by-laws. Their powers include those set out under Sections 28(2), 81, and 83 of the Indian Act, as well as most of the powers exercised by the Governor-in-Council under section 73.See Section 9 JBA.

The agreement has been put into operation through a series of Federal and Quebec statutes. The Cree-Naskapi Act S.C. 1984, c.18 sets out in detail the powers and structures providing local government on the 1A lands to the James Bay Cree under the James Bay and Northern Quebec Agreement, and the Naskapi of Shefferville on 1A-N lands under the Northeastern Quebec Agreement.

The Act's provisions take precedence over all Federal acts and Provincial laws of general application which are inconsistent or in conflict with its terms. See Sections 3-4. In particular, the Indian Act does not apply to the Cree and Naskapi bands under the agreements, not the to 1A or 1A-N lands.

Regional government is created for all of the regions covered by the agreements. The 1B lands of the James Bay Cree are held in outright ownership by provincial corporations composed soley of Cree. See section 10 JBA. The corporations are akin to Quebec municipalities, are are actually deemed to be municipalities under many Quebec statutes. See section 10.017 of the JBA. See also la Loi sur le Conseil regional de zone de la Baie James, R.S.Q. 1984, c.C-59 and la Loi sur les villages cris et le village naskapi, R.S.Q. 1984, c.V-5.1

A different arrangement exists for the Inuit communities under the agreement. Considering their isolated location the preservation of ethnic government was less pressing, and more conventional Quebec municipal structures were opted for by the Inuit. The so-called Northern Villages and their regional administrative unit called Kativik are dealt with by la Loi sur les villages nordiques et

l'Administration regionale Kativik, R.S.Q. 1984, c.V-6.1

209. See section 14 JBA with respect to Cree Health and Social Services, section 16 on Cree Education, section 15 for Health and Social Services (Inuit), and section 17 regarding Education (Inuit). In each case Cree or Inuit structures are established to provide the social services, but the structures are subject to some degree to provincial laws and bureaucratic regulation,

210. See section 24 JBA for the complex arrangements whereby the categories of lands under the agreement are subject to different means to manage wildlife resources.

211. Nunavut Constitutional Forum, Building Nunavut A Working Document with a Proposal for an Arctic Constitution (1983)

At p.9 of Building Nunavut it is noted

> "...Nunavut is not an ethnic government. It is public government within the Canadian tradition. Canadian federalism was designed to accomondate regional diversity, specific cultural traditions and the political rights of minorty groups or regions. In Nunavut that philosophical federalism can reach its finest flower."

However, given the isolation of the Eastern Arctic "Nunavut" would become in essence an Inuit province or territory, where the same publication recommends that Inuiktitut be an official language with English and French to be given equivalent status "whevever numbers of one or the other national language group warrants, including as a language of education." (p.18)

212. "On November 26, 1982, the federal government announced its acceptance, in principle, of the creation of Nunavut. This has been re-stated by favourable words of the Prime Minister. The NWT Territorial Assembly and the people of the NWT have already voted to accept division of the territories..." (At p.3, (1984) Vol.1:3 INCI Newletter Inuit Committee on National Issues) A referendum to determine the border between the Western and Eastern Arctic in anticipation of the creation of the two new proposed territories took place in January 1985.

213. For example, under the James Bay and Northern Québec Agreement (1975), (JBA) the Federal Minister of Indian and Northern Affairs retains general powers to supervise the administration of Category 1A lands (sec.9.0.1), the by-laws of the James Bay Regional Zone Council have no effect unless ratified by Québec's Lieutenant-Governor in Council along with the James Bay Municipality (sec.11B.0.9), the residual powers of the Québec Minister of Social Affairs over the Cree Regional Health Board of Health Services and Social Services (sec.14), the power of the same Minister to exercise his powers if the Health and Social Council (Inuit) fails (sec.15), the incorporation of the Cree Education Board as a Québec provincial school board whose by-laws require approval of the Minister of Education and to whom the Québec Education Act applies (except where the agreement differs)(sec.16), the same provision for the Inuit

(sec.17), and the Cree units of the Québec Police Force (sec.19). Other examples exist such as the point that the responsible Minister need only "endeavor to respect the views" in certain matters of the Coordinating Committee established under the Hunting, Fishing and Trapping provisions (sec.24.4.27, 24.4.36, and 24.4.37).

These points must be balanced, of course, against the important provisions of the agreement that alterations of legislation which would affect the native parties, either Federal or provincial, can only be done with their consent. It should also be noted that the major concerns of the JBA beneficiaries have so far not been over this issue, but have been with the reduction of Federal programs in their communities, and the feelings of frustration that life in the area is not improving as quickly as anticipated. For a discussion of these and other concerns see Canada, Indian and Northern Affairs, James Bay and Northern Quebec Agreement Implementation Review (1982)

214. The House of Commons' Special Committee on Indian Self-Government recommended in its 1983 report (Penner Report), at pp.141-2,

> "The Committee recommends that the federal government establish a new relationship with Indian First Nations and that an essential element of this relationship be recognition of Indian self-government...
>
> The Committee recommends that the right of Indian peoples to self-government be explicitly stated and entrenched in the Constitution of Canada. The surest way to achieve permanent and fundamental change in the relationship between Indian peoples and the federal government is by means of a constitutional amendment. Indian First Nation governments would form a distinct order of government in Canada, with their jurisdiction defined...
>
> While the Committee has concluded that the surest way to lasting change is through constitutional amendments, it encourages both the federal government and Indian First Nations to pursue all processes leading to the implementation of self-government, including the bilateral process...
>
> The Committee recommends that any changes of policy possible under existing laws that would enhance self-government and that are acceptable to designated representatives of Indian First Nations be taken without waiting for the enactment of new legislation. It must be the responsibility of First Nations themselves to select a method of designating representatives on their behalf...
>
> The Committee does not support amending the Indian Act as a route to self-government. The antiquated policy basis and structure of the Indian Act make it completely unacceptable a blueprint for the future...
>
> The Committee recommends that the federal government commit itself to constitutional entrenchment of self-government as soon as possible. In the meantime, as a demonstration of its commitment, the federal government should introduce legislation

that would lead to the maximum possible degree of self-government immediately..." (emphasis added)

215. Canada, Indian and Northern Affairs, Federal Government Proposes Legislation for Indian Self-Government, (Doc.No.1-8354, 1984). See comments of the former Minister for Indian and Northern Affairs, the Honorable John Munro.

For a discussion of the Penner Report see the comments of a group of political scientists in P.Tennant et al., "Indian Self-Government -The Report of the House of Commons Special Committee on Indian Self-Government: Three Comments", (1984) X:2 Can.Public Policy 211.

216. Canada, Indian and Northern Affairs, Response of the Government to the Special Committee on Indian Self-Government (1984), at p.2

217. An Act Relating to Self-Government for Indian Nations (Bill C-52, 2nd Session, 32nd Parliament, 32-33 Eliz.II, 1983-84) Preamble.

218. ibid.

219. See agreements cited at note 182. In addition, the Federal government has made efforts to encourage Indian self-management in several fields, particularly education, health and social services, and economic development (see discussion at note 175 and 176).

220. See the summary of the provincial and Federal goverments' positions at the 1984 Constitutional Conference on Aboriginal Matters at note 181.

221. An Act Relating to Self-Government for Indian Nations (Bill C-52, 2nd Session, 32nd Parliament, 32-33 Eliz.II, 1983-84)

222. However, the view of natives as incapable of holding sovereignty was not, of course, a creation of the 19th century. See:
J.Westlake, International Law (1910) at chapter V,
Collected Papers of J.Westlake on Public International Law, L.Oppenheim (ed.) (1914)
W.E.Hall, A Treatise on International Law (8th ed. 1924), A.Higgins (ed.) at p.125,
T.J.Lawrence, The Principles of International Law (7th ed. 1923) sec.74,
D.D.Field, Outlines of an International Code (2nd edition 1876) at pp.38,78-79,
cited at M.F.Lindley, The Acquisition and Government of Backward Territory in International Law (1926) at pp.18-19

223. P.Hutchins, The Legal Status of the Inuit (unpublished L.L.M. Paper, London School of Economics, London, 1971) at pp. 29-37
B.Slattery, Land Rights of Indigenous Canadian Peoples (unpublished paper, University of Dar es Salaam, 1973) and
The Land Rights of Indigenous Canadian Peoples As Affected by the Crown's Acquisition of Their Territories (unpublished Ph.D. Thesis, Oxford, 1979).

For a discussion of early French policy see B.Slattery, French Claims in North America 1500-59 Studies in Aboriginal Law, U.of Saskatchewan (1980)

224. See St.Thomas Aquinas (1227-1274) who argued that sovereignty could be justly exercised by infidels. He reasoned that dominion is based upon human law whereas the distinction between the faithful and infidels comes from divine law above and does not annul the former. For a contrary view see the writings of Raymond de Penafort (13th c.) who expanded on St.Augustine's three bases of just war to include war against infidels. For a supporting view see Sinibaldus de Fieschi (later Pope Innocent VI) who viewed such a war as inadmissible against infidels living in peace.

In 1537 Pope Paul III issued the Subliminus Deus which declared

> "...que lesdits Indiens et tous les autres peuples qui, par la suite viendront à la connaissance des chrétiens, quand bien meme ils seraient en dehors de la loi du Christ, ne sont pas privés et ne doivent pas l'être de leur liberté ni de la jouissance de leur biens, et qu'ils ne doivent pas être reduits en esclavage."
> (cited at M.Lachs, The Teacher in International Law (1982) at p.45 and Hutchins, supra, at p.30)

The Spanish Crown attempted to place stricter controls on the colonists' activities towards the Indians and issued the New Laws of 20 November 1542 to end the worst abuses and outright slavery. G.Margadant, "Official Mexican Attitudes Towards the Indian: An Historical Essay",(1980) 50 Tulane Law R. 964

225. M.de Vatel, Law of Nations, (1793) at pp.32-33, Book I,Chapter VII, para.81

226. Advisory Opinion on Western Sahara [1975] I.C.J. Reports

The comments of international tribunals like the International Court of Justice are extremely significant when they speak of principles having entered international customary law. While there may be some debate on its consequences, it is accepted that international customary law forms part of the common law system. The significance of this aspect of common law, both in terms of British colonial practice and Canadian domestic law, is not addressed in detail in the present discussion, but is an area deserving further consideration in future. For a short discussion of the role that international customary law plays in Canadian domestic law, and in particular, on the law relating to human rights see: A.Bayefsky and M.Cohen, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 Can. Bar Rev. 265

227. E.Nys, Introduction to "De Indis et de Jure Belli Relectiones", Classics of International Law, (1917) at p.85. See the writings of Bartolome de las Casas (1519) who vigorously opposed slavery of the Indians and appealed directly to the Spanish Crown to halt the misdeeds practiced in its name. Other missionaries like Geronimo de Mendiato and Juan de Torquemada also attacked the enslavement of the

Indians and the destruction of their institutions; see Lachs, op.cit. note 224 at p.45

228. F.de Vitoria, "De Indis et de Jure Belli Relectiones", Classics of International Law, (1917)

229. M.F.Lindley, op.cit.note 222, at p.13

230. ibid, at p.14

231. G.Gould and A.Semple (eds.), Our Land - The Maritimes, (1980), at pp.22-25. The Royal Proclamation of 1763 is reprinted at Appendix II, R.S.C., 1970.

For a discussion of the survival of private interests despite a change of sovereignty from the prespective of international law see: Chorzow Factory Case (1926) P.C.I.J. Ser.A, No.7 (based on a convention between Germany and Poland designed to preserve existing property interests despite the exchange of the territory between the two states)
German Settlers Case (1923) P.C.I.J. Rep.Ser.B, No.6; see also Jablonsky v. German Reich (1935-7) 8 A.D. Case No.42 both cited at D.W.Grieg, International Law (1976) at pp.609-614

232. de Vitoria, op.cit. note 228 at p.162, "On the Indians", Sec.III, para.409

233. Lindley, op.cit. note 222, at p.329

234. See the comments of Judge Nervo in the South West Africa cases on the goal of the sacred trust to allow a people to "stand by themselves" [1966] I.C.J.Reports

235. Lindley, op.cit. note 222, at pp.332-334

236. ibid

237. L.Sohn (ed.), Basic Documents of the United Nations, (1968) at pp.295-303

238. Judge Nervo wrote a dissenting reason in the South-West Africa case in 1966, and stated at [1966] I.C.J. pp.465-466, in his discussion of the Mandate System of the League of Nations,

> "The sacred trust of civilization...is a legal principle and a mission, where fulfillment was entrusted to more civilized nations until a gradual process of self-determination makes the people of the mandated territories able to stand by themselves in the strenuous conditions of the modern world."

Even stronger language comes from the 1971 advisory opinion of the International Court of Justice on Namibia, in which the Court was asked to consider the status of the South-West African territory, and the Court comments in its reasons, at [1971] I.C.J. p.31,

"...the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all 'territories whose peoples have not yet attained a full measure of self-government'".

The Court in the Namibia case also noted the evolution of the sacred trust since the Mandates were established in 1919, at [1971] I.C.J. pp.74-75,

"...the Court must take into consideration the changes which have occured in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretaton. In the domain to which the present proceedings relate, the last fifty years...have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned."

Also see the Advisory Opinion on the Western Sahara, [1975] pp.32-33, in which the Court notes with approval these earlier statements.

239. For American sources on the "sacred trust" see Lindley, op.cit. note 222, at pp.330-331. For Spanish American sources see M.C.Barre, "De l'indigenisme a l'indianisme",(1982) Le Monde Diplomatique and M.Leon-Portilla, "Endangered Cultures: The Indian in Latin America" (1975) 1 Case Studies on Human Rights and Fundamental Freedoms, 178

240. Worchester v. State of Georgia, (1832) 6 Peters 515, 8 L.Ed. 483 (United States)

241. Lindley, op.cit. note 222, at p.336

242. See E.Sady, The United Nations and Dependent Peoples (1956) for a discussion of the early United Nations interest in the problems of dependent peoples.

243. See for example the comments of Professor J.P.Humphrey on the impact of the Second World War on the United Nations and the protection of humah rights,

"So potent was this catalyst that it produced not only an unprecedented growth in human rights law, but the very theory of international law had to be adapted to the new circumstances".

at pp.82-83 of J.P.Humphrey, "The International Law of Human Rights", M.Bos (ed.), The Present State of International Law and Other Essays (1973) at pp.75-105.

See also the discussion of M.McDougal and G.Leighton, "The Rights of Man in the World Comunity: Constitutional Illusions vs. Rational Action", at M.McDougal et al., Studies in World Public Order, (1960)

at pp.335-403.

For a more general discussion of the United Nations human rights structures see W.L.Tung, International Organizations under the United Nations System, (1969) at pp.147-159

244. J.P.Humphrey, "The United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities" (1968) 62 Am.J.Int'l.L. 869 at p.870. Professor Humphrey suggests that the failure of the United Nations to follow through with the League's work for the protection of minorities was due to:
(1) disillusionment with the League system which had proven to be both discriminatory in terms of the countries it applied to and susceptible to abuses by irridentist movements
(2) shift in political power away from Europe for the immediate post-war period to the states of immigration and assimilation
(3) emergence of new Third World states with their attention to 'nation building' and the creation of national unity

For further discussion of the early United Nations history relating to minorities see:

I.Claude,Jr., National Minorities - An International Problem, (1955)

M.F.Lowe, International Organization and the Protection of Minorities: Alternatives, Approaches and Prospects for the Future, (Unpublished paper, Institut universitaire de hautes études internationales, Geneva, 1976)

245. For full text of the Charter see pp.485-511, I.L.Claude,Jr., Swords into Plowshares, (2nd edition 1961) or Sohn, op.cit.note 237

246. See, for example, E.Schwelb, "The International Court of Justice and the Human Rights Clauses in the Charter" (1972) 66 Am.J.Int'l.L. 337. See also R.Lillich and F.Newman, International Human Rights: Problems of Law and Policy, (1979) at pp.14-50

247. See references to peace and human rights in the Preamble and Article 1(1). The express link between human rights and peace is not clear in these passages but they are mentioned in tandem which suggests that the drafters appreciated that a connection existed. Claude, op.cit. note 245 comments at pp.86-87,
"...the emphasis in the Charter upon the promotion of respect for human rights lends colour to the suggestion that the United Nations was built upon a conception hastily generalized from immediately preceding experience, the view that the danger of war emanates from totalitarian governments, that war is caused by dictatorial plots of ruthless dictators who are contemptuous of human rights."

248. Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) [1971] I.C.J. Reports 16 at p.57. See paragraph 131 which refers to Charter obligations "...in a territory having an international status".

However, see the remarks of Judge Ammoun which suggest that a more general application was intended. At page 76 he comments

> "The Advisory Opinion takes judicial notice of the Universal Declaration of Human Rights. In the case of certain of the Declaration's provisions, attracted by the conduct of South Africa, it would have been an improvement to have dealt in terms with their comminatory nature, which is implied in para. 130 and 131 of the Opinion by the references to their violation".

249. United Nations, General Assembly, "Treatment of Indians in the Union of South Africa, Resolution 44(I)", Official Records: 1st Session (1947), U.N. Doc. A/64/Add.1 at p.69

250. United Nations, General Assembly, "Violation by the USSR of Fundamental Human Rights, Diplomatic Practices, and Other Principles of the Charter, Resolution 285(III)", Official Records: 3rd Session (1949), U.N.Doc A/900 at p.35.

    See also R.Ballinger, "United Nations Action on Human Rights in South Africa",pp.248-285, and J.Fawcett, "Human Rights and Domestic Jurisdiction", pp.286--304 both in E.Luard (ed.), The International Protection of Human Rights (1967)

251. See J.P.Humphrey, "The Implementation of the International Human Rights Law" (1978) 24 N.Y. Sch.L.Rev. 31,
    Kunz, "The United Nations Declaration of Human Rights" (1949) 43 Am.J.Int'l.L. 316,
    E.Schwelb, "The Impact of the Universal Declaration of Human Rights on International and National Law", [1959] Am.Soc.Int'l.L.Proc. 217

252. United Nations, United Nations Yearbook for Human Rights (1949), U.N.Sales No. 1949.XIV.1, at p.543. The text proposed by the Drafting Committee read:

> "In States inhabited by a substantial number of persons of a race, language or religion other than those of the majority of the population, persons belonging to such ethnic, linguistic or religious minorities shall have the right, as far as compatible with public order, to establish and maintain schools and cultural or religious institutions, and to use their own language in the Press, in public assembly and before the courts and other authorities of the State."

253. Article 20. Text at United Nations, Human Rights - A Compilation of International Instruments, (1978), U.N.Doc. ST/HR/Rev.1, at pp.1-3 [hereinafter Human Rights Docs.]

254. Article 17

255. Also see the comments of Claude, op.cit. note 245, at pp.87-88,

> "The United Nations system, like the League found its philosophical origins in liberalism. But if the liberalism which inspired the League was essentially a 19th century phenomenon, the doctrinal foundation of the night-watchman state, the liberalism which underlay the new system was the 20th century version, the theoretical support of the welfare state."

256. Article 6 (right to gain a living by work), Article 8 (labour rights), Article 10 (family), Article 12 (physical and mental health), and Article 13 (education). Text at Human Rights Docs, pp.3-8

257. Canada, Indian Affairs and Northern Development, Indian Conditions: A Survey (1980).
Life expectancy is ten years less for natives than the national average for Canada. Violent deaths are three times and suicides more than 6 times the average for the Canadian population. One in three native families live in crowded conditions with less than 50% of houses being properly services compared to a national average of 90%. In 1964 30% of Indians received social assistance, but by 1977-78 the figure was between 50% and 70%.

258. R.Higgins, "Derogations and Limitations on Human Rights" (1976-77) 48 Brit.Yb.Int'l.L. 171,

R.Marcic, "Duties and Limitations Upon Rights" (1968) XI:1 J.Int'l.Comm.Jurists 59 , and

United Nations, Study of the Individual's Duties to the Community and the Limitations on Human Rights and Fundamental Freedoms under Article 29 of the Universal Declaration of Human Rights (1980), Special Rapporteur Mrs.Erica-Irene Daes, U.N.Doc. No. E/CN.4/Sub.2/432/Add.7

259. June 23,1984, The Gazette, Montreal, p.B-12 and June 23,1984, La Presse, Montreal, p.A-16

260. Assembly of First Nations, Resolutions Passed at AFN Special Legislative Assembly held on May 16-18,1984, Edmonton, Alberta (1984) at p.2

261. See materials cited at note 202

262. Charter of Organization of American States entered into force on December 3,1953. Text in A.V.Thomas and A.J.Thomas, The Organization of American States, (1963) at p.4

263. T.Buergenthal, "The Revised OAS Charter and the Protection of Human Rights",(1980-1) 30 Am.U.L.Rev. 828

264. The Second Special Inter-American Conference, held in Rio de Janeiro in 1965, agreed to substantially amend the Charter of the Organisation of American States with "new objectives and standards for the protection of the economic, social and cultural development of the peoples of the Hemisphere...". The amendments were accomplished by the Protocol of Amendment to the Charter of the Organisation of American States (Protocol of Buenos Aires) signed at Buenos Aires on 27 February 1967. The Protocol came into force on 27 February 1970 with the required two-thirds of States signatory to the O.A.S. Charter having deposited their instruments.
Text at (1974) 721 United Nations Treaty Series 324.

265. Buergenthal, op.cit.note 263, Article 31(f) of O.A.S. Charter

266. Resolution XXX, Ninth International Conference of American States, Bogota,1948, cited at United Nations, Study of the Problems of Discrimination Against Indigenous Populations Chapter III (1982), Special Rapporteur José Martinez Cobo, U.N. Doc.No. E/CN.4/Sub.2/1982/2/Add.1

267. Resolution XXIX, ibid

268. United States, Department of State, Report of the Delegation of the United States of America to the 9th International Conference of American States, 1948, cited at Buergenthal, op.cit note 263, at p.829. Also see the 1949 Report of the Inter-American Juridical Committee cited by the same author which stated that "it is obvious that the Declaration of Bogota does not create a legal contractual obligation".

269. Buergenthal, op.cit. note 263

270. For full text of American Convention on Human Rights see (March 1970) 5 Int'l.Comm.of Jurists Rev. The Convention entered into force 18 July 1978 and has been ratified by 16 OAS members.

271. Resolution VII, Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, 1959. OAS Offical Records OEA/Ser.C./II.5 cited at Buergenthal,op.cit. note 263. Article 51 of the revised OAS Charter designated the Commission as a principle organ.

272. Statute of Inter-American Commission on Human Rights, Article 2, cited at Buergenthal, op.cit. note 263 at p.830

273. ibid, Article 9

274. Inter-American Commission on Human Rights, Report on the Work Accomplished During the First Session, October 1960, OAS Official Records OES/Ser.L/V/II.1,Doc.32, cited at Buergenthal, op. cit. note 263, at p.830

275. ibid. Case studies were produced on Cuba, Haiti, and the Dominican Republic.

276. Resolution XXII, Second Special Inter-American Conference, Rio de Janero, Brazil, 1965, Final Act, OAS Official Records, OEA/Ser.C/I.13, cited at Buergenthal, op.cit, note 263 at p.831. The Commission was authorized to examine communications from individuals which dealth with the right to life, liverty, and personal security, equality before the law, freedom of religion, freedom of expression, the right to a fair trial, freedom from arbitrary arrest, and the due process of law.

277. Inter-American Commission of Human Rights, Official OAS Records OEA/Ser.l/V/II.29 Doc.38 (27 Oct.1972) cited at United Nations, Sub-Commission on the Prevention of Discrimination and the

Protection of Minorities, Study of the Problem of Discrimination Against Indigenous Populations Chapter III (1982), Special Rapporteur José Martinez Cobo, U.N.Doc.No. E/CN.4/Sub.2/1982/2/Add.1

278. ibid

279. See for example Aborigines Protection Society, Tribes of the Amazon Basin in Brazil 1972, (1973)

280. Inter-American Commission on Human Rights, Diez anos de actividades, 1973 at p.27, cited in United Nations, Working Group on Indigenous Populations, Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous Populations (1983), U.N. Doc.No.E/CN.4/Sub.2/AC.4/1983/4 at pp.2-3

281. For a history of the problems of the Ache or Guajaki tribes of Paraguay see M.Sardi, "The Present Situation of the Indians of Paraguay", pp.173-217, World Council of Churches, Situation of the Indian in South America (1972)

282. Inter-American Commission on Human Rights, Resolution on Case 1802, cited at United Nations, op.cit. note 277 at pp.3-4

283. ibid

284. Inter-American Commission on Human Rights, Resolution concerning the report of the situation of human rights in Guatamala, cited in United Nations, op.cit. note 277 at p.6

285. Inter-American Commission on Human Rights, Resolution on the situation of human rights in Columbia, 1981, cited in United Nations, op.cit. note 274 at p.13

286. ibid at p.14. See also A.Ramos and K.Taylor, The Yonoama in Brazil 1979, (1979, International Working Group for Indigenous Affairs, Document 37)

287. United Nations, op.cit. note 277 at p.10

288. Convention of Patcuaro. Text at A.Peasless, International Government Organizations, Vol.1 (1st ed. 1956) at pp.631-639

289. ibid

290. ibid, Article 4

291. United Nations, op.cit. note 280

292. Convention of Patcuaro, Article 2(3)

293. Inter-American Conference, Montevideo,1933, Resolution XCII, "Conference on Indian Life" cited at C.Fenwick, The Organization of American States (1963) at p. 459.

294. United Nations, op.cit. note 277 at p.9

295. ibid at p.18

296. ibid

297. ibid

298. See: I.Brownlie, "Humanitarian Intervention" in J.Moore (ed.), Law and Civil War in the Modern World (1974)
M.Ganji International Protection of Human Rights (1962) at p.161
H.Verzijl, International Law in Historical Perspective (1972) at pp.178-88

299. M.Sornarajah, "Internal Colonialism and Humanitarian Intervention" (1981) 11:1 Ga.J.Int'l. & Comp.L. 45

300. For a discussion of the protection of minority rights under the League of Nations see:
C.A.Macartney, "League of Nations Protection of Minority Rights" at E.Luard (ed.), The International Protection of Human Rights (1967) pp.27-37
J.B.Kelly, "National Minorities in International Law" (1973) 3 J. Int'l L. & Policy 253 at pp.255-263
J.Verzijl, op.cit. note 298 at pp.188-200
L.Sohn and T.Buergenthal, International Protection of Human Rights (1973) at pp.213-325.

For judidical discussions of the effect and meaning of the terms of the treaties and declarations on minority protections see:
Access to German Minority Schools in Upper Silesia (1931) P.C.I.J. Ser A/B, No.40
Minorities in Upper Silesia (Minority Schools) (1928) P.C.I.J. Ser. A, No.15
Minority Schools in Albania (1935) P.C.I.J. Ser. A/B, No.64

301. Treaties dealt with Poland, Yugoslavia, Czechoslovakia, Roumania, Greece, Austria, Bulgaria, Hungary, Turkey, and Germany-Poland (Upper Silesia). General Declarations were made before the Council of the League of Nations by Albania, Estonia, Latvia, and Lithuania. A Special Declaration was made by Finland. See Sohn and Buergenthal, supra at pp.213-214

302. League of Nations, "Report of the Committee of Three (Japan, Spain, and the United Kingdom) pursuant to Resolution of 7 March 1929", League of Nations Official Journal, Special Suppl.No.37 (1929), cited at Sohn and Buergenthal, op.cit. note 300 at pp.216-217

303. R.Veatch, Canada and the League of Nations (1975) at pp.91-100

304. E.Lane, "Mass Killings by Governments Lawful in the World Legal Order" (1979) 12 Int'l.L. & Politics 239 and C.Bassiouni, "International Law and the Holocaust" (1979) 9 Cal.W.Int'l.L.J. 202

305. Convention on the Prevention and Punishment of the Crime of Genocide. Opened for signature by General Assembly Resolution 260A (III) of 9 December 1948 and entered into force 12 January 1951. Full text at Human Rights Docs.

306. Bassiouni, op.cit.note 304, at p.272

307. ibid at pp.273-274

308. G.Margandant,"Official Mexican Attitudes towards the Indians: An Historical Essay", (1980) 54 Tul.L.Rev. 964.

309. For example, the Royal Letters of Brazil in 1808 and 1809 allowed militia to capture Indians in war and hold them as slaves for 15 years: C.de Araujo Moreira Neto, "Some Data Concerning the Recent History of the Kaingang Indians", pp.329-333, World Council of Churches, The Situation of the Indian in South America (1972)

310. United Nations, Report on Slavery and Add. 1-5, (1966), Special Rapporteur Z.Mustafed, U.N.Doc.No. E/4168 at p.72

311. In 1949 the Secretary-General of the United Nations established an Ad Hoc Committee on Slavery whose report described various forms of labour of semi-feudal character still in existence at that time in the Americas, cited at
United Nations, Study of the Problem of Discrimination Against Indigenous Populations Chapter I (1981), Special Rapporteur José Martinez Cobo, U.N.Doc. No. E/CN.4/Sub.2/476/Add.4 at p.8

312. ibid, at p.23

313. ibid, at p.24. See also, M.Munzel, "The Manhunts: Ache Indians in Paraguay", at W.Veenhoven (ed.), Case Studies on Human Rights and Fundamental Freedoms (1976)

314. United Nations, op.cit. note 311 at pp.55-56 and 112-113. Ecuador passed laws in 1918 to abolish debt-bondage but serf-like practices in rural areas were not outlawed until 1964. Likewise in Peru legislation to end contracts whereby the use of land was granted subject to the performance of labour was not introduced until 1964.

315. Charter of the United Nations. Text at Sohn, op.cit.note 237

316. International Court of Justice, cited at N.Lerner, The United Nations Convention on the Elimination of All Forms of Racial Discrimination (1980)

317. Preamble to Discrimination (Employment and Occupation) Convention. Text at Human Rights Docs.

318. I.L.O. Convention No.111- adopted 25 June 1958 by General Conference of I.L.O. at its 42nd Session. Text at Human Rights Docs.

319. ibid, Article 3

320. Preamble to UNESCO Convention Against Discrimination in Education adopted by General Conference of UNESCO of 14 Dec. 1960. Text at Human Rights Docs.

321. ibid.

322. United Nations Declaration on the Elimination of All Forms of Racial Discrimination proclaimed by General Assembly on 20 Nov. 1963 by Res. 1904 (XVIII). Text at Human Rights Docs.

323. International Convention on the Elimination of All Forms of Racial Discrimination opened for signature by General Assembly Res. 2106A (XX) of 21 Dec. 1965 and entered into force on 4 Jan. 1969. Text at Human Rights Docs.

324. UNESCO Declaration on Race and Racial Prejudice, adopted unanimously and by acclamation by the General Conference of UNESCO in Paris at 20th Session on 27 Nov.78. Text at Lerner, op.cit.note 316

325. United Nations, op.cit. note 280, at p.23

326. ibid, at p.24

327. ibid, at p.24, footnote 94

328. Declaration of the World Conference to Combat Racism and Racial Discrimination (14-25 Aug.1978); Declarative Part Article 20. Partial text at United Nations, op.cit. note 311, at pp.31-32

329. ibid, Programme of Action, Article 7

330. ibid, Declarative Part, Article 21

331. ibid, Programme of Action, Article 8

332. International Covenant on Civil and Political Rights. Adopted and opened for signature, ratificiation, and accession by General Assembly Res. 2200 A(XXI) of 16 Dec. 1966. Entered into force on 23 Mar. 1976.Text at Human Rights Docs.

333. L.Sohn "The Rights of Minorities", pp.270-289, at L.Henkins (ed.), The International Bill of Rights- Covenant on Civil and Political Rights (1981)

334. United Nations, Sub-Commission for Prevention of Discrimination and Protection of Minorities, Study of the Rights of Persons Belonging to Ethnic, Religious, and Linguistic Minorities (1979), Special Rapporteur F.Capotori, U.N.Doc.No. E/CN.4/Sub.2/ 364/Rev.1 at p.6

335. ibid, at p.7

336. ibid, at p.35

337. ibid, at p.36

338. United Nations, Human Rights Committee, "Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Poltical Rights Concerning Communication No.R 6/24", [1982] 1 C.N.L.R. 11 at pp.12-13

See Canada's response which noted that efforts were being made to amend the legislation which creates the discrimination. United Nations, Human Rights Committee, Response dated 6 June 1983 of the Government of Canada to the views adopted by the Human Rights Committee on 30 July 1981 concerning Communication No. 24/1977 Sandra Lovelace Annex XXXI Report of Human Rights Committee General Assembly Official Records. 38th Session (1983 U.N.Doc. A/38/40

For a discussion of the decision see Anne Bayefsky, "The Human Rights Committee and the Case of Sandra Lovelace" [1982] Canadian Yearbook of Intern.L. 244. For a recent discussion of the issue see Douglas Sanders, "Indian Status. A Women's Issue or An Indian Issue?", [1984] 3 C.N.L.R. 30.

339. Indian Act, R.S.C. 1970, c.I-6, Sec.12(1)(b)

340. United Nations, op.cit.note 334,at p.36

341. Canada, Secretary of State, International Covenant on Civil and Political Rights-Report of Canada to Human Rights Committee (1979)

342. Canada, Secretary of State, Supplementary Report in Response to Questions of Human Rights Committee (1983)

343. Arbitral Award of King of Spain [1960] I.C.J. Reports at p.213; Temple Case [1962] I.C.J. Reports at p.32

344. Eastern Greenland Case 1933 P.C.I.J. Ser.A/B, No.53
Nuclear Tests (Australia and New Zealand v.France) [1977] I.C.J. Reports

345. I.Brownlie, Principles of International Law, (3rd edition 1979) at p.638. See also dissenting opinion of Judge Spender in Temple Case op.cit. note 343 at p.143

346. Declaration on Principles of International Cultural Cooperation proclaimed by General Conference of UNESCO in 1966. Text at Human Rights Docs.

347. United Nations, Use of the terms 'declaration' and 'recommendation', (1962), U.N.Doc. E/CN.4/L.610,para.4. In a memorandum dated 2 April 1962 the Office of Legal Affairs of the United Nations Secretariat noted
"...in view of the greater solemnity and significance of a 'declaration' it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may be custom become recognized as laying down rules binding on states."

348. Declaration on Principles of International Cultural Cooperation proclaimed by General Conference of UNESCO in 1966. Text at Human Rights Docs.

349. Universal Declaration of Human Rights proclaimed by the General Assembly as Res.217 A(III) of 10 Dec. 1948: Article 27. Text at Human Rights Docs.

350. International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification, and accession by General Assembly Res.2200 A(XXI) of 16 December 1966. Text at Human Rights Docs.

351. United Nations, UNESCO, Final Report on the Intergovernmental Conference on Institutional, Administrative and Financial Aspects of Cultural Policies,Venice, 1970, (1970) cited at United Nations, op.cit. note 311, at p.36.
For a discussion of the obligations on states to accord equal rights to cultural development for indigenous minorities see United Nations, Study of the Problem of Discrimination Against Indigenous Populations, Chapter XV (1983), Special Rapporteur José Martinez Cobo, U.N.Doc.No. E/CN.4/Sub.2/1983/Add.3

352. United Nations, UNESCO, Doc. SHC/EUROCULT/1, para.7. For a discussion of the view of culture as an individual and collective human right see UNESCO, Cultural Rights as Human Rights, (1970), Doc. SHC.68/XIX.3/A

353. United Nations, op.cit.note 334, at p.36

354. International Labour Organization, "First Session of I.L.O. Committee of Experts on Indigenous Labour" (1951) LXIV:1 International Labour Review 61 at p.61

355. International Labour Organization, International Labour Office Studies and Reports: No.35 Indigenous Peoples (1953) at p.588

356. I.L.O. Convention 107 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-tribal Populations in Independent Countries, presented to and adopted by the Governing Body at the 40th Session of 5 June 1957. Text at G.Bennett, Aboriginal Rights in International Law (1978, Occasional Paper No.37, Royal Anthropological Society)

357. ibid, Article 1(1)(b)

358. Bennett, op.cit. 356, at pp.16-17

359. United Nations, op.cit note 351

360. ibid, at p.26

361. ibid, at p.27 citing United Nations,(1950), U.N.Doc.No. E/1619

362. United Nations, Economic and Social Council, Report of the Economic and Social Council - Protection of Human Rights in Chile (1978), U.N.Doc. No. A/33/46 at para.689

363. ibid, at para. 685-727

364. United Nations, General Assembly, Official Records: 33th Session, Supp.No.45, (1979), U.N.Doc.No. A/35/45 at pp.159-61

365. United Nations, General Assembly, Official Records: 35th Session, Supp.No.46, (1980), U.N.Doc.No. A/34/46 at pp.192-193

366. ibid

367. United Nations, op.cit. note 280, at p.15

368. United Nations, General Assembly, Official Records: 35th Session, Supp.No. 48, (1981), U.N.Doc.No. A/35/48 at pp.203-4

369. United Nations, Economic and Social Council Report of the Economic and Social Council- Protection of Human Rights in Chile, (1980), U.N.Doc.No. A/35/522 at para.422

370. United Nations, op.cit. note 368 at p.202 (Bolivia) and p.206 (El Salvador)

371. United Nations, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination Against Indigenous Populations Chapter I Special Rapporteur José Martinez Cobo (1981) U.N.Doc. E/CN.4/Sub.2/476/Add.4 at p.12

372. ibid

373. ibid at p.12. ECOSOC Resolution 1589(L) of 21 May 1971.

374. United Nations, Study of the Problem of Discrimination Against Indigenous Populations, Chapter IV (1981), Special Rapporteur José Martinez Cobo, U.N.Doc. No. E/CN.4/Sub.2/476/Add.5, at para.619

375. United Nations, op.cit. note 371, at p.13

376. ibid, at pp.15-17

377. United Nations, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on its First Session (1982), Chairman-Rapporteur Asbjorn Eide, U.N.Doc.No. E/CN.4/Sub.2/1982/33 at para.1.

378. United Nations, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on its Second Session, (1983), Chairman-Rapporteur Asbjorn Eide, U.N.Doc. E/CN.4/Sub.2/1983/22.

The most recent report deals with the third session of the Working Group, now under the chairmanship of Mrs. Erica-Irene A.Daes. See

United Nations, Working Group on Indigenous Populations, Report of the Working Group on Indigenous Populations on its Third Session, (1984), Chairman-Rapporteur Mrs.Erica-Irene A.Daes, U.N.Doc. E/CN.4/Sub.2/1984/20

379. Ibid, at para.121-124

380. See for example United Nations, Doc. E/CN.4/Sub.2/AC.4/1983/3 and E/CN.4/Sub.2/AC,4/1983/5 (May 1983). This is also true for States which deny that Article 27 applies to their situations. Government denials of the existence of minorities have drawn surprise from Committee members. Two examples are India and Gambia which, in the 1984 consideration of their State Reports, denied that they possessed any majority, and therefore they had no minorities. The Committee's assumption that Article 27 did apply to their situations suggests that it could apply to any group in a non-dominant position, rather than only those which are numerically inferior to a majority. United Nations, Human Rights Committee, Report of the Human Rights Committee. Official Records 39th Session (1984) U.N.Doc.No. A/39/40

381. United Nations, General Assembly, Report of Human Rights Committee, GA: Official Records 34th Session, Supp.No. 40, (1980), U.N.Doc.No. A/34/40 at paras.92 and 106

382. United Nations, Human Rights Committee, Report of the Human Rights Committee, GA: Official Records, 35th Session, Supp.No.40, (1980), U.N.Doc.No. A/35/40/ at para.293

For the comments of the Committee with respect to the Indian and Gambian reports that they had no minorities see United Nations, Human Rights Committee, Annual Report of the Human Rights Committee: GA Official Records: 39th Session (1984) U.N.Doc.No. A/39/40

383. A.Cassese, "The Self-Determination of Peoples", pp.92 -113, at p.112, at Henkins, op.cit.note 333.

For further arguements on a broad application of self-determination see:
A.Cassese, "Political Self-determination - Old Concepts and New Developments", at p.137, A.Cassese (ed.), UN Law/Fundamental Rights, (1979) and,

"The Helsink Declaration and Self-determination", at p.83, T.Buergenthal (ed.), Human Rights, International Law, and the Helsinki Accord, (1977)

A broad view of self-determination, and particularly the one proposed by Professor Cassese, has been severely criticized by more "traditional" jurists who define it in terms of state sovereignty and the anti-colonial struggle. See for example the East German jurist Bernhard Graefrath's critique of Professor Cassese: B.Graefrath, "A Necessary Dispute on the Contents of the Peoples' Right to Self-Determinaton: Rejection of an Old Concept in a New Guise" (1981) 1/81 Bulletin - GDR Committee for Human Rights 11

384. United Nations, Human Rights Committee, Report of Human Rights Committee, GA Official Records: 39th Session (1984) U.N.Doc. A/39/40 at para.204 and 205

385. ibid, at para.100

386. ibid

387. ibid, at para.119

388. United Nations, Human Rights Committee, Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (22nd Session) Concerning Communication No.78/1980 A.D. v. Canada at para. 2.1-2.2, Appendix XVI Report of the Human Rights Committee: GA Official Records: 39th Session (1984) U.N.Doc.No. A/39/40

389. ibid, at para.8.2. One Committee member, Mr.Roger Errera of France, submitted an individual opinion and felt that the Communication raised issues which he felt should have been addressed by the Committee:

> "...(1) Does the right of "all peoples" to "self-determination" as enunciated in Article 1, paragraphl, of the Covenant constitute of "of the rights set forth in the Covenant" in accordance with the terms of article 1 of the Optional Protocol?
>
> (2) If it does, may its violation by a State party which has acceded to the Optional Protocol be the subject of a communication from individuals?
>
> (3) Do the Miqmaq constitute a "people" within the meaning of the above-mentioned provisions of Article 1, paragraph 1, of the Covenant?"
> (ibid, at Appendix - Individual Opinion)

He felt himself unable to endorse the opinion of the Committee for their failure to answer what he termed as "fundamental" questions on the interpretation of both Article 1 of the Covenant and Article 1 of the Optional Protocol relating to individual communications.

390. United Nations, Human Rights Committee, Report of the Human Rights Committee, GA:Official Records 34th Session (1980) U.N.Doc.No. A/34/40 at para. 352

391. United Nations, Human Rights Committee, Report of Human Rights Commitee, GA: Official Records, 38th Session, Suppl.No.40, (1983), U.N.Doc. No. A/38/40 at para.80

392. United Nations, supra, (Surinam, Costa Rica, Columbia, and Mexico), United Nations, op.cit. note 382, at para.289 (Peru), and United Nations, Human Rights Committee, Report of Human Rights Committee, GA Official Records: 39th Session (1984) U.N.Doc. A/39/40 at para.421 (Panama)

393. United Nations, ibid, (1984) U.N.Doc.A/39/40 at para.81

394. Canada, Secretary of State, Supplementary Report of Canada on the Application of the Provisions of the International Covenant on Civil and Political Rights in Response to Questions Posed by the Human Rights Committee in March 1980 (March 1983), at p.94

395. ibid, at p.102. See the description of Canadian government policies towards the native peoples found at pp.94-104 of the Supplementary Report.

396. United Nations, Committee on the Elimination of Racial Discrimination, Report of the CERD, GA: Official Records, 33rd Session, Supp.No.18, (1978), U.N.Doc. A/33/18, at para.128-133

397. ibid, at para.218. Uruguay provided no information on its Indian population and explained that it was
"...because there did not exist in that country an indigenous population as such: rather, that population had become completely integrated into the general population of Uruguay.."

398. ibid, at para.246

399. ibid, at para.300. The Committee asked Brazil's representative
"...what steps had been taken to prevent the arrival of modern civilization from disrupting the life of the Indians and exposing them to epidemics and diseases."

400. United Nations, Committee on the Elimination of Racial Discrimination, Report of the CERD. GA:Official Records, 34th Session. Supp.No.18,. (1979), U.N.Doc. A/34/18 at para.80.
"The Commitee noted with satisfaction that considerable effort was being made to promote respect for human rights, to protect the cultural heritage of minorities and to improve the conditions and standards of living of the indigenous populations."

401. ibid, at para.166

402. United Nations, Committee on the Elimination of Racial Discrimination, Report of the CERD, GA:Official Records, 35th Session, Supp.No.18, (1980), U.N.Doc.No. A/35/38, at para.270

403. United Nations, Committee on the Elimination of Racial Discrimination, Report of the CERD, GA:Official Records, 36th Session, Supp.No.18, (1981), U.N.Doc.No. A/36/18, at para.262

404. United Nations, Committee on the Elimination of Racial Discrimination, Report of the CERD, GA:Official Records, 37th Session, Supp.No.18, (1982), U.N.Doc.No. A/37/18, at paras.206 and 211

405. Canada, Secretary of State, International Convention on the Elimination of All Forms of Racial Discrimination - First Report of Canada (1971), at pp.18-19

406. Canada, Secretary of State, International Covention on the Elimination of All Forms of Racial Discrimination - Fourth Report of Canada (1978), at p.24.

It is interesting to note that in the Sixth Report of Canada filed in December 1982 the discussion of Federal government policies was very limited, and the report concentrated on provincial policies and programs. The detailed discussions of Federal policies for natives found in the earlier reports are not found in the Sixth Report, although provincial programs to aid them are discussed. Canada, Secretary of State, International Convention on the Elimination of All Forms of Racial Discrimination - Sixth Report of Canada (1982)

407. For a discussion of specific claims to self-determination by Canada's native groups see D.Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in Institute of Canadian Affairs (ed.), Canada and the New Constitution (1981)

See, for example, Native Indian Brotherhood, Universal Declaration of Aboriginal Nations (1980) which states:
"(1) We are nations. We have always been nations.
(2) As nations, we have inherent rights which have never been given up.
(3) We have the right to our own forms of government.
(4) We have the right to determine our own citizens.
(5) We have the right to self-determination
(6) We wish to remain within Canada, but within a revised Constitutional framework."

For general and theoretical discussions of self-determination and inherent self-government for the natives of North America see:
-E.P.Mendes and P.Bendin, The New Canadian Charter of Rights, International Law, and Aboriginal Self-determination: A Proposal for a New Direction, (unpublished paper, 1981)
-J.Andress and J.Falkowski, "Self-Determination: Indians and the United Nations- The Anomolous Status of America's 'Domestic Dependent Nations'" (1980) 8 American Indian L.Rev. 97
-L.C.Green, "Aboriginal Rights or Vested Rights?" (1974) 22:6 Chitty's L.J. 219
-J.Clinebell and J.Thompson, "Sovereignty and Self-determination: The Rights of Native Americans under International Law" (1971) 27 Buffalo L.R. 669
-R.Barsh,"Indigenous North America and Contemporary International Law"(1983) 62 Oregon L.R. 73.

Even within the Canadian context, with its tradition of bilingual institutions, some linguistic minorities seek "separate but equal political, social and cultural institutions for the francophone and anglophone communities": see "N.B. Francophones want a new 'social contract'", June 1,1984, The Gazette, Montreal, p.B-12. For an extensive discussion of the historical and legal basis for Canadian bilingualism see: C.Sheppard, The Law of Languages in Canada (1971)

For a non-Canadian example see the Australian case in which an aborigine argued for the continued existence of the 'aboriginal

nation' and unsuccessfully sued the Commonwealth of Australia for the impropriety of Captain Cook's declaration in 1770 of British sovereignty over the territorium nullius of Australia. The statement of claim included these points:

" 4A From time immemorial prior to 1770 the aboriginal nation had enjoyed exclusive sovereignty over the whole of the Continent...

7A The whole of...Australia was held by the said aboriginal nation from time immemorial for the use and benefit of all members of the said nation and particular proprietary possessor and usufructary rights in no way derogated from the sovereignty of the said aboriginal nation....

11A The aboriginal people being as aforesaid a nation from time immemorial to the present day were and are entitled to the quiet enjoyment of their rights, privileges, interests, claims and entitlements in relation to lands....and were entitled not to be dispossesed thereof without bilaterial treaty, lawful compensation and/or lawful international intervention".

Coe v. Commonwealth of Australia and other (1980) 24 A.L.R. 118 (HC)

For a slightly different perspective see Scandinavian writers who deal with the concerns of Sami (Lapp) and linguistic minorities in that region:

T.Modeen, "The Small Nations of the North: Similarities and Peculiarities" (1982) 51 Nordisk tiddskrift for international ret.og jus gentium 8

E.Gayim, "The United Nations Law on Self-determination and Indigenous Peoples" (1982) 51 Nordisktiddskrift for interntional ret.og jus gentium 53.

For a summary of claims to self-determination being presented by indigenous organizations in international fora see: United Nations, U.N.Doc.No. E/CN.4/Sub.2/1982/33, at pp.45-53, United Nations, U.N.Doc.No. E/CN.4/Sub.2/1983/22, at pp.12-14, and U.N.Doc.No. E/CN.4/Sub.2/1984/20

408. R.White, "Self-determination: Time for a Reassessment?" (1980) 28 Netherlands International L.R. 147

S.Sinha, "Self-determination in International Law and its Applicability to the Baltic Peoples", at pp.256-283, A.Sprudz (ed.), Res Baltica (1968)

J.Collins, "Self-determination in International Law: The Palestinians" (1980) 12 Case W.Res.J.Int.L 137

B.Meissner, "The Right of Self-Determination after Helsinki and its Significance for the Baltic Nations", (1981) 13 Case W.Res.J.Int.L 375

Y.Dinstein, "Collective Human Rights of Peoples and Minorities", (1976) 25 Int.and Comp.Law.Q 102

J.Claydon, "Internationally Uprooted People and the Transnational Protection of Minority Cultures", (1978) 24 New York School L.R. 125

P.Thornberry, "Is there a Phoenix in the Ashes?- International Law and Minority Rights", (1980) 15 Tex. Int.Law J. 421

409. Charter of the United Nations, Article 55

For a discussion of the relationship between human rights and

international order see M.McDougal, H.Laswell, and L.Chen, Human Rights and World Public Order, (1980)

410. United Nations, General Assembly, Official Records, 6th Session, 3rd Committee, 387th Meeting, (1952), U.N.Doc. No. A/C.3/SR.397, at p. 299. See the United States amendment at A/C.3/L.204/Rev.1 and Soviet Union's amendment at A/C.3/L/206.

411. United Nations, ibid, p.299-300

412. United Nations, General Assembly, Official Records, 6th Session, 3rd Committee, 399th Meeting, (1952), U.N.Doc. No.A/C.3/SR.399, at p. 311

413. United Nations, ibid, at p.313

414. United Nations, The Right to Self-Determination (1981), Special Rapporteur Antonio Cristescu, U.N.Doc.No. E/CN.4/Sub.2/404/Rev.1 at para.220

415. Ibid, para.221

416. "Canadian Practice in International Law,1979" [1980] Can.Ybk.Int'l.L. 326.

For an overview of the role played by Canada in the human rights programme of the United Nations see J.P.Humphrey, "The Role of Canada in the United Nations Program for the Promotion of Human Rights",at pp.612-619, R.St.J.Macdonald, G.Morris, and D.Johnston (eds.) Canadian Perspectives on International Law and Organization, (1974)

417. "...The recognition of the principle in a certain number of treaties cannot be considered as sufficient to be put upon the same footing as a positive rule of the Law of Nations. Positive international law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of the right, any more than it recognizes the right of other States to claim such a separation."
League of Nations, Judicial Committee, League of Nations Official Journal, No.3 (1920), at p.5

418. See E.Suzuki, "Self-determination and World Public Order: Community Response to Territorial Separation", Virginia J.Inter.L. Vol.16:4 at p.779 (1976),
V.Nanda, "Self-determination under International Law: Validity of Claims to Secede", Case W.Res.J.Inter.L. Vol.13:257 (1981),
C.Johnson, "Towards Self-determination-A Reappraisal as Reflected in the Declaration on Friendly Relations," Ga.J.Comp.and Inter.L. Vol.3:145 (1973), and
S.Calogeropoulos-Stratis, Le Droit des peuples a disposer d'eux-mêmes, (1973)

See the comments of R.Emerson,
"If the right of secession is eliminated and the maintenance of the

territorial integrity of a state takes priority over the claims of 'peoples' to establish their own separate identity, the room left for self-determination in the sense of the attainment of independent statehood is very slight, with the great current exception of decolonization." (at "Self-Determination" (1971) 65 Am.J.Inter.L. 459

419. "With regard to the preservation of territorial integrity of the State in relation to implementation of the right of peoples to self-determination, both the Declaration on the Granting of Independence to Colonial Countries and Peoples and Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (General Assembly resolutions 1514 (XV), para.6, and 2625 (XXV) assert in strong terms the need to respect and preserve that integrity. Where the territorial integrity of a State is involved, the right to self-determination does not in principle apply. This is the assertion of the greatest importance, which determines the attitude of the United Nations on the subject..."
(At para.89, United Nations, Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Right to Self-Determination: Implementation of United Nations Resolutions (1980) by Héctor Gros Espiell U.N.Doc.No. E/CN.4/Sub.2/405/Rev.1

See also the Declaration of Judge Singh in the Western Sahara Case [1975] I.C.J. Reports, at p.80 which makes reference to territorial integrity.

The priority given in the discussion of this thesis to territorial integrity is because it is intended to concentrate on the relationship between a state and any of its components which might claim some form of self-determination as secession. In terms of international law and practice, there are certainly other principles to be considered, such as non-intervention by one State in the domestic affairs of another State. The principle of non-intervention, as expressed in the United Nations Charter, has been reiterated on many occasions by the United Nations in relation to self-determination. (see United Nations, supra) The author, when discussing some form of self-determination for the components of a state in relation to territorial integrity, does not address the principle of non-intervention since it is an inter-state matter. Perhaps naively the author does not consider the question of autonomy for minorities in terms of inter-state, but rather intra-state, affairs.

420. "The express acceptance in [Declaration on the Granting of Independence to Colonial Countries and Peoples and Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States] of the principles of national unity and territorial integrity of the State implies non-recognition of the right of secession. The right of peoples to self-determination, as it emerges from the United Nations system, exists for peoples under colonial and alien domination, that is to say, who are not living under the legal form of a State. The right to secession from an exisiting State Member of the United Nations does not exist as such

in the instruments or in the practice followed by the Organization, since to seek to invoke it in order to disrupt the national unity and the territorial integrity of a State would be a misapplication of the principle of self-determination contrary to the purposes of the Charter."
(At para.90, ibid)

See also Declaration on Friendly Relations Among States in Accordance with the Charter of the United Nations, adopted by the General Asembly in 1970 on the 25th Anniversary of the United Nations. Text at L.Buchheit, Secession - The Legitimacy of Self-Determination (1979)

421. L.Buchheit, Secession - The Legitimacy of Self-Determination (1979) at p.14. See also the use of the term "internal" self-deterination to mean the ability of all portions of a society to participate in the political and constitutional system by L.C.Green, "Aboriginal Populations, International Law, and the Canadian Charter of Rights and Freedoms" (1983) 61 Can.Bar Rev. 339 at p.342 et seq.

422. Suzuki, op.cit.note 418, at p.779

423. ibid

424. H.Niebur, Political Violence: The Behavioral Process (1969) at p.100, cited by Suzuki, op.cit. note 418, at p.789

425. R.Friedlander, "Proposed Criteria for Testing the Validity of Self-determination as it Applies to Disaffected Minorities", (1977) 25:10 Chitty's Law J. 335

426. See notes 249 and 250

427. United Nations, Commission on Human Rights, Report of the Commission on Human Rights, G.A.Official Records 35th Session, Supp.40, (1980), U.N.Doc. No.A/35/40 at para.259

428. Canada, Secretary of State, International Covenant on Civil and Political Rights: Report of Canada to Human Rights Committee, (1979)

429. Declaration on Friendly Relations Among States in Accordance with the Charter of the United Nations, adopted by the General Assembly in 1970 on the 25th Anniversary of the United Nations. Text at L.Buchheit, Secession - The Legitimacy of Self-Determination, (1978)

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431. ibid, Volume IX (1962-3), (1974)

432. United Nations, General Assembly, Official Records: 6th Special Session, Suppl.No.1, (1974), U.N.Doc.No. A/9559

433. See Human Rights Docs..

434. United Nations, General Assembly, Official Records: 28th Session, Supp.No. 30, (1974),U.N.Doc. No. A/9030, It reiterated the points made by General Assembly Resolution 3026A (XXVII) of 18 December 1972

435. United Nations, United Nations Educational, Social and Cultural Organization, Human Rights and Scientific and Technological Development, (1973), U.N.Doc. No.A/9227, at p.11

436. Canada, Secretary of State, International Covenant on Civil and Political Rights: Report of Canada to Human Rights Committee (1979) at pp. 107-108

437. Proclaimed at General Conference of UNESCO on 4 Nov. 1966. Text at Human Rights Docs.

438. United Nations, General Assembly, Res.3148 (XXVIII) "Preservation and Further Development of Cultural Values", of 14 December 1973, General Assembly: Official Records, 28th Session,Supp.No.30, (1974), U.N.Doc. A/9030, See also Res. 3026A (XXVIII) of 18 December 1972 on the same subject. These principles were repeated and updated in Res.31/39 of 30 Nov.76 of the same title.

439. League of Nations, League of Nations Official Journal, No.3 (1920), at p.5

440. [1966] I.C.J. Reports at pp.464-465

441. [1971] I.C.J. Reports

442. ibid

443. [1975] I.C.J. Reports at pp.103-104.

Also see the comments of the I.C.J. which suggest that self-determination has achieved the status of a general principle of international law: Barcelona Traction Case [1970] I.C.J.Reports

444. A.Cobban, National Self-determination, (1944) at p.102

445. V.Lenin, The Socialist Revolution and the Right of Naions to Self-determination, (1916), at pp.275-76, cited by B.Wells, United Nations Decisions on Self-Determination, (1963) at p.5

446. V.Lenin, The Right of Nations to Self-Determination, (1951)

447. J.Stalin, Marxism and the National and Colonial Question, (1951), at p.18

448. J.Reed, Ten Days that Shook the World, (1967), at p.127

449. ibid

450. The self-determination envisioned by the socialists defined 'nation' in a more restrictive and materialistic manner than the liberal-democrat tradition. The Russian Bolsheviks went even further than other Europeans and writers like Stalin severely denounced others like the Austrian Social-Democrat Otto Bauer who had suggested that the nation was an "aggregate of people bound into a community of character by a common fate". W.Ofuatey-Kodjoe, The Principles of Self-Determination in International Law, (1977), at p.27.

451. A good example of the often romantic vision of the nation in 19th century liberal-democratic writings can be found in a contemporary source which deals with the question of the Québecois nation: J.Brossard, L'accession à la souveraineté et le cas du Québec, (1976), at p.65,
"...communauté humaine, le plus souvent installée sur un même territoire, et qui, du fait d'une certaine unité historique, linguistique, religieuse, ou même économique, est animée d'un vouloir vivre commun..."

German writers in particular during the 19th century saw the linguistic link as the essential element in the formation of national consciousness. See for example the writings of the German radicial philosopher Gottfried Herder., A.Rugo Sureda, The Evolution of the Right of Self-determination, (1973)

452. J.Stalin, Marxism and the National and Colonial Questions, (1936), cited at Ofuatey-Kodjoe, op.cit. note 447.

453. Ofuatey-Kodjoe, op.cit. note 450, at p.27

454. Stalin, op.cit. note 447, at p.11

455. J.Triska, Constitutions of the Communist Party-States, (1968). Constitution (Fundamental Law) of the Russian Socialist Federated Soviet Republic adopted 10 July 1918, Article 2, Chapter V.(2)

456. Triska, ibid. Constitution (Fundamental Law) of the Union of Soviet Socialist Republics adopted 6 July 1923, Article 2(3) and (4)

457. A.Blaustein and G.Flanz, Constitutions of the World, (1984). Constitution (Fundamental Law) of the Union of Soviet Socialist Republics adopted 4 May 1977, Article 70-72

458. ibid, Article 70

459. For a discussion of the constitutional documents of the People's Republic of China see Triska, op.cit.note 455 for earlier versions and Blaustein and Franz, op.cit.note 457 for the most recent version of the Constitution adopted 4 Dec. 1982.

China's Constitution describes it as a "unitary multinational state" and Article 4 states:

"All nationalities in the PRC are equal. The state protects the

lawful rights and interests of the minority nationalities and upholds and develops the relationship of equality, unity and mutual assistance among all of China's nationalities.

Discrimination against and oppression of any nationality are prohibited; any acts that undermine the unity of the nationalities or instigate their secession are prohibited.

The state helps the areas inhabited by minority nationalities speedup their economic and cultural development in accordance with the peculiarities and needs of the different minority nationalities.

Regional autonomy is practiced in areas where peoples of minority nationality live in compact communities; in these areas organs of self-government established for the exercise of the right of autonomy. All the national autonomous areas are inalienable parts of the PRC.

The people of all nationalities ahve the freedom to use and develop their own spoken and written languages, and to preserve or reform their own ways and customs."

460. For a discussion of the Soviet Union's theory and practice with regards to self-determination for national minorities see:
-U.O.Umojurike, Self-determination in International Law, (1972) at pp.161-168
-L.I.Brezhnev, Socialism, Democracy and Human Rights, (1980) at pp.64-69, 72-73, 160-1, and 201
-G.I.Tunkin, Theory of International Law, (1974) at pp.8,61,264 (nationality principle) and pp.7-14, 60-69 (self-determination)
-U.N.Uvachan, The Peoples of the North and Their Road to Socialism, (1955)
-Y.Branley and V.Kozkov, "National Processes in the U.S.S.R.", Races and Peoples, (1974)
-M.Kim, "The Soviet People: A New Historical Community," Races and Peoples, (1974)
-R.Kosolopov et al., "How Ethnic Group Relations are Changing", (1983) 34:49 Current Digest of Soviet Press 1-6
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"Data on Non-Russians' Growing Bilingualism", (1981) 33:39 Curr.Dig.Soviet Pr. 12

For a discussion of the Chinese theory and practice with regards to minorities see:
-Y.Ming, United and Equal- The Progress of China's National Minorities, (1977)
-J.LaLeve, Tibet and the Chinese People's Republic- Report of the International Commission of Jurists, Geneva, 1960
-J.Dreyer, "Language Planning for China's Ethnic Minorities", (1978) 51 Pacific Affairs 369
-P.Israeli, "The Muslim Minority in the People's Republic of China", (1981) 21:8 Asian Survey 901
-D.McMillen, "The Urunqi Military Region: Defence and Security in China's West", (1982) 22:8 Asian Survey 705

461. See H.Carrfère d'Encausse, Decline of An Empire: The Soviet Socialist Repuplics in Revolt, (1979)
-R.Conquest, The Nation Killers: The Soviet Deportation of

Nationalities, (1970)
-E.Goldhagen, Ethnic Minorities in the Soviet Union, (1968)

462. Worchester v. State of Georgia (1832) 6 Peters 515, 8 L.Ed. 483 (United States). See also Cherokee Nation v. State of Georgia (1831) 30 U.S. 1, 5 Peters 1 (United States)

463. A central component of United States policy towards the aboriginal inhabitants has been the concept of a moral and legal duty towards the natives. See Message of President Nixon to Congress, 116 Cong.Rec. 23,131, 23,132 (1970) ("[T]he special relationship between the Indian tribes and the Federal government continues to carryin immense moral and legal force..."; Indian Health Care Improvement Act s.3, 25 U.S.C. s.1602 (1982) (identifying the United States' "special responsibities and legal obligation to the American Indian people"); Indian Child Welfare Act of 1978, s.2, 25 U.S.C. s.1901 (1982) (recognizing "the special relationship between the United States and the Indian tribes") cited at "Notes- Rethinking the Trust Doctine in Federal Indian Law" (1984) 98 Harvard L.Rev. 422. For a general discussion of the trust doctrine in American law and political thought see the same source.

The existence of the trust doctrine towards the Indian tribes did not, however, prevent them from being subject to the powers of the Congress. At various times during American history these powers have been used in ways inconsistent with autonomy for the natives, but justified as carrying out the duties of the trust. See the discussion of assimilationist policies in the United States at M.Wax and R.Buchanan, Solving the "Indian Problem": The Whiteman's Burdensome Business, (1976)

For a brief review of United States laws on native Americans see Owen Young, "Aborigines and the Constitutions of Australia, Canada, and the United States", (1977) 35:1 U.T.Fac.L.R. 87

464. W.Canby, American Indian Law, (1981). See Indian Reorganization Act, 1934 (25 U.S.C.S. para.476-477)

465. Indian Self-determination and Education Assistance Act. 1975 (25 U.S.C.S. 450)

466. United States, Congressional Statement of Findings, Congressional Statement of Findings, January 4,1975,P.L. 93-638, para.2, 88 Stat. 2203, cited at 25 U.S.S.C. para.450, at p.139

467. United States, House of Congressional Representatives, Congressional Declaration of Policy, January 4, 1975, P.L. 93-638, para.3, 88 Stat. 2203, cited at 25 U.S.S.C. para.450a, at p.141

468. ibid.

The statements of some form of Indian self-determination are found from several past Presidents, as well as the Congress, which have commented on the existence of a moral claim for native autonomy, as well as the legal basis for the independence of Indian tribes. See,

Message of the Carter Administration to the International Non-Governmental Organizations Conference on Discrimination Against Indigenous Populations in the Americas (1977) ("The U.S. administration is committed to continuing the policy of Indian self-determination under the recent Indian Self-determination and Educational Assistance Act..."", reprinted in 3 Am.Indian J. Nov.1977, at 7; Message of President Nixon to Congress, 116 Cong.Rec. 23,131, 23,132 (1970) ("The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions"); Indian Self-Determination and Education Assistance Act s.3, 25 U.S.C. s.450a(a) (1982) ("The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian for self-determination...") cited at "Notes-Rethinking the Trust Doctrine in Federal Indian Law" (1984) 98 Harvard L.Rev. 422

469. Canada, First Ministers' Conference, March 15-16,1984, Opening Statement- Prime Minister P.E.Trudeau, (1984) at pp.9-10

470. ibid at pp.14-15

471. ibid at pp.16-17

472. Canada, Indian and Northern Affairs, Response of the Government to the Report of the Special Committee on Indian Self-government (1984) at p.4

473. Maklivik Corporation, Information Department, Tagralik, (Summer 1983) at pp.17-18

474. ibid

475. ibid

476. Canada, Indian and Northern Affairs,(1983) 2:2 Press Extracts on Greenland, 19.
N.Orvik, "Northern Development: Modernization with Equality in Greenland",(1976) 29:2 Arctic 67
J.Brosted and H.Gullov, "Recent Trends and Issues in the Political Development of Greenland", (1977) 30:2 Arctic 76
H.Gullov, "Home Rule in Greenland",(1979) 3:1 Etudes/Inuit/Studies, 131

477. For a discussion of the European concepts of "nation" and "people" see A.Cobban, National Self-Determination, (1944), and
Brossard, op.cit.note 451, and
Greco-Bulgarian 'Communities' Case, (1930) P.C.I.J., Ser.B., No.17 (1930)

478. Canada, House of Commons, Indian Self-Government in Canada: Report of the Special Committee (Penner Report) (1983)

CASELIST

ABBREVIATIONS

Canada:

Canada Federal Court Reports	F.C.
Canada Law Reports, Supreme Court (1923-70)	S.C.C..
Canada, Supreme Court Reports (1971-)	S.C.C.
Canadian Native Law Reporter	C.N.N.L.
Dominion Law Reports	D.L.R.
Federal Cases	F.C.
Western Weekly Reports	W.W.R.
New Series Reporter	N.R.S.
British Columbia, Law Reports	B.C.L.R.
Québec, Rapports de pratique	R.P.
Québec, Cour superieur	C.S.
Québec, Cour d'Appel	C.A.
Upper Canada, Queen's Bench	U.C.Q.B.

Foreign:

England, Appeal Cases	A.C.
Australian Law Reports	A.L.R.
All England Law Reports	All E.R.
England, Chancery Reports	Ch.R.
English Reports	E.R.
Australia, Federal Law Reports	F.L.R.
United States, Indian Law Reporter	I.L.R.
England, Law Reports, Indian Appeals	L.R.Ind.App.
United States	U.S.
England, Weekly Law Reports	W.L.R.

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