LEGISLATIVE ASSEMBLY OF THE NORTHWEST TERRITORIES

9TH ASSEMBLY, 11TH SESSION

TABLED DOCUMENT NO. 4-83(2)

TABLED ON AUGUST 31, 1983

Constitutional Development in the Western Northwest Territories

protection of aboriginal rights

Legislative Assembly Special Committee on Constitutional Development

TD 4-83(2)
Tabled August 31/83

CONSTITUTIONAL DEVELOPMENT

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THE PROTECTION OF ABORIGINAL RIGHTS

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The Western Constitutional Forum

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June 18, 1983.

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EXECUTIVE SUMMARY

Before considering protection of the form of rights known as aboriginal rights, a brief look at fundamental rights in British, Canadian and U.S. history is in order. The nature of these rights is one on which philosophers and statesmen have been unable to agree.

Two principles of English law-making running throughout English legal history are that all power flows from the Crown and that anything not expressly prohibited to a citizen is permitted. The fact that the burden of proof is on the Crown affords some protection.

The U.S. system divided power three ways -- to the citizens, to the States, and to the central government whereas Canada maintained the principle of Parliamentary supremacy. Canada adopted a federal model from the United States which divided power between federal and provincial legislatures with the courts arbitrating any differences of opinion on who had authority in any given situation.

In the most concrete sense, rights can be seen as powers. The rights of citizens, who are usually in a weaker position to exercise power than the state, are more secure when recognized in law. Therefore, rights are a form of power usually reserved for individuals or groups whose capacity to protect themselves is in question. Historically, where rights have been preserved, it has generally been owing to the strength of the underlying existent institutions.

Aboriginal Rights

The concept of aboriginal rights can only occur in a settler society, i.e., one where the dominant culture has developed from a diversity of immigrant groups with one in prominence. When the same rights arise elsewhere, they are labelled differently, e.g. rights of the ancient towns of England or the traditional nation-states of Germany.

A long view of history confirms that aboriginal rights have in fact been recognized by both policy and law. Whereas the recognition of Indian sovereignty may have arisen from economic and military necessity, it was well entrenched in administrative practice by the time of the Royal Proclamation of 1763. This proclaimed that "the several Indian nations shall remain undisturbed in this land (Canada)." The most important part about the Royal Proclamation, for the purposes of this discussion, is that it set out to devise a system for peaceful cohabitation of two very different cultures and one in which neither would dominate the other.

The implicit protection of rights which the Royal Proclamation promised did not materialize. Treaties were eroded or neglected. Attempts by the First Nations during the 1920's to pursue their rights in law were unsuccessful. And in 1927 an Act of Parliament made it a criminal offense for aboriginal people to pursue their claims against the government in the courts. A policy of separation and assimilation was relentlessly pursued. And in 1969 a government White Paper attempted to eliminate the notion of aboriginal rights altogether.

ERRATUM

On page 75 under (iv) Who Makes the Reference, the last sentence should read:

> We would be concerned that a reference could be made by either the Governor-in-Council or the Speaker on Order of the House.

<u>The Dene Experience</u>

<u>Land</u> and the <u>right</u> <u>to</u> <u>maintain</u> <u>their</u> <u>way</u> <u>of</u> <u>life</u>, <u>language</u> <u>and</u> <u>culture</u> have been defined by the Dene as their most important realities. Yet the right to participate in establishing these realities has been denied repeatedly from the time of colonization. In 1870 when the Hudson's Bay Company surrendered this territory to the federal government, the aboriginal inhabitants were not consulted.

In 1973, results of the Dene court action to invoke a caveat relative to Treaties # 8 and # 11 produced both a <u>recognition</u> and <u>denial</u> of aboriginal rights. Judge Morrow claimed he was satisfied that "these same aboriginal people are prima facie owners of the lands covered by the caveat." Yet when the federal government appealed this decision before the Supreme Court of Canada, the Court ruled on the narrow issue of the right to invoke caveat. It did not rule on aboriginal rights.

<u>Protection of rights has been minimal in the Dene experience.</u> From the lack of consultation in the passing of the Migratory Birds Convention Act in 1917, to the designation of game preserves, to the wasteful burning experiments on caribou moss in 1982, Dene interests have not been protected. In areas of oil and gas development, the lack of long-term benefits such as royalties have outweighed short-term benefits such as temporary employment. Environmental damage has been cited as a result of mining operations.

Inadequate protection of Dene culture can be seen by the fact that formal education of young Dene up to 1969 did not include studies in the Dene language or culture or in the Northern environment. Boarding schools disrupted a way of life, the Mackenzie Highway brought in ills from the outside society, and the threat of the pipeline was felt to be in the nature of irreversible damage to the culture and the land.

Parallel Paths

The traditional approach to the protection of aboriginal rights at its best and strongest has centred on maintaining two separate societies: aboriginal and non-aboriginal, each with its own institutions, authority over its own people and its own particular interest in the land, and usually its own land base.

In the United States, the Indian Self Determination Act and numerous tribal constitutions have aimed basically in the direction of parallel development.

The designation of separate regions has allowed more southerly indigenous people to survive. It has also ensured a continuing competition for land, for resources, and for authority. It has brought neither peace nor security. A look at Guatemala shows us the worst example of this condition.

The Western Arctic Opportunity

The Western Arctic, with its willingness to seek a common structure for the different interest groups, possesses a unique opportunity to build a framework which will ensure

individual civil and human rights for all, and at the same time the protection of aboriginal rights of the Dene and Metis.

The recognition of aboriginal rights as a form of collective political rights need not imply government based on race, but rather government committed to the values, customs and traditions arising out of a given culture.

A Territorial Charter

A Charter might consist of a treaty between the original people of the territory and the settler people. It could indicate common ground and could be a joint statement endorsing one another's primary needs and fundamental values. A treaty-charter could be incorporated into a territorial or provincial constitution so as to have the same over-riding effect that the Charter of Rights has, federally.

The central question would then be, what sort of body could most usefully and effectively ensure that not only the letter but the spirit and intent of the treaty-charter would be upheld?

A Range of Options

In the consideration of review bodies and mechanisms to protect aboriginal rights, the following options are offered: 1) an Ombuds office; 2) A commission similar to a Human Rights Commission; 3) A judicial review process; 4) a legislative committee within a legislative assembly; 5) a second chamber with three possible structures, based on different methods of selection and tenure.

Criteria established for measuring the effectiveness of the selected mechanisms under study are three in number, as follows: 1) the screening of legislation should largely occur before legislation is enacted; 2) the burden of cost should be borne by government; and 3) the burden of proof that rights are not being infringed must rest with government.

Conclusions

The ombuds office and the commission both fail to meet the criteria due to their limitations in taking action. A standing committee could deal with matters preventively but without real power. Judicial review would place demands on a court which go beyond the role of the court. Much of the success of a judicial review system would depend on the provisions made for reference cases. While other access to the courts regarding a treaty-charter would be essential, it would not meet the preventive criteria, it would not place the onus on the proponents of a measure, and it would not put the financial burden on the government.

A second chamber is the one mechanism which clearly meets all criteria. It could be designed so as to represent all the people of the Western Arctic while reflecting traditional aboriginal geographic lines. It would be responsible for reviewing all legislation for its conformity with a spirit and intent of a treaty-charter, including its provisions for aboriginal rights. A second chamber would be able to enter into negotiations with the other House, and with Ministers to seek solutions. It would be a highly public body open to public scrutiny.

The essence of a second chamber is that it participates directly in the law-making process. The cost of a second chamber is borne in the same manner as the cost of a first chamber. The burden of proof is upon the sponsor of a measure. The cost of witnesses appearing before committees are typically borne by the chamber as a part of the law-making process.

The method of selection requires careful thought. A second chamber which represented only a part of the population would not be in keeping with the spirit of dialogue. Nor would it be in keeping with the spirit of a treaty-charter such as we have suggested. However it is finally structured, the Council of Elders, or Senate must appear to represent the whole population as far as any legislative body may do so.

At the same time, the Elders must be constituted along lines which serve the purpose for which the body was created. It must be capable of articulating aboriginal interests in ways which would not be possible in the Assembly.

Four methods of selection are offered as possibilities for consideration, any one of which would be workable and democratic. These are: 1) direct election for a relatively long period (six to nine years) with election occurring on a staggered basis every two years, like the U.S. system. 2) nomination by regional council, which would include representatives from all communities within the region, seats to rotate according to subject matter, much like the German system; 3) nomination by the regional council, to include representatives from all communities within the region, for a relatively long period (six to nine years) with terms running for a staggered period; and 4) election by each and every

community in the Valley of one representative to the Senate. Since there are more communities in the Western Arctic with predominantly Native populations, this could provide the mechanism for ensuring that the aboriginal interests are given adequate representation.

The extent of the powers of a Senate or Elders' Council might be split along German lines. On matters affecting issues within the treaty-charter, cultural concerns or matters directly affecting regional interests, the veto could be absolute. Proposals for the whole territory w ich did not affect the interests of the regions as regions, and which did not affect aboriginal rights, would be limited to a suspensive veto which could be over-ridden by a 2/3 majority of the Assembly.

There are several international precedents for a second chamber whose role includes the protection of rights of one sort or another, but particularly rights which resemble aboriginal rights. These examples serve to confirm to us our recommendation that this route deserves special consideration.

The real value of a second chamber will not be measured by the number of proposals it defeats but by the skill with which the two Houses negotiate to bring about legislation which meets their respective interests.

CONSTITUTIONAL DEVELOPMENT & THE PROTECTION OF ABORIGINAL RIGHTS

We have been asked to do two of three closely related research reports: I is concerned with the possible benefits, constitutionality and other implications of a residence requirement for voting in the elections in a future territory/province in the Western Arctic; II is concerned with outlining the reasons for needing a special mechanism for the protection of aboriginal rights, and to consider several different options for the structure, function, role and nature of such a mechanism. A third report has been requested from Mark Malone which is integrally related to our two discussions, namely, the value of guaranteed representation for aboriginal peoples within the same future territory/province.

It seems useful, therefore, in providing some overview, to regard the three topics as three aspects of a single, central question: if a need for protecting aboriginal rights, as well as protecting the local public interest, can be adequately demonstrated, to what extent will this be fulfilled by

(a) the definition of the franchise for the election of the legislature;

(b) guaranteed representation in the legislative assembly;

(c) a review mechanism which assesses the significance for aboriginal rights of legislation with a view to preventive action where abrasive consequences can be identified.

This discussion will combine (1) the historical and conceptual reasons for providing protection aboriginal rights; (2) a discussion of the definition of the franchise for the election of the legislative assembly; and, (3) a study of several possible review mechanisms with an assessment of their likely effectiveness.

This paper is in response to Research Proposal II. It contains two major discussions: first, the historical and conceptual reasons for the protection of aboriginal rights; and, secondly, a discussion of five major mechanisms which have been suggested as possible models.

This discussion of aboriginal rights begins with a discussion of the general concept of rights in an effort to find a broad, consensual definition of rights in general before considering the specific form of aboriginal rights. This is followed by a major historical discussion in the hope that when we present findings and conclusions about the nature of aboriginal rights, it will be clear to the reader from where these ideas have come.

II The Protection of Aboriginal Rights

(a) The Nature of Rights

One of the reasons why we have some difficulty understanding the need for the protection of aboriginal rights is that the concept of rights is, itself, not altogether clear. Neither philosophers nor statespersons have agreed on the nature of fundamental rights. But this very lack of agreement is a good place to begin with a brief overview for the purpose of (1) defining what we will mean by rights in the context of these discussion papers; and, (2) developing a perspective on how aboriginal rights relate to other commonly used terms such as "civil rights," "human rights," and "fundamental rights." This is not intended to be a highly philosophical discussion but one which sets out to find the concrete reality underlying terms which sometimes seem to have as many meanings as they have advocates or critics.

Even if these terms were not elusive by their very nature, Canada has gone through a series of dramatic changes with respect to our notion of rights which are recognized in law. During the same period the Legislative Assembly of the North West Territories has emerged as a real force speaking for the peoples of the Territories in its own name. A brief historical review of the events which changed the legal status of different kinds of rights in Canada may reflect the tips of the iceberg, from which we can begin to chart the nature of these rights.

1948-50: A Senate Committee, chaired by Senator Arthur Roebuck, recommended a constitutionally entrenched bill of rights for Canada. No immediate action taken but the waters were tested formally for the first time and the documentation for and against such a dramatic shift was officially laid out.

1961: The Diefenbaker Bill of Rights was passed by the federal Parliament. Limited in its application to strictly federal matters, the courts generally held that it did not invalidate other laws which appeared to offend the bill of rights. The major exception to this rule was the liquor provisions of the Indian Act when applied to an Indian in the NWT, which were both harsher and applicable only to persons registered under the Indian Act.

1967: Justice Minister Pierre Trudeau called a conference of provincial justice ministers to consider an entrenched Bill of Rights similar in concept to that proposed by the Roebuck Committee. Provincial Ministers were virtually unanimous in their opposition. Most opposition was based on fears of the limitations this would place on their legislatures. One province had just received a 5 volume report from its chief justice advocating 500 amendments to its statutes as an alter-

native to a bill of rights. Hence, pro and anti-rights provincial governments united in rejecting the Trudeau proposal.

1969: Prime Minister Pierre Trudeau, speaking on his government's recently tabled White Pater, Indian Policy, declared aboriginal rights to be "too vague a concept" to be a basis for negotiations.

1973: Six judges of the Supreme Court agree that aboriginal title is a right in common law and split 3 - 3 as to whether the aboriginal title of the Nishga Nation was extinguished by pre-Confederation legislation. Trudeau tells Nishga leaders, "I guess you have more rights than I thought you did."

1982: Canadian Charter of Rights proclaimed as part of the Constitution Act, 1982 which simultaneously patriated the Canadian Constitution and laid down an amending formula.

What has this debate been all about?
In the most concrete sense, rights can be seen as powers. Rights are those matters over which a certain body properly (rightly) exercises power. Hence, we speak of provincial rights when we mean to advocate that power to legislate in a

certain field rightly belongs to the province. We rarely speak of federal rights, though grammatically there is no reason not to do so. We generally identify rights with bodies, groups or people whose powers are more limited.

Citizens, or subjects, to use the old monarchical term, are usually in a weaker position in their efforts to exercise their rights than the state. Their rights are, accordingly, made more secure and certain when they are clearly recognized in law. Very often, in the history of our legal system, recognition of rights has been spelled out a step at a time, case by case, in ways which are often most unclear and nearly incomprehensible to the ordinary citizen, even though the particular right may have acquired a great deal of security and certainty. To simplify this complex process, we most look for the few golden threads running through the history.

Two principles of English law-making have been held in dynamic tension, more or less throughout English legal history, to form an arch through which the whole of that history can be perceived: First, that "all power both spiritual and physical doth flow from the Crown;" secondly, that anything which is not expressly prohibited to a citizen is permitted.

The steady expansion of Parliamentary fields of legislation from the end of the Middle Ages until the nineteenth century

-with the King making laws "by and with the advice and consent of the Lords spiritual and temporal and the Commons in Parliament assembled" - drew from the first principle, of all power flowing from the Crown, the doctrine of the Supremacy of Parliament.

The common law courts more or less held the doctrine of the Supremacy of Parliament, by the second principle of permitting any behaviour which was not expressly prohibited. The most conspicuous manifestation of this principle is the practice of placing the burden of proof on the Crown in criminal prosecutions, and similarly on any other plaintiff in other litigation.

A further result, is that while rights have often been expressed in wide and sweeping language, as borne out by any of the various Bills of Rights, prohibitions must be expressed in language that is clear, specific and explicit. The sweeping language granting or recognizing rights may be seen as a security blanket which can only be pierced by a prohibition which is sharp and precise. This balance has developed because the courts have been generally ill disposed toward legislation which prohibits indirectly, vaguely or obtusely an act which the legislature has been unwilling to prohibit in clear and explicit language.

For example, the first effort to prohibit potlatching, a federal act passed in 1884, resulted in a test case against a Kwakiutl man, Hemasack, in 1889. In dismissing the case, Judge Begbie rejected a guilty plea saying that the accused could hardly be

thought to understand the charge when the judge himself did not understand it,

> "If the Legislature intended to prohibit any meeting announced by the name of potlatch they should have said so. But if it be desired to create an offence previously unknown to the law there ought to be some definition of it in a Statute."
>
> (page 73, The Fourth World)

The disposition of the courts to put the burden of proof on the Crown has served as a major, but incomplete protection of the rights of citizens. Incomplete to the extent that when Parliament chooses to be sufficiently explicit, the placing of the burden of proof on the Crown did nothing to override the Supremacy of Parliament. Indeed, nothing overrode the Supremacy of Parliament until the recent Charter of Rights. A recent report of the Senate and Commons Joint Committee on Statutory Instruments refers to an act of the Westminster Parliament which directed that the Bishop of Rochester's cook be boiled.

i) "Congress shall make no law"

The United States, following its independence from Britain, sought to achieve a system of government in which the people, rather than the Parliament, might be supreme. At the same time they wished to achieve a legislature which is, in fact, surprisingly similar to the one whose rule they had just escaped, and to preserve the basic common law system.

It is worth noting that their first effort was far more divergent from the British system than the one which finally took

root. That first effort placed far less effort in the central government and left much more power with the states. It was largely inspired, in its broad outline, by studies the English colonists made of the Confederacy of the Five Nations of the Long House (The Iroquois or Six Nations). The chief defect in this system seems to have been its failure to provide a clear role for a strong, central leader, that is, a federal head of state whose office would be the primary center of power.

The eventual result was a system which sought to blend the anti-authoritarian Confederal concept of a written, democratic constitution with a British notion of a strong central government headed by a strong, central head of state. This blend was achieved by building into the system two major distinctions from the British system: first, a far greater independence of the legislature from the executive, thus allowing the representatives of the people to play a stronger role; and secondly, a Bill of Rights, which begins, "Congress shall make no law respecting..." followed by the amendments each of which limit the powers of both federal and state legislatures.

The result is that any matter which falls within the Bill of Rights is protected against any legislation which might be passed dealing with that matter. It is commonly said that the Bill of Rights reserves the powers with which it deals to the citizens. At the same time, matters not granted to the federal

Congress by the Constitution are held to be reserved to the states. Hence, power is seen to be divided three ways: power reserved to the citizens; power reserved to the states; and federal power.

In creating a Bill of Rights which would override all other law making authority, the United States not only preserved the common law system it inherited from Britain, but expanded the role of the same courts by allowing them to become the arbiters of what did and did not conform to the Bill of Rights.

ii) Canada

Canadian Confederation and the commitment to westward and northward expansion are inextricably tied in to the American events of the same period.

Canada came into being in the aftermath of the U.S. Civil War. In fact, much of the designing of Canada was done at Kingston, Ontario, then the capital of the United Canadas, within earshot of one battle at Odgensburg, New York. The significance of this time frame is telling, in terms both of the shape of the Canadian Constitution, as it emerged in the British North America Act, and for Canada's relationship with Indian peoples during its period of westward expansion. On the constitutional front, the developments can be summarized as follows:

1. Canada maintained the principle of the supremacy of Parliament. There was virtually no limit on the power of the legislatures if it were used in explicit fashion.

2. Canada adopted a federal model, from the United States, dividing powers between federal and provincial legislatures with the courts arbitrating differences of opinion as to who actually had authority in any given situation. On occasion, the courts have been inclined to find laws which were especially offensive to natural justice, really should have been passed by whichever legislature had not passed them, that is, if a provincial legislature passed an offensive law, the court might say the jurisdiction to make such an enactment belonged with the federal Parliament, and vice versa. This tendency in the court has, as a protection of rights, two basic shortcomings. First, it has been sporadic at best. Secondly, it has relied on highly technical, often hair splitting interpretations of those sections of the British North America Act setting out the respective powers of the federal and provincial legislatures. Such logic chopping is a far cry from a simple statement that, for instance, a padlock law offends a basic freedom guaranteed in a charter of rights.

3. With the passage of the British North America Act, Canada acquired a Constitution which was written in part but which depended for its real dynamics on passing allusions to an

unwritten Constitution. No reference is made to the office of Prime Minister. No clear reference is made to the system of Responsible Government, the main check on abuse of executive power, and a concept which had only been defined and cultivated during the century after the American Revolution.

4. The steady expansion of the franchise in Britain from 1832 until three years after the Confederation of Canada, was an essential prerequisite for establishing the primacy of the House of Commons over both the House of Lords and the King in controlling the executive, and requiring that ministries which lacked the confidence of the Commons resign. Canada inherited this system, which had been introduced in the United Canadas while still in its adolescence in Britain, well before its implications were understood. The other critical feature about the creating of the Dominion of Canada is that the marriage of Confederation was performed to conceal, if not prevent a divorce. Upper and Lower Canada had been shotgunned into a most unhappy marriage as the Province of the United Canadas and one which produced a satisfactory political system for neither Ontario nor Quebec. Confederation was a way of allowing each its own internal sovereignty while keeping the whole together and expanding it to include first, the other two founding provinces, and later western and northern Canada. Viewed from 1867, Confederation

provided for four provinces with

(a) not quite as much internal sovereignty as American states;

(b) several clear prohibitions against secession or separation;

(c) transfer payments guaranteed in the constitution which would eventually evolve into equalization payments ensuring a basic minimal financial ability to govern effectively;

(d) a high degree of cultural homogeneity within each province and a clear intention to make each homogeneous province a home for its culture while respecting and protecting the respective minority cultures, at least those of European origin.

(e) provinces thus becoming focal points for collective rights.

This brief summary is intended to provide a basis for understanding the nature of rights in general in the English speaking world:

1. Rights are a form of power or a subject matter of power, usually reserved for groups or individuals whose capacity to protect themselves appears in some doubt. More powerful bodies can also be said to have rights but they are less

commonly described in that fashion because less protection is necessary.

2. In the medieval system from which the English Constitution evolved, each lord granted and protected certain rights for his vassals and his own rights were, in turn, protected and guaranteed by the king.

3. Bills of Rights go back into ancient British history. But it required the demise of medieval systems and the introduction of a chiefly written constitution to establish a Bill of Rights by which all other law would be measured.

4. All Bills of Rights are written with a broad brush reference to those rights which, whether worded positively or negatively, are reserved to those who without such protection might be in jeopardy. No Bill of Rights respected by its own would-be beneficiaries has detailed definitions or precise descriptions of the meaning and nature of the rights it guarantees.

5. Rights have been commonly recognized as belonging to both groups and individuals in political formulations although only legal persons can bring actions in court. Certain towns have had their existence guaranteed under the Magna

Carta in England. The local public interest is the subject of the matter defined as states' rights in the United States, and provincial rights in Canada. Freedom of religion, of speech, and of peaceful assembly are all guaranteed by the First Amendment in the U.S. Bill of Rights. Freedom of association is derived by implication from the First Amendment and might be seen as the nexus between individual and group rights. These rights become critical to the recognition of the collective rights of Indian nations in the United States.

6. The great debate regarding rights, throughout the evolution of constitutional government in the English speaking world, has been the protection of small and weak groups, and individuals against the state, i.e., government as the source of protection of the people, and the people needing protection against the government. A survey of the most recent literature in this debate would demonstrate that only the style of language and the complexity of the social and political structures have changed. Truly, where rights have been preserved, it has been owing to the strength of the underlying existent institutions.

(b) Aboriginal Rights

When the Special Committee of the House of Commons on Indian Self-Government began its hearings in the fall of 1982 one of the earliest witnesses was the federal Associate Deputy Minister of Justice, W.I.C. Binnie. One Member on the Committee, a senior member of the legal fraternity, asked him to table a list of Indian rights cases since Confederation in which Indian people had been represented by counsel. The Special Committee has not yet been provided with this information, nine months later. The fact that many of the most important early cases defined the nature of aboriginal title, if not of aboriginal rights, without ever hearing an Indian witness, and without any Indian body being represented by counsel, is well known. It is therefore not surprising that First Nations around the country are coming to the opinion that the trust obligation of the federal government is something which they must enforce upon the Crown, rather than something for which they can rely upon the protection of the Crown.

The concept of aboriginal rights has been debated in every settler society, that is, every society in which the dominant culture has become that of a diversity of immigrant groups over which there is one pre-eminent immigrant group, those people from the colonizing state. The momentary conclusion of the debate is different from one settler society to another. One

recent Australian ruling reviews all the common law countries in which aboriginal rights have a high degree of recognition and then concludes that none of these findings need intrude on the denial of the rights of the aborigines in Australia.

Aboriginal rights is a concept which could only happen within a society in which the dominant interests are those of a settler society. When the same rights do arise elsewhere, they are labelled differently. They are the rights of the ancient towns of England. They are the rights of the traditional nation-states of Germany.

At the same time, the policies of successive colonial, American and Canadian government can most charitably be described as uneven. At times, these policies were based on an expectation of extinction by natural causes with a little cultivation thrown in along the way. Correction of government policy by the courts has as often resulted in government being comtemptuous of the courts (politically if not legally) or denying Indian people access to the courts, or constructing such literal interpretation of treaties and other agreements as to reduce them to silliness.

Yet any longer view of history will confirm that both policy and law have in fact recognized aboriginal rights, however

they may be defined and, those who have those rights possess thereby a special status which is different from the status enjoyed by any other citizen.

In the earliest days of European contact with the aboriginal peoples in North America, the European powers, including Britain, recognized them as allies and partners. Indeed, most of the wars which Britain won, and most of the battles which she won in wars she eventually lost, were won for her by her First Nations allies. While the recognition of Indian sovereignty may have arisen out of economic and military necessity, it was well entrenched in administrative practises by the time it was made law in the Royal Proclamation of October 10, 1763.

What was it that was being recognized? That "the several Indian nations shall remain undisturbed in their land." There would be no encroachment upon their land by loyal subjects of the King. Their right and title would be recognized and protected by the Crown. They would continue to govern themselves according to their own customs, traditions and leaders. And, should they wish to dispose of some of their land, an orderly way would be provided for doing so, namely, there would be a formal people-to-people relationship in which the land would be ceded from that Indian nation to the Crown. Professor Douglas Sanders has suggested that there is no reason why the aboriginal title to the land should not be considered as good

and valid as any other title to the land beyond the necessary limitation that surrender must be to the Crown. The right to self-government flows from the nation's right to the land. It is simply the right to create and effect the institutions necessary to maintain the people's relationship with the land.

There has been far too much confusion about the meaning of the Royal Proclamation of 1763 to straighten out in a brief review here. What is important is that it did reflect general practice and views at that time. The basic aim of the Proclamation was twofold: to establish four new colonial governments; and to provide for harmonious relations with the "Indian tribes or nations" within and around these new regimes. The question of whether the Royal Proclamation applies in other areas is really better understood as a political than as a legal question. Legally, it has been held that it does not apply outside the areas described in the text. This has major implications for the Northwest Territories. At the same time, what is important about the Royal Proclamation was that it set out to devise a system for peaceful cohabitation of two very different cultures in which neither would dominate the other. The lands of Indian nations would be secure, but should they wish to dispose of any land, it would be surrendered to the Crown in a formal public

proceeding. The Crown would then distribute the land to settlers according to current public policy.

Chief Justice Marshall makes it clear in his early rulings on aboriginal rights in the United States that the force of the Royal Proclamation continued after American Independence. He quotes with approval letters from Secretary of War Henry Knox to President George Washington outlining the advantages of a policy of peace and justice. Marshall's interpretations, which created the concept of "domestic, dependent nations", were framed from a desire to maintain the spirit and intent of the Royal Proclamation within a freer and more democratic independent republic. He recognized that aboriginal title did not depend upon the good will of the state, but upon custom and usage which predated the founding of the state of Georgia and the Republic of the United States. He also recognized the need to exclude the local state authorities if the interests of the Cherokee nation were to be considered. Like the Westminster Parliamentary Committee of 1337 which argued that Indian Affairs must always remain an Imperial matter, because, as it told the British House of Commons, provincial assemblies could always be expected to represent the interests of the settlers to the detriment of the aboriginal peoples. While Indian Affairs was given over to Canada at Confederation, maintaining it as a federal power should be seen as fulfilling the injunction of this Committee, namely by reserving power over Indians and lands reserved for the Indians

from provincial interests.

But placing a matter within federal jurisdiction is not a guarantee that rights will be respected. Nor is it even a guarantee that rulings in favour of the rights of people under federal jurisdiction will be enforced. When President Jackson was told of one of Chief Justice Marshall's rulings in favour of the Cherokee Nation, he said, "Mr. Marshall has made the law, let him enforce it," and thereby signalled to the State of Georgia that the federal power would not be used against its policy of eviction. A similar respect for the courts was shown when Mr. Justice Albert Malouf granted an injunction against Hydro Quebec in favour of the Cree and Inuit, following the longest trial in Quebec history. During the short time until the Appeal Court overturned the injunction, television cameras regularly filmed the continuing work which was specifically prohibited by the injunction.

The earliest Indian Policy in Canada was strongly tied in to the aftermath of the U.S. Civil War, the acquisition of the Northwest Territories from the Hudson Bay Company, and the beginning of the treaty making period.

(i) Early Canadian Policy

Canada began its Indian policy with legislation it had inherited from the province of the United Canadas. The treaty making

period of the 1870's saw Canada acquiring the Northwest Territories as it then was, i.e., the entire area of Rupert's Land which Canada acquired from Britain after Britain bought it back from the Hudson Bay Company. This acquisition by Canada, of course, is the most immediate fact in our discussion so far for the Western Arctic. Without that transaction, none of the history reviewed here so far would have any particular significance for the Mackenzie Valley or its peoples. But the acquisition was made more out of response to post-Civil War events in the south than to the fortunes of the fur economy of the Hudson Bay Company.

The U.S. Civil War ended in 1864 leaving an estimated three million men, who were in the habit of bearing arms, unemployed and often homeless. There was an immediate and urgent need to occupy them in a project which would both capture the national imagination and distract the country from the ravages of the war which had torn apart the heartland of the United States as it then was. The demands of U.S. spokesmen for compensation for British sympathy with the Confederacy took various forms. But the demand for an extension of a northern boundary at 54° 40′ by a vocal faction in the U.S. Senate reflecting a widespread sentiment, in turn, stimulated the British and Canadian moves to transfer Rupert's Land to British North America and to create the Northwest Territories.

The Sioux Wars, which were to make General Custer a famous U.S. hero, arose largely out of the need to move veterans from both sides in the Civil War away from the areas already part of the United States. The discovery of gold in the Black Hills, and the need to dispose of two huge armies, in lieu of any other form of Veterans' Land Grant program, resulted in the wholesale distribution of smallpox blankets, the destruction of the buffalo herds and the total warfare which followed.

The impact of these actions on the more northerly First Nations can best be appreciated by studies of the population curves done on the west coast peoples in which it was estimated that, within two years of the smallpox blankets being spread in the prairies, Nations on the other side of the mountains lost half their numbers.

The forty-ninth parallel was established as a boundary only very late in this episode. The U.S. Government had sought compensation for the sympathy Britain had shown the Confederacy and the cry of 54°40' had gone up. Canadian control of the prairies and the drawing of the 49th parallel came in response to this threat.

When the treaty makers set out from Ottawa for what was then the southern part of the Northwest Territories, Canada became the prime beneficiary of the wars waged by the U.S. Cavalry. The northern prairie peoples had traditionally followed the buffalo in annual migration. The drawing of the border represented a

final death knell to a way of life essentially destroyed with the destruction of the animal on which it depended. The drawing of a border which would keep the U.S. Cavalry out was probably more welcomed than not, given the circumstances of the moment.

The treaties themselves were often welcomed as a possible shred of support in the face of the extreme adversity already visited upon the people who were invited to sign them. Nonetheless, it is clear that wherever possible, the First Nations speakers held out for more than was offered, and understood how little they were receiving in return for their surrenders. The education provisions were inserted as a result of their negotiating pressures. The demands for agricultural supplies, a reading of the negotiations will show, came from a desire to adapt their way of life to the newly emerging economy as a means of survival.

The governments who had written these treaty provisions in terms of balls of twine and numbers of implements quickly reduced their provisions to a literalism that would ensure the failure of any beneficial intent. Once the period of total warfare had ended in the United States, it would be difficult to find that the Canadian Indian administration was less harsh than the American administration.

(ii) The Treaties, a Legal Netherland

The treaties as evidence of aboriginal rights entered into a sort of legal netherland. Signed by the Queen, or her appointed deputy, they had a legal force. Without supporting legislation, no funds were attached to their fulfillment except what Parliament was asked to vote from year to year. Some treaty rights have proven to be a defense in law against charges under provincial game law. But later international treaties and simple federal legislation have overridden treaty guarantees of fishing rights and hunting of migratory birds. Parliament's passage of later legislation did not even require the repeal of treaty rights since the vice-regal signature had been sufficient ratification. Other promises, the school house clauses, were typically written with all the style and humour of a tax lawyer and are filled with qualifications such as "When the Queen deems wise," or "When her ministers so advise."

It is sufficient to consider that the Saskatchewan land entitlement formula, agreed to by all three prairie provinces in the mid-70's, and seriously negotiated in Saskatchewan but without tangible benefits, is a formula for the fulfillment of land obligations.

The success of the school house clause can be seen from the 94% dropout rate cited by Hawthorne in the 1960's, and repeated to

the Standing Committee on Indian and Northern Affairs a decade later. The 1971 Sub-Committee on Indian Education found that federal, provincial and church schools had equally failed to reach Indian students. It laid the groundwork for the National Indian Brotherhood position paper on "Indian Control of Indian Education", which would have allowed Indian bands to take control of their children's education and allowed school boards to be the forerunners of Indian government. Endorsed by Jean Chretien in the latter period of his record term of office, the policy was abandoned by DIAND with his departure.

During the 1920's there were a series of near successes when First Nations tried to pursue their rights in law. The details of these events are probably the most exciting part of Canadian history, and at times the most shameful. When the Six Nations took their case to the League of Nations, their traditional council members were arrested and Canada told the League that since they no longer held office, the chiefs' complaint should lapse. When the west coast peoples petitioned to have their claims sent to the Privy Council, Ottawa passed an act making it a criminal offence to raise funds for the purpose of pressing Indian claims. While this charge was used only rarely, on the prairies people were denied their annuity payments for leaving the reserve without a pass. Indian children in residential schools across Canada were regularly flogged for speaking their own language.

Further detail seems unnecessary.

(iii) Patterns vis a vis Aboriginal Rights

What emerges from this brief overview are a number of patterns that have characterized government's historical approach to aboriginal rights.

First, it has been an on-again-off-again recognition, governed by expediency and repeatedly overwhelmed by the pressure for land and resources from interests for whom a respect for aboriginal rights was a severe inconvenience. When a First Nation served an important military and economic function, their rights as nations were accorded full respect; when their lands became valuable for encroaching settlers, however, their rights were either bargained away for pitiable amounts in questionable treaties or denied altogether (as in B.C. and the Maritimes).

Second, government policies since Confederation have been characterized by an either-or approach, i.e., either isolation (on reserves) or assimilation (loss of distinct culture). Neither approach has proven successful. The result has been that the vast majority of aboriginal people whether on or off reserves continue to be marginalized from the mainstream of Canada's political and economic life. At no time has government offered them an alternative whereby their distinctive values and traditions would find expression in the political and economic institutions of the country. In many respects, this is the alternative that still remains available to the Western Arctic.

Third, the government's record for respecting both the letter and the spirit of past treaties and agreements has been poor. The flood of claims made against the federal government since it instituted its specific claims policy in 1973 is ample testimony to its failure to live up to its treaty and trust responsibilities. The James Bay and Northern Quebec Agreement is but the latest example, furthermore, of a tendency to interpret commitments in the most narrow legal terms in order to minimize, if not escape obligations.

Fourth, there has been a repeated tendency on the part of both executive and legislative branches of government to deny aboriginal rights unilaterally. An example of this would be the 1927 Act of Parliament which made it a criminal offence for aboriginal peoples to pursue their claims against the government in the courts. A more recent example is the federal government's 1969 White Paper on Indian policy which was an attempt to do away with all aboriginal rights in one fell swoop.

Fifth, there has been a pattern whereby the courts have finally come to recognize aboriginal peoples' rights only long after governments have lost interest in respecting them. This occurred in the U.S. during the period of Chief Justice Marshall's rulings in the early part of the 19th century. While his decisions that the Royal Proclamation still had application were clearly based on earlier British and U.S. policies, they nonetheless were made

at a time when pressures for colonial expansion made politicians indifferent to the law. A similar example can be found within Canada during more recent times. For over a hundred years after its entry into confederation, the government of British Columbia had been content to deny the existence of aboriginal rights altogether. When the Nishga decision of 1973 cast doubt on the validity of that position, the B.C. government merely modified its position to stress the federal government's exclusive responsibility for such matters.

(iv) Irrevelance & Revival

Ten or fifteen years ago, when Indian organizations and other aboriginal associations came into public prominence, there was a lively debate among political pundits who took an occasional interest in such things, about the nature of "the Indian renaissance". Finally, several Indian commentators pointed out that while the renaissance was real, its reality was different from its appearance. The difference to which they pointed was that they, and their peoples had been there all along. They neither went away nor came back. Terms such as Palmer's, "period of irrelevance", to describe a people who have been dispossessed, help to create the illusion of "now you see them, now you don't". Most of the Indian people who read such histories were convinced that they had never been irrelevant. Except in the way that Canada could be described by a world economic historian as irrelevant, or at least marginal to the world economic order.

What has been real about the "renaissance" is the coming of age of a generation who have had more or less enough to eat as children, who were not under any legal restrictions in pursuit of their people's well being, and who have begun to feel that it is once again safe to assert title to their place in the sun, a title which Chief Justice Marshall had declared to be theirs by the Law of Nations a hundred and thirty years before.

When the Supreme Court brought down its decision on the Nishga case in 1973, Peter Cummings, co-editor of Native Rights in Canada, said that it would have been easier for the court to make that decision eighty years earlier when people were far more familiar with the history which was the substance of the issues in the Nishga case.

The legislatures and courts which have denied aboriginal rights have done so by minimizing and ignoring the political and legal frameworks which others had built before them. It seems fair to summarize the pattern in North American settler society as two contradictory tendencies: the recognition of aboriginal rights on the basis that aboriginal peoples necessarily had to be recognized as having the same or at least similar rights to European communities the rule over which had exchanged hands; and, the denial of aboriginal rights, almost invariably resting on a view of history which portrays the First Nations as less human than European peoples, and prescribes a

policy of separation and assimilation.

Isolation and assimilation, in fact, have usually gone hand in hand as instruments of Indian policy. The policy identifies a people as savages who cannot possibly fit into society in their present condition. It proposes to isolate them, on reserves, until they are ready to assimilate. The 1869 Act, entitled, An Act for the Gradual Enfranchisement of the Indians is a clear statement of this policy. Diamond Jenness, the otherwise much respected anthropologist, took up the same cry, in an appearance before the 1945 Joint Committee on the Indian Act, with his program for the assimilation of the Indians over a twenty-five year plan. The 1969 White Paper might be seen as a sort of centennial re-statement.

Such a policy is necessarily based on an historical view which, if it recognizes aboriginal peoples as having rights at all, diminishes them to the point of sentimentality because any view which recognizes prior rights is hard put to justify declaring that they no longer exist unless their surrender can be voluntarily obtained for fair compensation. Throughout all the early literature on the subject, the recurring question is whether there is any basis for recognizing less status in an aboriginal people than in a European people. Two reasons are advanced: their lack of Christianity and their lack of agriculture. These reasons were quickly reduced to absurdity: the religious reasons

by travellers who frequently described different First Nations as showing far more evidence of Christian virtues than any people they had seen in Christendom (that is, in Europe); the apparent lack of agriculture by its widespread practice where it made sense, and its impossibility or lack of benefit elsewhere. The result is that the isolation-and-assimilation view has generally rested on a view of history which presumes, if it does not assert, a degree of inferiority in the aboriginal nations of the Americas.

The dire results of such a policy are most clearly demonstrated by looking at the success of Canada's Indian Policy since 1869.

(c) The Western Arctic

It would be pleasant indeed to consider that the Western Arctic is so much more 'the true north' than 'a part of the continent, a piece of the main,' and that there is simply no need to make special provision for the protection of aboriginal rights. We know from the history of the region, however, that this is not true. And we know that the projections for development in the immediate, if not actual foreseeable future make the need for protection especially acute.

(i) The Dene Experience Under Treaties #8 & 11

Our history so far has centred on southern Canada and the United States. But, a brief review of the experience of the Dene Nation from the time of treaty will suggest that, while the degree of contact so far may have been less intense than further south, it has not, on the whole, been much healthier for the Dene people.

Land and the right to maintain their way of life, language and culture have always been the most important realities for the Dene. They have demonstrated this repeatedly throughout the decades since their first contact with non-Dene.

The process of colonization in the Northwest Territories began around the time when the British Crown gave to the Hudson's

Bay Company a charter, or monopoly of trade, in this huge territory. In 1870, the Bay surrendered this territory to the Canadian federal government for a sizeable compensation. These transactions took place without consultation with the aboriginal inhabitants.

As the encroachment and eventual settlement of many non-Dene became evident, the federal government was forced to address the issue of land. The methods of negotiation, whose results are found in Treaties #8 and #11, tended to be expedient rather than honourable and were therefore the subject of a caveat action by the Dene chiefs in 1973.

Judge Morrow, who heard the case, heard from a number of Dene elders from up and down the Valley who, in their youth, had witnessed the process of the treaties. They testified that 'peace and friendship' were the terms they understood and signed. In his judgment, Justice Morrow concluded "I am satisfied that those same indigenous people ... are prima facie owners of the lands covered by the caveat -- that they have what is known as aboriginal rights." When the federal government appealed this decision before the Supreme Court of Canada, the Court ruled on the narrow issue of the right to invoke caveat. They did not rule on aboriginal rights.

Morrow's decision, the decision of the Supreme Court of Canada, and the prevailing economic climate compelled the federal government to adopt a policy on settling claims on land and aboriginal rights. Ultimately, the Dene Rights settlement will be resolved under the government's comprehensive Claims policy, that is, the category of claims where no treaties were signed.

At the time of this writing, however, Denendeh is effectively in limbo and the federal government has legal responsibility over Dene land. It has jurisdiction over natural resources, parks and most of the land outside of the Dene communities. That is, it has jurisdiction over those lands and water outside those designated under the Territorial Lands Act.

The Dene are aware that in any future arrangement with the federal and territorial governments, provision for protection of land and rights to language and culture must be made into law. The list of grievances is long. Government-initiated administration and development have proceeded on the premise of protecting the "national interest" and not with the local interest of the North at heart. Examples follow:

(A) Renewable Resources

1. Games laws were usually made without consultation, dating back to the nineteenth century.

2. The Migratory Birds Convention Act of 1917 between Canada and the U. S. A. and Mexico was an international agreement that came about without consultation with the northern people.

3. Game preserves were initiated without full knowledge of how they would affect land-based activities of the Dene.

4. Criteria for the Fire Suppression Program were determined without properly consulting or advising the Dene. Priority zones were determined by the Canadian Forest Service and the Department of Indian Affairs.

5. In July 1982, an experiment was carried out by the National Forest Fire Research Centre and the Canadian Forest Services in the Northwest Territories to discover how caribou moss burns. This fire burned out of control for weeks.

6. In the summer of 1979, the Ministry of Transport made plans to use the herbicide 2-4-D to kill brush near their marine navigational sites along the Mackenzie River. A delay in this action was brought about by protests from the Dene and the Consumers' Association of Canada in Yellowknife. Whether or not this type of practice has been halted in subsequent years is unknown.

(B) Non-Renewable Resources

1. One of the earliest agreements made with respect to non-renewable resources was the 1944 agreement between Esso Resources Ltd. and the federal government. This was done without involvement or consultation with the Dene.

2. Pointed Mountain natural gas development was constructed from late spring 1971 to October of 1972. At the peak of construction, a total of 60-70 Dene were employed; however, employment was short term. As for direct fiscal benefits, there existed no mechanism whereby the North could receive fiscal-type benefits from natural resource projects of this type.

These fields were exempt from the recent Bill C-48. In essence, what this means is that the North will not benefit from the past, present and future rents or royalties derived from export of the above-named oil and gas resources.

3. In the area of mining, Pine Point lead zinc mine situated on the southern shore of Great Slave Lake began its development in 1964. People from the nearby community of Fort Resolution expressed concern over environmental damages they had witnessed and change they had noticed in the quality of water. Very few aboriginal people are employed here at any given time.

4. Giant Yellowknife Gold Mine was charged with polluting of the Yellowknife Bay with arsenic tailings.

5. Cadillac Mine Ltd., situated north of the South Nahanni National Park, was developed against the wishes of the Mackenzie-Liard Dene. The government said it was locked into a lease with this mining company.

Most of these and other companies such as Con/Rycon gold mine, Canada Tungsten, Echo Bay silver mine, are owned by larger multi-national companies such as Cominco, Falconbridge Nickel Mines, Superior Oil Company of the U.S.A., Canadian Pacific Investments Ltd, Trans-Canada Pipelines, etc.

(C) Social and Economic Policies

1. Up to 1969, no serious attempt was made to include, in the formal education of the young, studies in the Dene languages, culture or northern environment. From 1920 to the early 1940's, the mission-administered boarding schools operated ten months of each year. By the early 1940's, the mission system had expanded, having entered into contractual arrangements with the federal government. This arrangement continued for another twenty years although by 1947, a Federal system was introduced. No comprehensive assessment has been conducted to date on the effects of the mission system.

2. The federal government's (DIAND's) economic and social policies were often not understood, or were outright rejected by the Dene, particularly because the policies were at variance

with the goals and aspirations of the Dene. For example, (a) the Dene of Ft. Wrigley protested in 1969 when the Mackenzie Highway was going to be extended to their community. They felt that this access route would bring in strange types of people and would generally adversely affect their community. (b) Dene from every community in Denendeh testified before the Berger Inquiry that an innovation such as that of the proposed Mackenzie Valley Pipeline would irreversibly damage the Dene people, culture and land.

(c) Whereas governments generally assume that large developments are welcome because they boost the economy and offer employment, the Dene have become aware that short-term benefits through short-term jobs are not congruent with their economic goals and aspirations. Numerous seismic lines, clearings for construction, slashing for right-of-way, were carried out by the Dene but they have not received lasting benefits, especially those associated with mining, and oil and gas developments.

Short-term benefits from large developments have been: construction of schools and government facilities; slashing right-of-way for the Mackenzie Highway; construction of the Canol pipeline (it is not certain whether any Dene were employed on this project); and the immense construction of Inuvik in the early 1950's.

(ii) Parallel Paths

The traditional approach to the protection of aboriginal rights at its best and strongest has centred on maintaining two separate societies: aboriginal and non-aboriginal; each with its own institutions; usually each having its own land base; always having its own authority over its own people and its own particular interests in the land even when there are overlapping interests.

The Two Row Wampum which records the treaty of the Iroquois Confederacy with the Crown shows the wake of two canoes each travelling parallel courses. The belt is read to warn that people who stand with a foot in each canoe will do very well until the boats come to rough waters.

Marshall's prescription of "domestic, dependent nation" aimed to ensure that the Cherokee nation would have plenary power within its own territory over its own people while the State of Georgia, which physically encompassed the Cherokee Nation, would have plenary powers over its own people but be excluded from interference in the affairs of the Cherokee Nation.

The Indian Self-Determination Act and numerous tribal constitutions in the United States aim basically in the same direction today. Professor Jack Forbes gives the opinion that the Navajo Nation has more or less as much power as the states it overlaps.

Canada has, in the past century, recognized an Indian interest in the land but has denied or minimized an indian right to self-government. None of the witnesses before the current Special Committee of the House of Commons on Indian Self-Government has found the results of this regime satisfactory. There is a consensus running through the divergent views of Indian witnesses which can be summarized as follows:

1. Their nations enjoy an inherent right to self-government;

2. The authority of these First Nations governments is not to be delegated from the federal Parliament but the federal Parliament needs to recognize the authority which is inherently theirs as a gift of the Creation;

3. The First Nations have, until recently, been excluded from effectively participating in Canada as a Confederation; it would be a greater fulfillment of both Confederation and of their own nationhood if they were allowed to participate, as First Nations, in Confederation;

4. The First Nations who did enter into treaty were guaranteed sufficient resources to support themselves and the necessary technical assistance to adapt their way of life to changing social and economic conditions to ensure their survival as peoples;

5. Every trust relationship involves the trustee in rendering a full account to the beneficiary; the failure of the Crown to fulfill their trust responsibilities requires that the First Nations assume increasing responsibility for ensuring their own well-being, and that they enforce upon the Crown the trust obligations which remain with it;

6. That the powers which the First Nations governments need to be free to exercise overlap very closely with those set out in the Constitution Act for the provinces.

Keith Penner, Chairman of the Special Committee, in a speech in May 1983 to the Assembly of First Nations, recognized the need to replace the delegated structure of the band council system with a federal recognition of an inherent right of self government in each of the First Nations:

> "I want to say something further about the notion of 'granting' Indians self-government. That notion is the devolution scenario which is one of the options under discussion in the development of a policy towards Indian self-government. Under devolution, certain powers are delegated to Indian governments at someone else's discretion. It is a move towards municipalization. It limits self-government to only local autonomy. This option, Indian people have told us, is not acceptable. It does not recognize the original and continuing authority of Indian governments.
>
> "There is another option, however. This option is to change, basically and fundamentally, the framework of Indian-Canada relations. This approach would recognize Indian rights to political self-determination. It would entail the constitutional entrenchment of Indian government as an integral part of the Canadian political system..."

What truly distinguishes the Western Arctic from southern Canada is not its relative isolation. The very history producing the leading development of constitutional government in the Western Arctic can also be seen as a history of overcoming isolation. By the same turn, indigenous people and settler people alike have sought refuge in the relative isolation of places distant from urban sprawl and industry for the past two centuries. But only a very few of those seeking refuge have turned away the best advantages of contact and exchange when they have been available.

The true distinction of the Western Arctic in the process of constitutional development has been the willingness of the different interest groups, peoples, and the Assembly itself to enter into dialogue in a common search for a structure and system that will, in fact, be pluralist in its embrace of diverse traditions, cultures and values.

Most places in the world which have wrought a constitution in recent years have done so because there is part of their past governance of which they wish to rid themselves. They are looking to start over. In a very real sense, the Western Arctic dialogue is genuinely about a first beginning. Not in a way which denies that the Dene have been there for many thousands of years. But in a way which says, "We need to make something which speaks well for all of us."

The Dene and Metis represent a near majority of the total population. The only jurisdiction outside the Northwest Territories in North America where the indigenous people represent the majority culture is Guatemala, a country presently torn apart by a most horrible warfare in which government troops are killing a thousand First Nations people a day; and, hundreds of thousands have sought refuge in neighbouring lands.

Between Guatemala and the Mackenzie Valley, First Nations continue to protest less extreme assaults on their land, their well-being and their right to self-determination. But there is neither the political leverage nor the good will to create protective structures other than separate political structures.

Separate regimes have allowed more southerly indigenous peoples to survive. But they have also ensured a continuing competition for land, for resources and for authority between the two regimes. To that extent, they have brought neither peace nor security either to the First Nation or to the settler people.

The Dene and the settler people, in the Western Arctic, have both asked the question, "Can we not do better than that? Can we not build some common political framework and structure which will ensure the individual civil and human rights of everyone in our territory, and also protect the collective aboriginal rights of the Dene and Metis? Is not the local public interest of the

territory so closely aligned with the rights of the Dene that the collective rights of the territory as a whole and the collective rights of the original people can be protected through the same political structures?"

(iii) Need for Protective Mechanism

An old Latin maxim says, "Great law is made only for great cause." When we look through the efforts since the end of World War II to create an international legal order, beginning with the United Nations Charter, through the Convention Against Genocide, and the Convention Against Racial Discrimination, and the parallel developments domestically with human rights legislation, federal and provincial, Charters of Rights, appeal systems, legislative reform, we know that the impetus for these changes has indeed sprung from a great cause.

Section 73 of the United Nations Charter provides that

> "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well being of the inhabitants of these territories, and, to this end
>
> "a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement, their just treatment, and their protection against abuse;

"b. <u>to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions</u>, according to the particular circumstances of each territory and its peoples and their varying stages of advancement,"

The very language of this Charter, "a sacred trust," comes from the earliest discussions of aboriginal rights in North America. But we have been far quicker, thus far, to apply its spirit and intent to peoples elsewhere.

It would be tempting to say that these are all issues of the past. But when one looks through the laws, and particularly the protective laws, of any people, exactly what is found is a series of prescriptions against the misdeeds and misfortunes of their own history. Implicit in that prescription, of course, is a statement of what they themselves found defective in their own past performance and the undertaking to protect against a repetition. This is the origin of all protective legislation.

The need to protect aboriginal rights through specific mechanisms has, in fact, been recognized, as we have shown throughout the history of English settlement in North America. Until now, this recognition has always taken the form of a separate society with separate political institutions. Sometimes these institutions have been essentially controlled by government. Sometimes they have had a considerable internal autonomy. We might suspect that the "isolation-and assimilation" forces have often combined with

the supporters of aboriginal rights to reinforce the separateness of these institutions. Nonetheless, there is no question that this has been the favoured mechanism. Nor is there any serious doubt, whatever motives lay behind government policy, that its cumulative effect has been to reinforce a strong sense of collective identity among the First Nations.

There is no doubt that there is at least as much need to provide protective mechanisms during the evolution of public government in the Western Arctic. Indeed, if the pitfalls of earlier southern policies are to be avoided the question will not be whether there is a need for such protection, but how to make that protection a good deal more effective, consistent and positively beneficial for the Dene, the Metis and the Inuvialuit than it has been for southern First Nations.

If sufficient protection can be given these rights through the same institutions as will generally care for the local public interest, it may result in the First Nations of the Western Arctic enjoying a consistently beneficial policy which will avoid the marginalization and deprivation which have become the hallmarks of past southern policies.

III Review Bodies & Mechanisms for Protecting Aboriginal Rights

1. Introduction

Earlier, in reviewing the historical and conceptual basis for aboriginal rights, we concluded that there was a definite need for protecting these rights through some formal mechanisms which might be used.

Several options were suggested to us in the guidelines which were provided, and in discussions during their preparation.

The options which we will consider are

(a) an ombuds office;

(b) a commission similar to a human rights commission;

(c) a judicial review process

(d) a legislative committee within a legislative assembly;

(e) a second chamber with three possible structures, based on different methods of selection and tenure; and varying functions.

At the same time, three criteria were also established. The criteria against which these will be measured include, among others,

(a) the screening of legislation should largely occur before it is enacted;

(b) The burden of cost is to be borne by the government;

(c) The burden of proof that rights are not being infringed rest with the government.

So we begin the consideration of each option by considering how well it meets these criteria. It is worth taking a moment to consider these criteria, and what they say about the purpose of a review body, before going on to study each possible form of review body in detail.

In considering the experience of aboriginal peoples elsewhere, we saw that there was almost an invariable pattern of marginalization when their presence was not critical to the major military or economic goals of the dominant society. We have seen also that the major way in which their rights have been protected elsewhere has been by creating a separate set of political institutions, recognized as having "domestic dependent nation" status which U.S. courts have recognized as going so far as to include sovereign immunity, i.e., like the states of the United States, and like the Crown in Canada until recent reforms were enacted, tribal councils are immune from being sued without their permission. This degree of political authority has been widely declared throughout the aboriginal world to be the only way First Nations can be assured of prosperity, or even survival.

The unique conditions of the Western Arctic, however, hold out hope that a single set of institutions might be framed which would allow the Dene, Metis and perhaps the Inuvialuit to realize their aspirations within the same political forum as the European or settler population.

These three criteria derived from our terms of reference, are basic to such an expression of mutual good will. The ordinary protection which anyone's rights receives meets these three criteria. Very often, there is provision for an extraordinary protection as well, for which there are necessarily different criteria. For instance, the very fact that any legislation must either pass through a legislature or be passed by a cabinet pursuant to a legislative enactment delegating power to the minister or the cabinet as a whole results in a situation in which

(a) There is a sponsor of a bill who must seek and receive support for it in public;

(b) The burden is on the sponsor to demonstrate the merits of his proposal in general and the safeguards it contains regarding rights which might be affected;

(c) The costs of the process of enacting laws is borne by the legislature itself, and to some extent by the office of ministers who sponsor legislation, but in either case, by the government.

In addition, we need to consider the effectiveness of each possible review body. Effectiveness largely amounts to the kind of power it will have. Can it block legislation? Can it put considerable pressure on the Assembly?

2. Cultural & National Identity, Not Race

Concern has been expressed that a body which protects aboriginal rights may be dominated by a single cultural or ethnic group. This concern will be discussed in greater detail when we consider the option of a second chamber. But we can state here that if the review body has real and substantial power, then it may not be necessary that it be controlled by any single part of the population, exclusively.

At the same time, the notion that in the rest of Canada, or in western democratic countries generally, there is no concept of "special status" for certain groups, or that cultural preservation is not a major concern in designing political institutions, is a myth which has largely been cultivated by those whose cultural preservation has been assured by a special status.

Quebec is guaranteed to gain four seats in the House of Commons even if its population declines following each decennial redistribution of seats. The smaller provinces have always been guaranteed, and frequently relied upon a constitutional provision that they should not have fewer seats in the Commons than in the Senate. Minority religious education has been constitutionally guaranteed since Confederation, at least within the spectrum of religious practice which is denominationally Christian.

Canada has generally, though not always, avoided constitutional or legal statements which say that a certain group will have rights

which no one else has. But it has frequently accomplished the same thing by saying that anybody who meets certain criteria, which can only be met by the group it wants to protect, will receive certain benefits. Special status then needs to be inferred from a careful study of the text of constitutional or legal provisions. But the reality of the provisions can not be denied because the language is not explicit. The most that can be said is that if some other group also meets the provisions they will also receive the benefits.

Nonetheless, it needs to be stressed that the recognition of aboriginal rights as a particular form of collective political rights does not, as certain federal spokesmen have from time to time suggested, imply government based on race. Rather, it indicates government which is committed to the values, customs and traditions arising out of a given culture.

We need not explore all the subtle differences between culture and race here. The meaning of the term race has changed dramatically over the past century. At one time, it was a virtual synonym for a nation, that is, a people with a common history and language from which they produced and expressed a set of traditions, customs and values which taken together might be called their culture. The later equation of race with a genetic pool, classified by colour and other gross physical character-

istics, is one of the great disasters of the Age of Progress. We would, therefore, join in any denunciation of attempts to establish or maintain any pretense at racial purity while suggesting that maintaining and enhancing the culture of a traditional nation or people is a normal and laudable function of government.

Even those European countries whom we noted only granted citizenship where there was some ancestral connection cannot fully be accused of discrimination against a race, or on account of national origin. A very slight connection, racially calculated, might suffice if that grandparent held citizenship at her death or your birth; and, there is no particular regard for what other supposedly racial ingredients a person brings with them.

Similarly, Quebec has a program to actively foster francophone immigrants. The economic standards are at least as high as the federal standards to qualify for support or encouragement under this program. But judging by the countries of origin, many applicants will not be white.

While Ontario does not seem to advertise an analagous program, there are officers trained to encourage immigration at the unofficial embassies, each of which is called "Ontario House", in the cities around the world where Ontario carries on her major trading activity. This is more likely to correlate to a racial pattern but that does not, on closer examination, appear to be the intention.

Lastly, in this regard, it should be noted that when no provision is made for enhancing or maintaining a culture that is not in a majority position, that is, holding effective control, the culture becomes marginalized. It gets shunted aside and a malaise manifests itself in the whole range of available social disorders.

Any legislative activity which touches on a matter of cultural concern can be expected to benefit the majority culture simply because it is in a position to reap the benefits. Any provision which maintains schools, or theatres or even tv drama in Toronto or New York can be expected to foster the English language.

3. What is to be Protected

We have discussed in some detail the need to protect aboriginal rights without specifically enunciating what aboriginal rights are. The problem up against which we run when we try to define aboriginal rights is, in fact, the same problem we face when we try to define any other kind of rights. All concepts and notions are somewhat elusive. This is one of the reasons why all Bills or Charters of Rights are painted with a broad brush. They may also be considered the standards on which a society has reached a broad consensus. Rights which are not entrenched may nonetheless have widespread recognition.

The Equal Rights Amendment, ensuring women's rights in the United States, for instance, did not attract a sufficiently large majority to pass into the Bill of Rights. But a large majority of states, directly as a result of the campaign for the ERA, either amended their state constitutions, or reviewed their entire body of statutes with a view to ensuring the same end. While there would still be considerable benefit to the passage of the Equal Rights Amendment, it would be a poor reading of its lack of passage thus far to infer anti-women sentiment dominating the legislatures.

Earlier, we observed that one way of understanding rights was to see them as those powers which were reserved to the citizenry in general or some group or collectivity within the state at large.

Clearly, there are certain areas where this description has to be taken a step further. If we say that there is a right to education, it is a rather hollow right unless there is reasonable access to a school. If the school is physically accessible but is not equally receptive to some candidates for reasons that are not appropriately related to the educational purposes of the school, those students and their parents will feel deprived of their right to education.

Aboriginal rights, as we have seen in our historical review, certainly cannot be limited to the provisions of a land agreement. No matter how fair or reasonable to either or both parties such an agreement may be, if we assume no more than that it will deal only with matters fairly directly related to land title, and to compensation for any land surrendered, but that it will not deal to any great extent with what we conventionally consider political development, then it will have dealt with a most critical but nonetheless fractional part of what the Dene or any other First Nation would consider their aboriginal rights.

The difficulty is that, if any given issue is raised for the purpose of asking, "Is this an aboriginal right?" it is much the same as asking, "Is this a fundamental right?" "Is this a civil right?" "Is this a human right?" Other than saying that, as an aboriginal right, it inheres in an aboriginal people or a First Nation, we see no simple way of distinguishing between many aboriginal rights and comparable human rights of non-aboriginal people.

All rights, regardless of how they are articulated, or how they are protected, by constitutional entrenchment, by common law, by statute, or by some other means, are values which a particular society has declared to be primary to its way of being and its way of living. Indeed, while there are certain matters which the writer would like to commend as rights, we refrain from doing so, precisely because we believe that any statement of rights is a statement of those values which are essential characteristics of a given people.

Civil rights are those rights which a given people believe to be essential to their well being, and to be essential pre-conditions for their living in a civil way with one another, that is without a tyrant or military rule. We suspect that the very term, civil rights, would not have come into existence except among a people who were vitally concerned with protecting themselves from tyranny. (A simple review of the literature of the American Revolution will illustrate how popular the term tyranny was as a description of the reign of George III. Whether the term is considered apt by non-participants at a later time is less important than the results of this widespread perception. The fear of some form of military rule supplanting free institutions runs throughout the Federalist Papers.)

Human rights is used internationally to include what English speaking North Americans consider civil rights. Domestically,

we use the term to mean protection against discrimination on grounds not rationally or reasonably related to the issue at hand, specifically discrimination on the basis of race, creed, colour, or national origin. More recently we have come to include discrimination on the grounds of sex, and in some places on the ground of sexual orientation. What all these matters have in common is that they are not relevant to lodging, employment and other matters which we have brought within the scope of Human Rights Codes. The connection between the broader international usage of the term, and the narrower domestic usage is readily apparent. Since 1945, most southern Canadian and United States jurisdictions have come to feel that eliminating these forms of discrimination had become a primary objective of their societies. From the perspective of anyone belonging to a minority group, on the basis of race, creed, colour or national origin, discrimination certainly was a primary value before this time.

Aboriginal rights are the rights necessary for an aboriginal people to provide for its own survival, and to define and work toward its own well-being. This is why aboriginal peoples throughout North America have petitioned, and spoken and struggled for their own self-government. Any lesser definintion or formula has resulted in widespread hardship, resentment and resistance.

4. A Territorial Charter

Any specific structure or mechanism will require some known standard against which to measure and judge the laws of the new territory which is to emerge in the Western Arctic.

All the examples on which we have drawn, thus far, have come from southern parts of this continent, or from Europe. They have reflected both the primary values of the place whence they came, and the issues current at the time they were formulated.

A territorial charter should identify those values which the people of the territory consider primary, and those issues arising out of those values currently and within living memory.

Such a Charter should have a much broader base than ordinary legislation. Often Charters are approved or formulated by a constituent assembly representing all vitally concerned parties. This Constitutional Development Committee, with its conferences in which numerous other groups participate with the Members of the Legislative Assembly is, itself, a miniature constituent assembly.

A Charter might well amount to a treaty between the original people of the territory and the settler people, however each may presently be organized. A treaty in that it would be a common statement of both people's common ground, and a joint statement

endorsing one another's primary needs and fundamental values.

A treaty-charter could certainly be incorporated into a territorial or a provincial constitution in a way that would have much of the same overriding effect that the Charter of Rights has federally. It would not compete with the federal Charter of Rights. Although it might include many of the same provisions, if it included the aboriginal rights of the original peoples of the Western Arctic and the concerns of northerners, generally it would go further.

The question would then become what sort of body could most usefully and effectively see that not only the letter, but the spirit and intent of this Treaty-Charter were upheld.

5. The Range of Options

For each of the options, we shall set out a brief description of how they typically function, with examples, and will then evaluate their applicability to the task of protecting aboriginal rights.

(a) Ombudsman

The concept of an Ombuds originated in Sweden as early as 1807 and has become a common feature of democratic, parliamentary systems, especially in the post-war era when bureaucracies expanded dramatically and a concern for basic rights became more pronounced. (One Swedish-speaking friend has suggested that there

is no merit to maintaining the suffix "man" which would perpetuate, in Swedish, the same sexist connotation that it carries in English. She also advises that there is no value in replacing it with the suffix "person" since the investigative function is sufficiently indicated by the term Ombuds.)

The function of the office is to investigate complaints from citizens about administrative actions, including inactions; and, thereby, to maintain public confidence in the administration of law by providing citizens with an additional means of seeking redress for administrative injustices.

The primary role of an ombuds office is to "seek the truth" and to advocate. It can conciliate. But few have any power to reverse a decision. Very often, they provide annual and also special reports to the legislature and, thereby, have some opportunity for whistle blowing.

The basic pattern of selection is appointment by the Governor-in-Council for a term of anywhere from four to ten years, sometimes with the nomination being subject to ratification by the legislature.

The mandate is to receive and investigate complaints about official actions by specific public authorities. The exact scope of the mandate varies but there is almost always some code, or sta-

tute or regulation which establishes those complaints which will be actionable. Some provinces and the federal government have several ombuds offices, each of which deal with different areas under different statutes.

For instance, as recently as May 31, 1983, the first Access to Information Officer was ratified under the new Access to Information Act. And on the same day a new Privacy Commissioner was ratified under the Privacy Act. It is important to note that it would not be enough to have a complaint about bureaucratic bungling. A citizen would have to have a grievance which falls within the scope of these offices as they are set out under these acts.

Ombuds offices can initiate investigations on their own initiative, but they generally do so when they have a sense that there is a general problem which is not going to be demonstrated through the investigation of a particular case or a series of cases.

The findings of an ombuds office are strictly advisory. Some have extensive powers of investigation, often powers equal to those a judge would have chairing a royal commission, that is, a power of subpoena. Some ombuds offices have the power to initiate a court action on behalf of a complainant.

While the office may offer potential for controlling a burgeoning bureaucracy, and clearly has much merit within the scope of the task for which it was intended, it does not meet the criteria established in the research proposal:

(a) An ombuds office acts only after a complaint has been received; that is appropriate to an office which is responsible for overseeing the implementation of a piece of legislation which identifies behaviours which are to be discouraged;

(b) The ombuds office reacts to complaints of an administrative nature, not to undesirable or unhealthy government policies; the goal implicit in the question with which we have been asked to deal is to prevent the enactment of legislation infringing aboriginal rights: this is clearly a task that is beyond an ombuds office.

(c) Because ombuds offices respond to administrative complaints, they have been used to focus attention on individuals who have been abused; there is no precedent for using such an office to protect collective rights, or indeed, for monitoring cross-cultural issues in general.

(d) The limits of the ombuds office seem to stop at notifying the legislature of a finding. A government willing to brazen out a criticism until the storm blows over quickly exhausts any hope of remedy in the aggrieved party.

(e) Ombuds offices depend on annual appropriations for the funding to maintain their support staff; their investigative role requires large support staffs, but they are at the mercy of the government for the maintenance of their staff.

(b) Human Rights Commissions

A human rights commission is, in a sense, a specialized ombuds office which is responsible for enforcing a code prohibiting discrimination on the basis of race, creed, colour, national origin, and sometimes sex or even sexual orientation.

One result is that very often such commissions will have eminent spokespersons (hereafter known as speakers) from the major minority communities within the province or state.

Although the Canadian Human Rights Commission has become well known across Canada in recent years, and has jurisdiction in the Northwest Territories, it is the youngest of the human rights commissions in Canada, probably because property and civil rights are provincial matters south of 60.

Like ombuds offices, human rights commissions have wide investigative powers. Unlike ombuds offices they have the authority to award damages. The classic models in Canada would be the Ontario and Saskatchewan commissions. They will attempt to arbitrate and conciliate between a complainant and defendant, typically an employee and employer or a landlord and a prospective tenant. But should the landlord or the employer refuse to conciliate, they can bring the action to court.

These commissions are willing to receive what are called "informal complaints" that is, complaints related to behaviour in the general ballpark of their mandate but in which it does not appear that the code has actually been violated. Only if there is a great deal of good will on the part of the landlord-employer defendant can these informal complaints have effect. This is often the case when a middle management person has behaved offensively and an effective conciliator gets through to the president of a large firm who would rather compensate for the misbehaviour of his underling than be seen to endorse bigotry. The ability of the Human Rights Commission model may be summed up as follows:

1. The human rights commission has more extensive powers than the ombuds office as far as enforcement is concerned, but its areas of enforcement are restricted to violations of the statutory human rights code; like the ombuds office, this fails to meet the preventive criterion;
2. The human rights commission is an agent of current policy. Indeed, the Ontario code declares that "it is public policy" to prohibit discrimination. Offenders, and others who wish to do so, are invited to display a decorative copy of the code with their endorsement. So far as the code which the commission enforces is current policy, it is subject to repeal or amendment like any other statute.
3. Human rights in the sense of racial discrimination is generally an offense committed by a person, or a company (which is legally a person) against another person. The state enters

into the scene as an enforcer, arbitrator or conciliator. The interest of the state lies in enforcing its laws. Historically, the major complaints of abuse of aboriginal rights have been against legislatures or against the executive arm of the government which, under our system, answers to the legislature and is subject to its control.

For all these reasons the human rights commission does not appear to be model, given the criteria set out.

(c) A Standing Committee of the Legislative Assembly

A standing committee of a legislature is any committee which gets its basic mandate from the permanent rules or standing orders of the legislature. One federal parliamentary committee is created by statute rather than by the standing orders. In either case, the standing feature is its permanent status.

Like any other legislative committee it is made up of Members of the legislative Assembly. Assemblies which have political parties generally distribute the memberships on the committees in the same ratio as the party standing in the house.

Standing committees typically examine legislation and will also sometimes receive special references from the house. Assemblies which follow the convention of three readings of a proposed law

will usually refer a bill to committee after second reading. This means that the committee can entertain only those amendments which do not change the principle of the bill. Reference before second reading means that the House has not yet given approval in principle, and therefore, amendments affecting the principle may be in order. Special references usually mean an order of the house inviting the committee to study a broad subject area and make broad policy recommendations, much like the work of a special committee.

Federally, Senate committees have had much more independence from the government of the day than have Commons committees. Commons committees have been especially limited since their budgets are set by the Commissioners of Internal Economy of the House of Commons, all of whom are cabinet ministers. The Senate, in contrast, has a Committee on Internal Economy which includes the Leaders from both sides but is made up, like other committees, in proportion to party ratios.

A Standing Committee on Aboriginal Rights could be created by statute, or even by Charter with the authority to examine all legislation for its impact on aboriginal rights. This mandate could specifically include a study of delegated legislation, that is, regulations, guidelines, circulars issued by cabinet or by individual ministers pursuant to an ordinance, It could judge these proposals in light of Charter provisions.

This would serve to inform at least a good cross section of the M.L.A.'s, who would, in turn, have access to the rest of their colleagues. It does meet the criterion of preventive action, but only if it is capable of real action.

With one exception, no parliamentary or legislative committee has ever had more than the power to report its findings to the House from which it springs. A recent change in federal Commons procedure requires the government to reply within 120 days to a report of a Committee. Its reply can be any written or oral statement the government chooses to make.

A handful of federal statutes provide for a power of disallowance of regulations. Even if these were automatically referred to committee, which they are not at present, the disallowance would occur at the time the Committee report is adopted by a vote of the House.

All Committee reports take on whatever effect they are capable of having, including the amendment of a proposed law, that is, a bill, upon adoption by the House. The Committee is, then, in effect, a microcosm of the House mandated to do the detailed work on behalf of the House as a whole, and subject to its approval. It has greater access to the House than an outside commission. But it has no power in its own name.

One positive aspect of a committee as a possible mechanism for protecting aboriginal rights is that it would be part of the legislative process itself. Thus, unlike the previous models discussed, it would have the ability to examine and comment upon legislation before it is passed. In many respects this would be its chief advantage.

Its chief disadvantage, on the other hand, would lie in the fact that it could never enforce its decisions. Committees are, by definition, creatures of the Legislative Assembly, their purpose being to do the detailed work the Assembly as a whole would be too busy or would find it too cumbersome to undertake. The assumption behind this is that the Legislative Assembly must be fully informed of the significance of any legislative action; it becomes the task of the committee to do this kind of detailed examination and to make recommendations on the basis of its study. The fact that a committee could only make recommendations to the Assembly would impose the most severe limitations on its effectiveness as a mechanism for protecting aboriginal rights.

Within the context of these most fundamental restrictions, however, ways could still be found to bolster such a committee's effectiveness. One step would be to provide a guarantee that would remain a permanent part of the legislative process. When we look abroad for precedents we see that the detailed structures which we have with the "fundamental principles of democracy" are not, in fact, carved in stone.

In the case of Fiji which is a member of the Commonwealth and has a bi-cameral system based roughly on the Westminster model, the upper chamber has a committee made up exclusively of native Fijian senators, 75% of whom must approve any legislation affecting native Fijians' communally owned land or customary laws before it can become the law. In other words, it is a committee, made up exclusively of members from one particular ethnic group, with the powers to impose its will on the more broadly representative Assembly.

If a Standing Committee on Aboriginal Rights were to be effective, it would have to have a most extraordinary and unprecedented power, permitting it to block legislation which might be approved by a majority of the Members of the House of which the Committee was an integral part. We are not sure that such a Committee could maintain credibility with the House, the electorate, or itself. There are several technical problems which conceivably could be overcome, such as guarantees of adequate staff, and authority to hold hearings on its own initiative and without the legislature sitting at the time.

A more fundamental question would be the membership of the Committee. Would it consist only of Dene and Metis and Inuvialuit M.L.A.'s? If the Committee were regionally representative of those two (or three) groups, would that then effectively conscript all the aboriginal M.L.A.'s, and consequently, either

place an extra committee membership on them, or prevent them from sitting effectively on another committee?

We assume that bills would normally still go to the appropriate policy committees, that is, the standing committee with the responsibility for the matter with which that bill deals (transportation, education, etc.) so that each bill might be considered by some other committee in depth for its general policy content, while also being considered for its implications for aboriginal rights by the aboriginal rights committee.

The elements of a similar type of mechanism can even be found within a Canadian context. While the Canadian government has long professed its opposition to any kind of government structures based on race, it was in fact a party to the James Bay and Northern Quebec Agreement which allows for just that possibility, at least within certain narrow fields of jurisdiction. The agreement established the Kativik Regional Government (KRG) - a form of public government made up of elected representatives from all the region's communities. It is a "public" government in as much as race is not a prerequisite for participating in the democratic process. In certain specified areas, however (i.e. relating to the management of harvesting by non-natives) the Agreement stipulates that "the regional government shall make regulations solely upon the recommendation of a committee composed only of Inuit. Such recommendations shall be binding on the regional government"(24.5.4)

As a precedent, the Kativik example is useful to the extent that it shows that governments in Canada have already veered from the traditional ideology regarding a) the power of committees over Assemblies which appoint them, and b) the racial make-up of political bodies. Its usefulness as a precedent is reduced by two factors:

1) For a variety of practical reasons, the Kativik committee has never been put into effect, thus denying us a working example from within Canada;
2) the scope within which the committee could exercise its power is by definition extremely narrow. If a comparable committee was going to be set up in a new government structure in the Western Arctic, its powers would have to be broadened to include all aspects of aboriginal rights, especially lands and cultural matters along the lines of the Fijian example.

(d) Judicial Review

Judicial review is a consideration of the validity of any legislative proposal, including delegated legislation, by a court. There are several systems of judicial review but they can be summarized into two basic forms, with some standard variations on each: reference cases and litigation

Reference cases are cases in which some major body, in Canada, the Governor General in Council or the Lieutenant Governor in

Council of a province asks the highest court available to consider the validity of legislation.

Validity within a federal system in which there is a federal charter, and perhaps a provincial or territorial charter can be judged against three questions: (1) Is the subject a provincial or federal matter, or within the competence of the territorial legislature. (This says nothing about the merits of the bill.) (2) Does the bill offend any section of the federal Charter of Rights? (3) Does the bill offend any section of the territorial Charter should one be adopted?

Reference cases in the provinces of Canada are presently referred to the Supreme Court of the province, all or most of the appeal judges sitting. Only the Lieutenant Governor in Council, that is, the cabinet, can make such a reference. Federal references are made to the Supreme Court of Canada. Provincial references cases are subject to appeal to the Supreme Court of Canada. Federal references are a one-shot deal.

(ii) Litigation

Any legislative measure, whether or not it has been the subject of a reference case, but especially when it has not, can still be argued as to its validity, after it has passed, by a citizen. This commonly happens when a citizen is charged under an act which he finds offensive, even if its offensive nature impressed itself

on him only after the charge was laid. Citizens can also seek a declaratory order of the court, that is, a declaration that "a law" is invalid, if they have a legitimate interest in its provisions. This is particularly useful when it is not in the nature of the particular offensive law to result in a charge being laid. Not all laws are for the purpose of declaring a certain action to be prohibited.

(iii) Meeting the Criteria

Judicial review could meet the requirement of being preventive rather than taking effect after a bill was passed under certain conditions. If a legislative chamber could refer a proposed law to the court in the same manner as the Governor-in-Council can now do, and if the chamber were prepared to delay further proceedings on the proposal pending the decision of the court, the matter would have been dealt with preventively.

Such a reference would naturally require a majority of the Assembly but it could also be done by some lesser number than an absolute majority.

It is customary in a reference case for other interested parties to intervene. One of the criteria is that the cost be borne by the government. Provision would have to be made for payment of the intervenant's legal fees as a constitutional right. Which intervenants would have this right? (This option seems suspect under the financial criterion.)

(iv) Who Makes the Reference

Provision could be made for reference by the Standing Committee on Aboriginal Rights. This need not fail any of the criteria but would have another problem. In the case of James Bay, the fact that the federal government did not intervene on an issue which involved the invasion of federal powers by a province is widely believed to have influenced the court's willingness to overrule the lower court which had earlier ruled in favour of the Cree and Inuit. We would be concerned that a reference could be made by either the Governor-in-Council or the Speaker on Order of the House.

(v) Special Constitutional Courts

France and Germany each have special constitutional courts. In Germany, the legislative chambers can make reference to the constitutional court. So the idea that a legislative chamber should make a reference, and not only the Governor-in-Council, is not without precedent.

However, a separate constitutional court does not seem workable within the Canadian system. Canada has always had a unitary court system even though we have a federal legislative system and a federal executive system. In the provinces, the higher courts are established by the province but the judges are named by the federal government. The Constitution Act, 1867, requires that judges be members of the bar of that province at the time of their appoint-

ment. A separate constitutional court would be truly unprecedented, though, once the Western Arctic became a province, not unconstitutional. Unless it had aboriginal members who were not lawyers, there would seem to be no advantage to such an unprecedented move. And, if it did have such members, their decisions would still be subject to appeal to the Supreme Court of Canada.

(vi) The Limits of Judicial Review

There is, in addition, another more subtle problem. No Canadian court has ever directed a legislature to spend money or to make any other specific legislative provision. The furthest the courts have gone is to strike down a measure which is offensive.

If it is to be a function of this review body to ensure that any legislative proposal is consistent with the general well-being of the aboriginal peoples, as outlined in a treaty-charter, then the review body should be able to make positive suggestions even though these would require approval of the legislative assembly.

This distinction between the Canadian and American judicial tradition needs to be stressed because we are very often aware of some of the more exciting developments in judicial intervention in the United States and may well fail to appreciate that these interventions are simply not part of Canadian practice.

When Washington State refused to honour Indian treaty rights to fish, the court provided detailed supervision of the allocation of fishing stations and fishing catches between the Indian tribes and the sports fishermen. This is similar to the detailed supervision provided by the resolution of the bussing issue in Boston, Massachusetts.

There is a suspicion that United States courts were led to develop their activist tradition because of the extreme unwillingness of legislatures to provide resolution to urgent and pressing social crises. Canadian legislatures have been more often damned with faint praise for their belated interventions. Owing to the combined effect of a lack of a Charter of Rights, until recently, and a reasonable hope on the part of a reticent court that the legislature would intervene in time to avert a crisis, we have thus far avoided the controversial practice of judicial activism.

A 1975 review of cases relating to the trust of the U.S. Secretary of the Interior found abundant cases compelling the executive to use their discretion in ways which were demonstrably beneficial

to the interests of the tribes for whom they acted as trustees. The same study, prepared by the Assistant Solicitor the Secretary of the Interior for the then Secretary, described the cases invalidating federal statutes as "sparse". Given the unwillingness of Canadian courts to compel legislatures to spend money, or to make alternative provisions when they do invalidate a law, judicial review might provide a sporadic negative constraint but it is unlikely to point a legislature in a direction which protects and enhances rights once the legislature is on another track.

Many of the matters concerning aboriginal rights which were reviewed in our historical discussion are matters on which a court would simply not be the best forum in which to resolve an issue. This is especially the case if a legislature has clearly and explicitly enacted a policy which detracts from aboriginal rights but does so in a way which is defensible under a Charter or Bill of Rights. Even with the activist tradition of the U.S. courts, there is much more reticence about striking down a federal statute than there is about invalidating an executive decision.

We can conceive of many aspects of aboriginal rights in which a court of any sort would simply not be the best forum in which to resolve an issue on which the legislature had pronounced in a manner offensive to the aboriginal people.

(e) A Second Chamber

Many parliamentary legislatures have two chambers. The chamber elected directly in the way familiar to the Members of the Legislative Assembly is commonly referred to as the Lower House and the other as the Upper House. This hierarchical language seems to add nothing to an understanding of their respective roles. We shall refer to the House that is not the Legislative Assembly as "a second chamber", "a senate", or "a council of elders".

Second chambers traditionally serve two functions. First, they provide a responsible voice for interests which are not sufficiently represented in the "representation by population" system characteristic of assemblies. These interests may be regional or cultural. Cultural may include small nation-groups within a federation, linguistic or religious groups. Secondly, they provide an instrument for the review of public policies before they become law.

It is important to note that although most second chambers are not elected by direct election on a rep-by-pop basis, any broad survey turns up a number of examples which are considered highly democratic. In short, many liberal democratic systems have recognized that rep-by-pop is a vital component in the democratic process but not the only one.

The United States Senate is elected directly. But there are two senators per state regardless of population. Further, they hold office for six years, three times as long as the House of Representatives, and half again as long as the four year term of president. This puts the Senate in a position where, if it chooses to resist pressures sufficiently, it can override the wishes of the House and of the President. Since only one third are elected at any two-year election, the whole body can not be overturned for its action on a given measure.

The Australian Senate is structured much like the United States Senate despite its being part of a parliamentary system. Governments have sometimes regarded defeat on money bills in the Senate as a vote of non-confidence, unlike similar defeats in the British House of Lords or the Senate of Canada. This has been somewhat problematic on the rare occasion on which it has occurred.

The German Bundesrat (Senate) has three members per state, with some states having a fourth or fifth senator. The Bundesrat members, however, are ministers of state governments who hold office as senators as part of their ministerial office. One member from each state spends full time in the federal capital, as plenipotentiary, while others come down as needed. The seats for each state can actually be rotated among the state ministers according to the business before the Bundesrat.

Since the state governments are elected in a democratic way it would be hard to call this method of selecting senators any less democratic than a direct election.

On matters affecting the rights of their states, or on cultural interests they exercise a full veto. On money bills or other strictly federal matters they have a suspensive veto which can be overridden by a 2/3 vote of the first house.

Fiji provides a somewhat exotic, but nonetheless useful example of a country which has tried to incorporate diverse cultural groups within a single public government system under the British parliamentary tradition. The population consists of 42% native Fijians, 50% East Indians and 8% Europeans. The Senate consists of 22 members: seven appointed by the Prime Minister, six by the Leader of the Opposition, one by residents of a particularly remote island, and <u>eight</u> by the Great Council of Fijian Chiefs. All are for a term of six years with a 50% renewal rate every three years. The Senate can exercise a suspensive veto over most legislation, and a complete veto over any legislation affecting the communally-owned lands of native Fijians (amounting to 80% of the country's total land mass). Even more precisely, this outright veto can be exercised by the native Fijian members of the Senate: the approval of six out of eight of them is required before laws affecting their lands and customs can be passed. In other words, the indigenous population has been guaranteed not only direct collective representation in the legislative process, but also an absolute veto over legislative measures directly affecting its interests.

Generally, a second chamber, in reviewing legislation already passed in the other place, repeats each of the steps taken in the primary house. A bill only becomes law when it is presented to the Commissioner, Lieutenant-Governor or other head of state with a statement that it has been approved by both Houses. If the second chamber does not have an absolute veto, then the bill must, as in Britain, simply wait for an extended period, or be passed again with a very large majority in the primary chamber, as in Germany.

For instance, if we follow the three-reading formula which is characteristic of the parliaments which have grown out of Westminister, then the same three readings are repeated in the second chamber. First reading represents an agreement to print the bill and debate it at a later time. Second reading approves the bill in principle, and more complex or controversial measures then go to committee for detailed study. The Committee reports. Third reading is the last chance to object and to propose amendments.

What is different is not the general procedure but the style of treatment. If the matter has been thoroughly considered in the first chamber, and does not present any problem with respect to the interests the second chamber represents, it will receive very speedy passage. If it has not received thorough consideration, or appears dubious to those interests, then it will receive more thorough scrutiny.

Money bills can usually only be introduced in the assembly. This is true even in the United States where cabinet secretaries do not sit in the Congress and the executive are quite separate from the legislative branch. In Britain and Canada, money bills may be introduced only by a minister tabling a letter from the Queen, Governor General or Lieutenant Governor. At least one bill in recent years was disqualified for lack of this letter.

Even with a suspensive veto the second chamber can still have a strong influence on budget matters if they affect the purposes for which that house exists. The last bill effectively defeated by the Senate of Canada was a Customs Tariff Amendment Bill which, among other things, proposed to abolish the Tariff Appeal Board, a court of record. The minority Government of 1961 argued that it was a money bill. But the majority Opposition argued that abolition of a court was a matter of rights. When the Commons refused the amendment, the Government lost a motion in the Senate vote which would have relented on the Senate's proposed amendment on this matter. The Senate had not interfered with the actual money provisions. But the lack of agreement between the two Houses on the final text led to the bill failing to pass.

The essence of a second chamber is that it participates directly in the law-making process. The cost of a second chamber is borne in the same manner as the cost of a first chamber. The burden of proof is upon the sponsor of a measure. The cost of witnesses

appearing before committees are typically borne by the chamber as part of the legislative process.

The method of selection is clearly the most troublesome question. We do not consider that a second chamber which represented only a part of the population would be in keeping with the spirit of dialogue which we have seen. Nor would it be in keeping with the spirit of a treaty-charter such as we have suggested. However it is finally structured, the Council of Elders (a translation for the Latin term, Senate) must appear to represent the whole population as far as any legislative body can do so.

At the same time, the Elders must be constituted along lines which do serve the purpose for which the body was created. It must be capable of articulating the aboriginal interests in a legislative proposal in a way which might not happen in the Assembly.

One possibility would be to divide the Western Arctic into a relatively few senatorial or conciliar districts, each of which would be represented by three Councillors, Elders or Senators. For instance, if there were seven districts including the five regions of the Dene, the City of Yellowknife, and the Inuvialuit, if they chose to join the Western Arctic, the second chamber would consist of no more than eighteen or twenty-one members.

There are four methods of selection, any one of which would be workable and democratic:

(1) direct election for a relatively long period, six or nine years, with elections occurring on a staggered basis, every two or three years, much like the American system;

(2) nomination by regional council, which would include representatives of all committees within the region, with the seats rotating among the members of the council during their tenure according to the subject matter, much like the German system;

(3) nomination by the regional council, which would include representatives of all communities within the region, for a relatively long period, six or nine years, with terms running for a staggered period, thus forming a blend of the two systems.

(4) election by each and every community in the Valley of one representative to the Senate, in much the same way that each state in the U.S. elects two senators despite wide variations in their respective populations. Since there are more communities in the Western Arctic with predominantly native populations, this could provide the mechanism for ensuring that aboriginal interests are given adequate representation, without offending any fundamental principles of democracy.

On the basis of the critera identified at the outset, it would appear that (3),a blended system may best serve the interests of the Western Arctic. First, it would allow the nomination of Elders who might not be members of the regional council.

Secondly, it would free the Council of Elders from partisan politics to the greatest possible degree while freeing the Assembly to gain the greatest advantage of a widespread Canadian practice. Thirdly, it would combine representation of regional interests with stability and continuity.

Either system of nomination by the regional councils supposes that such bodies would be created. The study of such bodies is well beyond the mandate of this study, and would have required more time than was available. Nonetheless, we note the discussion of such regional councils in the proceedings of earlier conferences.

The extent of the powers of a Senate or Elders' Council might be split along the German lines. On matters affecting issues within the treaty-charter, cultural concerns, or matters directly affecting the regional interests, the veto could be absolute. Proposals for the whole territory which did not affect the interests of the regions, as regions, and which did not affect aboriginal rights would be limited to a suspensive veto which could be overridden by a two-thirds majority of the Assembly.

The real value of a second chamber will not be measured by the number of proposals it defeats but by the skill with which the two Houses negotiate to bring about legislation which meets their respective interests.

To this end, they may each have committees of their own for most questions. For especially sensitive questions they may choose to have joint committees which would bring the same report back to both Houses.

Either House, as well as the Lieutenant Governor, should be able to refer any bill or regulation to the Court. But such a reference should not be a substitute for dealing with a bill on its merits. If ten senators or elders found that a bill offended their notion of aboriginal rights, it is not clear that two judges on a three judge panel would succeed in reassuring them. The real advantage to such a reference power would not be to resolve differences between the Houses so much as to resolve a difference of opinion within either House. "Would you believe that this does not offend the Charter if the court said so?" might be a strong bargaining chip during a debate.

The power to block legislation, permanently or temporarily, has several corollaries. Most important, a second chamber can amend a bill to cure its defect, and ask the first chamber to approve of its amendment. A simple motion approving of the amendment in the first chamber would be sufficient given that the whole matter has already had three readings previously. Secondly, if the second chamber identifies an issue on which the Ministers sitting in the other House have not proposed a bill, the Senate or Elders

might introduce a measure they felt was appropriate, do all that is necessary to pass it through their House and place it at the door of the other place. This would have the effect of putting very strong pressure on the Assembly. The Assembly may, then, still deal with the bill as it sees fit.

There are several precedents for a second chamber whose role includes the protection of rights of one sort or another, but particularly rights which very much resemble aboriginal rights.

Fiji is one example that has already been mentioned. It has a lower house which is elected at large in such a way as to ensure proportional representation for each cultural group. Eight of the twenty-two senators however, are elected exclusively by a Grand Council of Chiefs and have powers to veto any legislation which affects their rights.

The German Senate, which we have already discussed, represents states, each of which were once independent kingdoms in their own right. Each has a different dialect, a different culture, often different religious traditions. The people of each state certainly see themselves as the original people of their region. The demand for such a control over the central government came after a period when the domination of one state over the federal government, and it over the other states produced consequences which nobody wished to see repeated.

The Senate of Canada was intended to represent regional interests. Its failure to do so is widely acknowledged, most notably by its own members who have voted to establish a Joint Committee on Senate Reform while this study was being conducted. Very briefly, the fact that the party in government has usually been able to dominate the Senate by staying in office for long enough to name a majority of the Senators is, undoubtedly, a major cause of its weakness. It is interesting to note, however, that during many of the Senate Debates on Senate Reform over the past decade, numerous senators have suggested that they would be better off with a suspensive veto, at least on some matters, if it freed them up to use it, than to have an absolute veto which they were afraid to exercise.

If a Senate or a Council of Elders is to protect aboriginal rights, it may not be necessary that aboriginal people have an absolute control over it. But it will be necessary that the constitution of the Senate or Elders' Council not be subject to change without the consent of the people whose interests it is supposed to protect. When the federal government proposed to replace the Senate of Canada with another sort of second chamber, in 1978, the Governor in Council, under pressure from the Senate, referred the matter to the Supreme Court. The federal Parliament on its own initiative had, in the past, increased the Senate seats by providing for new provinces and territories. But the Court found that, while this

may have reduced the relative voting strength of a province, Parliament could not go so far as to abolish or directly reduce the representation of a province.

Conclusion

We have considered five options: an ombuds office; a human rights type of commission; a standing committee of the legislature; judicial review; a second chamber.

The ombuds office and the commission both fail to meet the criteria. A standing committee could deal with matters preventively but without real power. Judicial review would place demands on a court which go beyond the role of a court. Much of the success of a judicial review system would depend on the provisions made for reference cases. While other access to the courts, regarding a treaty-charter would be essential, it would not meet the preventive criterion, it would not put the onus on the proponents of a measure, and it would not put the financial burden on the government.

A second chamber is the one mechanism which clearly meets all the criteria. It could be designed so as to represent all the people of the Western Arctic while reflecting traditional aboriginal geographic lines. This might be done by making the five regions of the Dene, and the Inuvialuit six of the seven regions represented in the second chamber. Three members could be sent from each region to ensure diversity of thought, experience and skills.

Members could be elected directly for terms of six or nine years. Or they could be selected by their regional councils for the life of the council. Or they could be selected by their regional council for terms of six or nine years.

A second chamber would be charged with the responsibility of reviewing all legislation for its conformity with the spirit and intent of a treaty-charter including its provisions for aboriginal rights. Should these be offended, a bill could be vetoed. Should there be objection to a bill on other grounds there would be a suspensive veto only. The same body would also review delegated legislation, though the opportunity to do so should be available to both Houses.

A second chamber would be able to enter into negotiations with the other House, and with Ministers to find solutions which would be acceptable to all concerned. While the power to block legislation is the only real way to ensure that the interests it is meant to serve will be heard, it is a power which should be used only when all other efforts have failed.

A second chamber also has the distinct advantage of being a highly public body. If the legislature, as a whole, chooses to have ombuds offices and commissions which report to it the fruit of investigations they conduct largely behind closed doors, the re-

view of their work, like the review of all legislation, should certainly be conducted in the full light of a public scrutiny.

ABORIGINAL RIGHTS AND INTERNATIONAL LAW

Introduction

The Northwest Territories has a unique opportunity to design and to implement a system of government which at one and the same time will protect all of its inhabitants, native and non-native. While protecting the civil rights of all of its people, the government of the Northwest Territories can recognize the aboriginal rights of the indigenous population.

An examination of the laws of other nations should help to suggest some of the avenues available to accomplish the establishment of such a system.

Since the United States is both geographically and ethnically closest to Canada, a heavy emphasis is placed on American law. We should remember that we not only share a continent, but also have a common history with the United States. While the United States has a very highly developed system of law in regard to its native population, it is worth mentioning that the Royal Proclamation of 1763 applied to the whole of North America, since it preceded the American Revolution and separation from the Crown.

Most crucial to the examination of American law is the development of tribal sovereignty and the heavy emphasis, (especially since the Nixon administration of the early 1970's) on self-

determination for Indian peoples.[1]

The Nature of International Law

As a result of a League of Nations covenant in 1920, a Permanent Court of International Justice was established. It was dissolved in 1946. Following World War II, there was established an International World Court at the Hague. The Court is the judicial arm of the United Nations; article 93 of the U.N. Charter makes all U.N. members parties to the statute creating the Court.

The Court can only hear cases where both parties agree to the Court's jurisdiction. Therefore, although the Court can render advisory opinions, it has very limited power to adjudicate and no police power whatsoever.

International law then, is a body of law which is primarily comprised of custom. International law is what nations do among and between themselves and other nations.[2]

Therefore, "ex aequo et bono" as justice requires, becomes a matter of interpretation by each nation.

International Law and Aboriginal Rights

In this light, one can see that the question of aboriginal rights cannot be said to be answered in a particular body of

international law. Nations have responded to and continue to deal with this issue in various ways.

The following is a review of a Canadian government memorandum regarding the recognition and protection of Minority Rights in the Constitutions of other countries.[3]

Austria grants language rights to Slovene and Croate minorities who are granted the right to their own organizations, meetings, press, schools, administration and courts in their own language.

India has recognition of the right to use language and to establish schools and courts. Of particular interest is a provision setting aside seats in Parliament in proportion to their populations. There are special provisions with respect to Assan, a territory in which several indigenous tribes are located.

New Zealand has specific Maori seats in Parliament and Maori electoral districts. Four seats are reserved to the Maori population in the eighty-member House of Representatives.

Panama has Constitutional requirements for special protection and advancement of indigenous peoples including bilingual literacy programs in indigenous communities.[4]

Singapore stated Constitutional responsibility of the government to care for special interests of indigenous peoples.

Swaziland has Constitutional recognition of traditional Swazi lands, customs and cultures. Swazi National Council continues to advise government on Swazi law, custom, tradition, and culture.

Australia constitutionally (s. 25) recognizes race as a possible base for disqualification from voting. Also federal, provincial, and state legislatures can make laws affecting aboriginal peoples.

Belgium's language rights of Flemish and Walloons are extensive, but Germans are recognized only in a minor way.

Cyprus constitutionally provides for a Greek President and a Turkish Vice-President; for specific proportions of Greeks and Turks in Parliament, Cabinet, the Civil Service, and Judiciary. There are separate legislatures for the two communities and some restriction on office-holding for Greeks and Turks.

Finland's Laplanders are not provided for though both Swedish and Finnish-speaking Swedes have total language rights as well as "intellectual and economic" needs looked after.

Guatemala has a policy of assimilation "integration of indigenous peoples" that is stated at Article 110 of the Constitution.

South Africa has self-governing Bantu.

Aboriginal peoples have a relationship to international law in that they must eventually cope with the majority culture whose political and economic realities determine their fate.[5]

Most of the early court cases reflected the paternalistic attitude made famous in Cherokee Nation v. State of Georgia[6], where Chief Justice Marshall refers to "domestic dependent nations". In the Cayuga Indians Case[7], the British and American Claims Tribunal held that an Indian tribe is not a subject of international law and is a legal unit only insofar as the law of the country in which it lives recognizes it as such.[8]

A change in attitude is reflected in an Advisory Opinion on Western Sahara[9]. The International Court of Justice was asked for an interpretation of the concept of "terra nullus - a territory belonging to no one". The "case marks the first, albeit tentative step towards a less blinkered approach to the status of the aboriginal communities in international law..."[10] It follows that if "terra nullus" is a fiction, the original inhabitants continue to have title unless it has been extinguished. Very simply, the land did belong to someone, i.e. the indigenous population, when the "discoverers" arrived.

This decision also looks in the direction of a recognition of self-determination for native peoples. In the Report of International N.G.O. Conference on Discrimination Against Indigenous Populations in the Americas, 1977, there is stated the desire for recognition of "the right of indigenous peoples and nations to have authority over their own affairs."[11] Since modern International Law establishes that a nation is defined through

its own sovereignty, the principle of self-determination should express the freedom and the powers of the indigenous courts within their areas.

Various attempts have been made to set up systems in which native claims are adjudicated. "An Indian Claims Commission with decision-making powers operated in the United States from 1946 to 1978." "New Zealand established the Waitangi Tribunal in 1977 "inter alia" to make recommendations on claims" arising from the Treaty of Waitangi, 1840. A post was created in 1977 to deal with land claims in the Northern Territory of Australia.

In 1946, an Indian Claims Commission was established to "hear and determine" claims, committing it to adjudication, but not to mediation. Unfortunately, the Commission "has not functioned to the satisfaction of the Indians it was designed to aid."[12]

The Alaska Native Claims Settlement, 1971, was therefore handled in a different manner and a legislative resolution was sought.

The New Zealand Waitangi Tribunal has three members (two of which are appointed by the governor-general) which "inquire into and make recommendations upon" Maori claims that legislation or Crown conduct violate Maori rights since the Treaty of Waitangi, October, 1975. There appears to be a lack of faith by Maoris in the tribunal and it has been little used."[13]

In Australia, the Aboriginal Land Rights (Northern Territory) Act, 1976, provides for land grants based on traditional land use or occupation by the Crown, and for the administration of these lands by aboriginal groups. Unfortunately, the Act establishes the use of an adversarial process.[14]

In Israel, all legal issues of a domestic nature are heard in religious courts, functioning separately from the civil court system. Religious courts rule on all matters relating to marriage and divorce, adoption, inheritance and other matters deemed to be in the domestic sphere. Therefore, Moslems, Christians (several sects are recognized) and Jews can be heard by members of their own religious group for adjudication of family matters. Particularly where religious custom and tradition play a large role in the fair determination of such matters, this system is uniquely well-suited. In this way, the Israeli domestic courts resemble tribal courts in the United States.

Title Aspect of Aboriginal Rights

Among the issues involving aboriginal rights in international forums, the issue of aboriginal title is most essential. The United States has long asserted that aboriginal peoples' claims "to their ancestral lands...arises under established principles of international law. Aboriginal title, in other words, stems from immemorial possession *per se* and does not require a public

grant."[15]

Bennett then cites Lipan Apache Tribe et al v. the United States[16], where Justice Davis said "Indian title does not depend on sovereign recognition or affirmative acceptance for its survival. Once established in fact, it endures until extinguished or abandoned..."[17]

The 1957 Convention Concerning Integration of Indigenous Populations in Independent Countries[18] "requires as a matter of international obligation the acknowledgement of the rights of indigenous peoples over their ancestral lands."[19] "(S)imple justice demands that the law should acknowledge the rights of peoples who have occupied their land since time immemorial------ lands with which they have typically formed an irrevocable spiritual bond."[20]

Of course, such an assertion of moral right did not prevent the United States Supreme Court from denying a right of compensation for the appropriation of Indian lands held only by aboriginal title"[21].

Bennett further suggests that "international sovereignty and land tenure are separate concepts". He cites both the Purchase of Louisiana from Napoleon[22], and to the Indian Native Claims Settlement Act[23], in which native claims were settled for nine hundred and sixty-two million dollars ($962,000,000) for

a piece of land bought in 1867 from Russia for seven million pounds (7,000,000 pounds).[24]

In Australia, the leading case reviewed the history of aboriginal title in the United States, Africa, India, Canada, and New Zealand, and concluded in the one hundred and forty-eight page decision "that the doctrine of communal native title did not form and had never formed, part of the Law of Australia."[25]

The doctrine articulated by Blackstone in England was that aboriginal title was not part of the common law of England and could thus be ignored. This led the way to "a proposition of truly startling arrogance: that not only did the civilized nations acquire sovereignty by their "discovery" of lands already peopled by indigenous inhabitants but the right of those inhabitants to continue in possession of their ancestral homes must somehow receive executive or legislative recognition before it could be admitted to exist."[26,27]

New Zealand embraced the Blackstone Doctrine and in Hoani Te Heuheu Tukino v. Aotea District Maori Land Board said that aboriginal rights exist only to the extent acknowledged by the sovereign."[28]

In 1847, Judge Chapman asserted that native title can only be extinguished with the consent of the native occupiers."[29]

And in the longest trial in English legal history, the English Court of Chancery found that in spite of "grave breaches of government obligation to the Banabams, the court ruled that there had been no trust or fiduciary obligation".[30,30a]

Tribal Sovereignty

A learned article in the Harvard Law Review, reviews the judicial doctrine of tribal sovereign immunity in the United States and suggests that recent court decisions "may foreshadow future limitation of tribal immunity."[31] The Indian Reorganization Act of 1934[32] establishes tribal sovereign immunity. The Supreme Court has held that this immunity must be expressly waived and that the waiver cannot be implied.[33]

The Indian Self-Determination and Education Assistance Act (I.S.D.E.A.) "contrasts with previous federal government policy. Since 1970, "federal Indian policy has sought to encourage Indian self-determination and economic development."[34]

Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes[35] somewhat undermined Santa Clara and "opens the door to future intrusions into the workings of tribal governments."[36]

The Indian Civil Rights Act (I.C.R.A.), 1968, provided similar, but not identical individual rights as other individuals (see Appendix).

There may well be an erosion of tribal sovereignty in the limitation on tribal sovereign immunity. In Oliphant v. Suquamish Indian Tribe[37], the trend in Supreme Court, and by extension lower courts, as well, is to limit the sovereign powers of tribes, at least in criminal matters and further cites United States v. Wheeler[38].

Montana v. United States[39] may indicate a trend of the Supreme Court to move away from tribal sovereignty[40]. The Court held that the tribe no longer had title to the bed of the Big Horn River and could not therefore decide who should have the right to hunt and fish there.

Essentially this case is an abrogation of the most fundamental aboriginal rights. The tribe wished to prohibit non-members of the tribe from hunting and fishing on tribal lands. Rather than uphold the rights of the tribe, the court held that title was held by the State of Montana[41].

In United States law, Indian tribes are quasi-sovereign. Recent cases, such as United States v. Antelope[42], recognizes the concept that Indian tribes have inherent powers, and attributes of sovereignty. Congress, though, has "plenary and preemptive powers over Indian affairs"[43]. Strict scrutiny is the standard required where Congress makes a racially-based law.

Also, where an Indian treaty is abrogated by Congress, repeals a statute guaranteeing rights to a tribe, compensation is required.[44]

Conclusion

Because tribes in the United States have a quasi-sovereign status, they have a great deal of control over their own internal affairs. They are empowered by Congress to develop their resources, both human and land-based. There has been acknowledgement of their title in the land by the courts. They have been protected from suit by the doctrine of tribal immunity.

The first Reorganization Act has put an end to the allotment of Indian lands. The Indian Civil Rights Act, however, has become controversial since it is seen by some as a limitation on the powers of tribal government and thereby as a threat to Indian standards.[45]

In looking to the United States Indian law and policy, we recommend following the advice of the Solicitor that "government" agencies must "bend over backwards" to avoid infringing Indian rights."[46] This principle includes "both the preservation of a land and resource base for Indian", and the protection and nurturing of Indian tribal self-government."[47]

Returning to the Northwest Territories and remembering the task at hand, Chambers suggests that "Indian country becomes analogous to a territory prior to statehood"[48]. One is struck by the opportunity to incorporate this motion in a new plan for all of the peoples of the Northwest Territories.

Remembering that there is inherent limitation on all governments, self-determination is a goal which is both reasonable and attainable where the system is constructed with a view toward fairness.[49]

ENDNOTES

[1]Please note that no study of American Indian law would be complete without a thorough review of Felix Cohen, Handbook of Federal Indian Law, 1983. This book is on order but not yet available in Ottawa. Given the nature of the enormous changes in this area of the law since 1942, I have avoided the use of the first edition, 1942.

[2]The "World Court", International Court of Justice, Yearbook 1971-1972, at 1, 15, 16, 17, 36, 39-40, 41, 1972.

[3]December 20, 1977, I.A.N.

[4]Article 83.

[5]G. Bennett, Aboriginal Rights in International Law, 1978, p. 3

[6]30 U.S. (5 Pet) 1, 1831.

[7]6 R.I.A.A. 173 at 179, 1926.

[8]Bennett, p. 5.

[9]I.C.J. Rep. 1975, p. 6.

[10]Bennett, p. 6.

[11]At p. 17.

[12]Colvin, Legislative Process and the Resolution of Indian Claims, 1981, p. 21.

[13]Id, p. 22-23.

[14]Id., p. 24.

[15]Bennett, Aboriginal Rights in International Law, 1978, p. 30.

[16]180 Ct. Cl. 487, 491-492, (1967).

[17]Bennett, p. 30.

[18]Section 328 U.N.T.S. 247, 1957 Convention Concerning Integration of Indigenous Populations in Independent Countries, June 26, 1957.

[19]Buffalo Law Review, 617, 635.

[20]Bennett, Aboriginal Rights, p. 29.

[21]Tee-Hit-Ton Indians v. the United States, 348 U.S. 272, 1975; cited at fn. 72, 27 Buffalo Law Review 617, 632; G. Bennett, Aboriginal Title.

[22]For 15 million, while subsequently twenty times that amount was paid to "those Indians in the state who were willing to sell.

[23]43 U.S.C. Vol. 1601-1624, 1976.

[24]Id., p. 626.

[25]Milirrpum v. Nablaco Pty. Ltd., (1971) 17 F.L.R. 141 (Austl. Sup. Ct. N. Terr.) per Blackburn, J. (cited at 27 Buffalo Law Review 617, 627.)

[26]27 Buffalo Law Review 617, 629.

[27]By contrast, the United States has often invoked the doctrine of acquired rights, which "holds that a change of sovereignty cannot extinguish rights accrued under the old regime." (fn. 55, in 27 Buffalo Law Review 617, p. 628.)

[28]Id., p. 629.

[29]Fn. 68 at 630, Regina v. Symonds, (1847), N.Z.P.C., cas. 387.

[30]Tito v. Waddell, (1977) 2 W.L.R. 496 (Eng. Ch.).

[20a]"Compare with the approach in Te Teira Te Paea v. TeRoera Tareha, (1902) A.C. 56 (P.C.) (N.Z. Ct. App.) where an agreement between the Maoris and the Government of New Zealand (later incorporated into the Mahaka and Waikare District Act of 1870) provided that various Maori claimants, and were to be "held in trust in the manner provided or as hereinafter to be provided by the General Assembly for native lands held under trust." Agreement on Waikare-Mahaka District, June 13, 1870, New Zealand-Maoris, reprinted in id. at 58. Despite the words of trust, the Judicial Committee of the Privy Council held that in the circumstances

of the case a particular named Maori claimant took absolutely and free of any trusts. Id. at 72-73.

The most recent attempt by aborigines to enforce an equitable trust is Director of Aboriginal and Islanders Advancement Corp. v. Peinkinna, (1978) 1 A.C. -- 1978. There, some reserve aborigines sought a declaration that the Director had acted in breach of an alleged public charitable trust for the benefit of aborigines resident on the reserve, in that he had entered into a mining agreement with a bauxite company under which he was to receive a share of the profits accruing from the bauxite extracted from the reserve, and was to hold that share on behalf of all Queensland aborigines whether or not they lived on the reserve itself. Once again, however, the Privy Council rejected the contention that the Director was bound by any such charitable trust as the plaintiffs alleged.

[30b] 27 Buffalo Law Review 617, 634.

[31] 27 Buffalo Law Review 617, at p. 1059.

[32] 25 U.S.C., Subchapter V, Protection of Indians & Conservation of Resources, Section 461 ff.

[33] 27 Buffalo Law Review 617, at p. 1060, citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978).

[34] Fn. 24, at 1061.

[35] 623 F. 2d. 682 (10th Cir. 1980), cert. denied., 449 U.S. IIII8, (1981).

[36] 95 Harvard Law Review 1058, p. 1064.

[37] 435 U.S. 191 (1978).

[38] 435 U.S. 313, 316 (1978), fn. 49, p. 1065.

[39] 450 U.S. 544 (1981).

[40] As suggested earlier: cf. 95 Harvard Law Review article.

[41] For an interesting discussion of hunting rights v. wildlife protection, see 57 Washington Law Review 225 (1981) a discussion of United States v. Fryberg, 622 F. 2d. 1010 (9th Cir.),

cert. denied, 449 U.S. 1004 (1980). The note suggests that greater concern be given to the Indian where the hunting right does not involve a species more endangered than the native person himself.

[42]97 S.Ct. 1395, 1398 (1977).

[43]Tribe, L., American Constitutional Law, 1978, p. 1018.

[44]Fn. 39 at 1019, citing Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277-78 and m. 9 (1955).

[45]Jeanette Wolfley, Esq., May 24, 1983.

[46]Chambers, p. 8.

[47]Id., at III.

[48]Id., p. 31.

[49]Id., p. 85.

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APPENDIX

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the Legislature of the several States, pursuant to the Fifth Article of the original Constitution.

*(1791)

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II.

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital or otherwise imfamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

S 1302. Constitutional Rights

No Indian tribe in esercising powers of self-government shall---

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post fact law; or,

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(Pub.L. 90-284, Title II, S. 202, Apr. 11, 1968, 82 Stat. 77.)