- FIRST NATIONS CIRCLE ON THE CONSTITUTION -

TABLE OF CONTENTS

COMMUNITY KITS

"SHARING CANADA'S FUTURE"

- AN ANALYSIS FROM A FIRST NATIONS PERSPECTIVE -

- CONSTITUTIONAL SECRETARIAT

PROPOSALS

1. The government of Canada is committed to ensuring aboriginal participation in present constitutional deliberations.

   This commitment is rather vague. Is this a formal commitment to resurrect S.37? Is the aboriginal participation to be in the nature of negotiation or consultation? Equal participation?

   This is not the equal and full participation demanded by aboriginal peoples nor the "full and appropriate" participation promised by the Prime Minister during the meeting in August, 1991.

ANALYSIS OF THE PROPOSALS :

2. The government of Canada proposes:

   (A) To entrench a "general" "justiciable right" to aboriginal self-government "within canadian federation".

   (B) The right will be subject to the Canadian Charter of Rights and Freedoms.

   (C) Many federal and provincial laws of general application would apply to First Nations Governments.

   (D) The nature of the right to be described so as to facilitate interpretation.

   (E) To give time to the government of Canada, the governments of the provinces and the territories and the aboriginal people to come to a common understanding of the content of the right, the enforceability of which will be delayed for up to ten years.

   (F) The special joint committee is to examine the broad parameters of the right and jurisdictions to be exercised by aboriginal governments.

Analysis :

(A) To "entrench" a "general" "justiciable right" to aboriginal self-government "within Canadian federation".

1. The word "entrench" implies that s. 35 is an empty box in need of filling. Constitutional rights imply that they are complete. Rights are taken out of a constitution and put into functional, realizable form through legislation, not the reverse.

Entrenchment implies that the federal and provincial governments will recognize something new and not something pre-existing.

Definition is proposed as necessary because Parliament and the legislatures will limit any recognition of aboriginal jurisdiction.

The word "general" implies the right is no different than any other right. The word is certainly different from "inherent" which describes the freestanding nature and source of the right i.e. - time immemorial existence in what is now Canada.

The word "justiciable" simply means that the right can be reviewed and enforced by the courts. More importantly, a justiciable right to self-government implies that courts can create aboriginal jurisdiction if the political process fails. Can we leave a decision on self-government to the courts which do not reflect our values? Courts have been instrumentr of colonial rule and are unreliable as protectors of aboriginal interests because they are legalistic and represent the non-aboriginal political order.

(B) The right is to be subject to the Canadian Charter of Rights and Freedoms.

Subjecting the right to the Charter clearly goes against one of the primary tenets of aboriginal culture: collective rights are more important than individual rights. The Charter is aimed primarily at individual rights. This is why s. 25 was added to the Charter to protect aboriginal and treaty rights from erosion. Subjecting the right to self-government to the Charter may be a little more palatable if the proposals indicated that the Charter will be interpreted in view of the distinctiveness of aboriginal people as they do for Quebec.

It is now clear how these proposals affect what is now in s. 25 of the Charter. Will self-government right be shielded from erosion too or only general aboriginal and treaty rights?

(C) Many federal and provincial laws of general application would continue to apply.

Though the text of the proposals do not indicate, it is clear from the explanatory notes, that the right will be subject to laws of general application, both federal and provincial. This suggests that s. 88 of the Indian Act will be constitutionalized.

One of the biggest barriers to true self-government is the application of provincial laws. Section 91(24) of the Constitution Act, 1867 has been recognized in Sparrow in (1990) as a protective clause against provincial legislative incursion. But S. 88 of the Indian Act, permits the application of provincial law of general application to Indians. The Dick case held that all provincial laws that do not explicitly affect "Indians" but are general in scope are incorporated by reference by s. 88 and therefore apply to Indians. Indians, in other words, are legally surrounded. The only protection against provincial laws are the terms of any treaty which may be in force. This almost blanket application of provincial laws leaves very little scope for aboriginal jurisdiction. The practical reality of subjecting aboriginal self-government to the Charter and to federal and provincial laws of general application without qualification is a continuation of the Indian Act mentality of subordination and control.

(D) The nature of the right to be described so as to facilitate interpretation.

If the right was not subject to the Charter and laws of general application, and if the nature of the right was described as "inherent", then the establishment of guidelines for negotiation would be a good idea. However, the application of the Charter and laws of general application already imposes definitional limits on self-government.

(E) To give time to the government of Canada, the governments of the provinces and the territories and the aboriginal people to come to a common understanding of the content of the right, the enforceability of the right will be delayed for up ten years.

This not only endorses "definition" and "entrenchment" as discussed in (A) above, but clearly indicates provincial involvement. Politically, provinces have not proven themselves sympathetic to aboriginal and treaty rights, especially those involving around land and natural resources. It can be expected that in the definition process, the provinces will act to protect their interests.

The up to ten year time limitation seems rather arbitrary. However, this is not the main problem. Does the delay period mean that governments will entrench a clause to the effect "aboriginal people have the right to self-government.", then having entrenched the right, proceed with the process of defining the nature, scope and extent? Does this imply that the right to self government is separate and apart from s.35? If self-government is part of "treaty and aboriginal rights", then it would seem no entrenchment is required, just a clarification process.

What will be the status of community-based agreements that have been reached or in the process of being negotiated? Will they be constitutionalized? What amendment formula will be followed? Is aboriginal consent required?

If these community based agreements are constitutionalized, will they be separate and apart from, or will they become part of the proposed right to be entrenched? What if the entrenched right is broader in scope and more favourable than a community based agreement? Then what? Community based negotiations undermine the notion of nation-to-nation, government-to-government relationships as they are premised on delegation.

(E) The special joint committee will examine the broad parameters of the right and jurisdictions to be exercised by aboriginal governments.

The main issue here is how much examining of the parameters of the right of the special joint committee will pre-empt the FMC which are proposed?

3. The government of Canada proposes:

(A) to entrench a process to address matters not dealt with in the current constitutional deliberations;

(B) That the above entrenched process to be also used to monitor progress made in negotiations of self-government agreements.

ANALYSIS OF :

(A) to entrench a process to address matters not dealt with in the current constitutional deliberations;

This proposed entrenchment is ambiguous. Is it subject to the ten year limitation? The proposal implies that the government is only willing to entertain the issue of self-government and nothing else. If this is so, then this present constitutional round is rather narrow in scope, especially in view of the limitations already being placed on the right of self-government. The proposal is silent on issues relating to treaties and land claims.

(B) That the above entrenched process to be also used to monitor progress made in negotiations of self-government agreements.

This part of the proposed entrenched process is vague, monitoring suggests frequent meetings, but on the other hand, how many FMC's can you have in ten years?

4. The government of Canada proposes a representation of aboriginal people in a reformed Senate.

Analysis

It is interesting that there is a willingness to give representation in a reformed Senate, but no mention is made of representation in Parliament (as per the Marchand/Blondin initiative). The proposed reformed Senate, will be a forum for regional interests (provincial interests). Will aboriginal people be part of the Senate as governments? Guaranteed seats will provide a forum for aboriginal issues, but on the other hand, they may guarantee a permanent opposition status.

5. The Government of Canada proposes a "Canada Clause" to define Canadians. This clause will include a clause recognizing that aboriginal people were "historically self-governing" and that their rights are recognized within Canada.

Analysis

The use of the past tense is a good indicator of government thinking on the issue of self-government. It recognizes the fact that the First Nations were historically self-governing but is silent as to current status. The past tense suggests that somehow aboriginal self-government rights have disappeared, been eroded or surrendered. The truth is that the right has been suppressed. Self-government, like aboriginal title, comes from a source independent of any Canadian government -"time immemorial existence in what is now called Canada". Its source is not from the Crown or any legal instrument. One can argue that even under Canadian law the right continues. The Sparrow decision of 1990 states that "regulation" does not amount to "extinguishment". The Indian Act is an administrative act. In other words, it is regulatory in nature. If the Indian Act is a regulation of the right to self-government, then under Canadian law, the right continues : it has never been surrendered or extinguished. In fact, it has been recognized in the treaty process.

Conclusion

Historically, the relationship between the First Nations and the Crown has always been through what can be called "treaty federalism". Treaty federalism is another way of saying "sovereignty-association" or sovereigns come together in mutual interest and support. This sovereignty-association can take the form of a treaty of protection, where a weaker nation puts itself under the protection of a stronger nation. Protection by a stronger

nation does not eliminate the sovereignty of the weaker nation. The American courts have called this status of the First Nations that of "domestic dependent nations".

OTHER PROPOSALS OF IMPORTANCE FOR FIRST NATIONS

1. Entrenchment of Property Right

Entrenchment of property rights will have definite implications for land claims. Third party interests will loom large in areas where lands have been titled out to individuals and corporations. Or, for that matter, where any vested interest in land is with any individual. If individuals have vested interests in lands that are the subject of a land claim, the individuals' interest now will be constitutionally protected. This means that land claims will be that much harder to settle. It will also make the process more expensive and slow. Entrenchment of property rights may also require that only monetary settlement are made as return of lands may be unconstitutional. Because of third party interest, no land can actually be returned.

Property rights generally imply that the proprietor will enjoy free and unencumbered use of their lands. Entrenchment of property rights will make the enforcement of environmental legislation harder for governments.

It is interesting to note that the government is not subjecting the property right to definition prior to entrenchment as they are doing in the case of aboriginal self-government. The government is willing to entrench the property right without definition no matter the implications.

Many commentators suggest property rights have been added as a trade-off to the Social Charter which Ontario is promoting: both may be dropped in latter discussion.

2. Recognition of Quebec as a Distinct Society

Recognition of Quebec as a distinct society will be accomplished through an amendment of the Charter and inclusion in the "Canada Clause". The Charter will be amended to be interpreted in view of Quebec's distinctiveness, which is based on french language, culture, and civil law tradition. First Nations can, without much argument, satisfy those criteria in their claim for distinctiveness.

Indeed, we can elaborate on the concept of an inherent right to self-government by suggesting that it means protection for:

- aboriginal languages
- aboriginal culture
- aboriginal legal and political traditions

Same detail as "distinct society" definition.

In the Canada Clause, it is provided that Quebec has responsibility to promote and preserve its distinctiveness. The recognition of this responsibility can be used by Quebec to justify, for example, extra funding for language, law and culture. There will be no similar recognition for First Nations, again, pointing to a double standard.

The recognition of Quebec as a distinct society can be very detrimental to First Nations within Quebec. It does not take much to conjure numerous possibilities of how this recognition can be used to the detriment of First Nations, from land claims to hydroelectric developments to language programs to education and even military defence (i.e., Quebec must purchase tanks to defend its distinctiveness against the First Nations).

3. Appointment of Judges to the Supreme Court

The participation of the provinces in appointment of Supreme Court judges can be detrimental to First Nations. Provincial interests are usually at odds with First Nations interests. The provinces will, no doubt, push for candidates who favour the provinces as opposed to federal interests. There are no provisions on aboriginal appointments, even though three of the Supreme Court judges come from Quebec to protect civil law traditions.

4. Amending formula

It is suggested that Canada is willing to consider again the Meech Lake formula which requires unanimous agreement as per pre-patriation days. If all First Nations' rights were recognized and entrenched, then the formula requiring unanimous agreement may be useful to protect against change. But while first Nations are pushing for full recognition of their rights, the 7/50 formula may be more useful.

5. Broadening of ss.121 - Common Market Clause and Management of Economic Union

The main issue here is, First Nations' participation. There is no mention of First Nations in these proposals. The international boundary has been the main barrier for First Nations: What of the JAY Treaty? Will reserves be independent economic zones or will they be subsumed under the provinces?

6. Training

Canada proposes to amend s. 92 so as to give the province exclusive jurisdiction over labour market training. Education and training are interrelated. Giving exclusive jurisdiction to provinces means that aboriginal people will be caught between the two governments when it comes to education and training.

7. Residual Power and Legislative Delegation

The government proposes to give residual powers and to constitutionalize legislative delegation. This means all unspecified powers now will belong to the provinces. In spite of the fact the federal government indicates in the proposals that they will retain jurisdiction over aboriginal affairs, its jurisdiction will be seriously affected by legislative delegation and the transfer of residual powers to the provinces. In other words, the S.88 jurisdictional hassles will continue.

8. Council of the Federation

The main issue here is failure to include the participation and representation of First Nations on the Council which will be an intergovernmental coordinating agency. This is particularly worrisome because the Council will have responsibilities for fiscal arrangements and transfer-areas of critical importance for aboriginal governments.

National Indian Brotherhood

ASSEMBLY OF FIRST NATIONS

HEAD OFFICE:

TERRITORY OF AKWESASNE, HAMILTON'S ISLAND
SUMMERSTOWN, ONTARIO K0C 2E0
TEL.: (613) 931-1012 FAX: (613) 931-2438

FIRST NATIONS AND THE CONSTITUTION:

DISCUSSION PAPER

Assembly of First Nations
First Nations Circle on the Constitution

November 21, 1991

BRANCH OFFICE:

55 MURRAY ST., 5TH FLOOR, OTTAWA, ONTARIO K1N 5M3 TEL.: (613) 236-0673 FAX: (613) 238-5780

Table of Contents

NATIONAL CHIEF'S MESSAGE

Elders, First Nations Citizens, Chiefs, and Canadians;

I was given a mandate at the 1991 Annual Assembly of the Assembly of First Nations to convene a Constitutional Circle of Chiefs, so that we could discuss our constitutional strategy and the changes needed to reflect a First Nations vision in the Canadian constitution. Our guiding commitment is the preservation and flourishing of our societies for future generations on our own terms.

The Constitutional Circle of Chiefs met at Morley, Alberta, in July, 1991. At that gathering we decided to develop a constitutional position only after direct consultation with First Nations citizens. We committed ourselves to a process whereby we could hear the voices of individual First Nations citizens, Chiefs, off-reserve members of our communities, women, Elders, our youth, and non-aboriginal people who are concerned about justice for the First Nations in Canada. Only after such consultations do we believe a constitutional position can be advanced to the Canadian public and government.

The Assembly of First Nations has formed a First Nations Constitutional Circle, or commission, composed of eight (8) respected and committed First Nations citizens, who will travel across Canada, seeking your direction and insight on our constitutional position. The members of our circle are:

Konrad Sioui, Quebec
Sam Bull, Alberta
Sharon McGivor, British Columbia
Rosie Mosquito, Ontario
Steven Augustine, New Brunswick
Frank T'seleie, Northwest Territories
Frank Calder, British Columbia
Loretta Kocsis, Manitoba

I invite you to share your visions, ideas, and views of constitutional change and of the relations between the First Nations with the Federal government.

In addition to this travelling Circle, we will be holding four constituent assemblies specifically with groups of our citizens whose voices must be heard but who are often overlooked in developing national policy. The four special assemblies will be for Elders, youth, women and off-reserve First Nations people. The women and off-reserve people will organize their own meetings, with our support, in order to allow the First Nations Constitutional Circle to hear their voices. The Assembly will organize the Elders and youth assemblies, working extensively with organizations which now exist to insure their concerns and ideas are recorded.

We hope to carry out a consultation process in which every First Nations citizen will be included and no person or group excluded. This is our vision of consultation. To be strong when we come to present our constitutional positions, we must hear your voices. Our strength comes from you.

Our struggle, in terms of Constitutional change in Canada, is not just to rebuild our societies, which have been attacked at every point. This is certainly central to our agenda. But we must do more than this. We have to alter the fundamental thinking of the legal and political systems of this country so that it reflects and includes our voices. We cannot continue to be outsiders in our own homelands. If we fail to accomplish this task during the constitutional process, we will have two alternatives. One is to continue to allow another society to dominate our societies. The second is for us to do what Quebec appears to be doing and seek a path that is independent of Canadian society. I believe neither is the best route for us: we can be part of Canada. This is our homeland, and the Creator put us here with the responsibility for it. I, like you, do not want our land to be divided up by any province or government. We must find common pathways toward fulfilling our responsibilities to the land. We must ensure that our children and grandchildren can also fulfil their responsibilities to the Creator on their homeland, with a positive self-image and a knowledge of their importance to Canada. We are distinct peoples with inherent collective rights and freedoms. Our duty is to guarantee our survival as distinct people, which can only be secured by our full enjoyment of our treaty and aboriginal rights.

Ovide Mercredi
National Chief

I. INTRODUCTION

This booklet has been prepared for the First Nations Circle on the Constitution to provide background information on First Nations' relations with Canada. It reviews what the constitution now says about aboriginal and treaty rights, the past exclusion of the First Nations from the Canadian constitution, and the choices we face for the future. Aboriginal rights, treaty rights, self-government, provincial separation, and land claims are all canvassed below.

It is important to emphasize that this booklet is for discussion purposes only. It is meant to start debate on the constitution and to raise issues for you to consider in preparing your submissions to the Circle which will use your contributions to develop a policy statement.

We need your voices in order to develop a position that truly reflects the First Nations' vision of the future. Our process is open and informal. It has been designed so everyone can have a voice, including off-reserve people, Elders, youth, and women. This is your opportunity to participate directly in the process. A list of questions that you might want to consider appears at the end of this paper.

II. HISTORY OF RELATIONS BETWEEN THE FIRST NATIONS AND CANADA

(i) Original understandings

From the first contact between Europeans and our peoples, our relationship with the visitors has been that of equals. In fact, when they first set foot in our land the European newcomers depended on the First Nations for food, shelter, and protection. We have always seen our relationship with the newcomers as being that of equals, not inferiors. This is expressed in the very first treaties of Peace and Friendship, like those made between the Iroquois Confederacy and European powers in the 1600's.

Chiefs in the Iroquois Confederacy symbolized their relationship with the British in the Two-Row-Wampum Treaty of 1664. The belt of white and purple shell beads expressed the relationship as one between equals, peacefully coexisting on this land, Turtle Island. Two rows on the belt showed the great sailing ship of the newcomers and the canoes of the First peoples. The background is the river of life. The rows are separate; each side would steer its own course without interference from the other. Each side would continue to govern its own affairs independently, without interference from the other. This same concept is behind the later treaties between the First Nations and European sovereigns, including the British Crown.

The understanding that the First Nations were to be independent of and equal to the Europeans was also recognized in international

European treaties such as the Treaty of Utrecht (1713) and the Treaty of Paris (1763), which followed Britain's conquest of Quebec. After that conquest, a Royal Proclamation to all British colonies instructed colonial officials on how to relate to Indian Nations. The Proclamation explicitly recognized previous practice: Indian nations were not to be molested in their possession of their traditional territories, and our lands were not to be taken unless they were formally transferred to or purchased by the British Crown. The Proclamation recognized First Nations as the rightful occupants of the territory now called Canada and instructed colonial officials to respect the rights of First Nations peoples to govern themselves. The Royal Proclamation is part of the Canadian constitution.

Subsequent changes to this policy were made without our consent. As white settlement advanced in Canada and the desire for Indian lands increased, particularly after Confederation in 1867, the new federal government unilaterally assumed jurisdiction over Indians and Indian lands. Section 91 (24) of the British North America Act of 1867 gave the federal government authority over "Indians and lands reserved for Indians." The federal government began to extend its control over Indians through a policy aimed at assimilation. In 1869 the Enfranchisement Act was passed to lure First Nations citizens into giving up their special status and to give them Canadian-style property rights, thus encouraging their integration into the new Canada. In 1876, the federal government passed the first Indian Act, which established an entire system for controlling and assimilating the First Nations. This Act is still with us today. It has been used to control our lives practically since Confederation. It has been amended over the years and no longer offers "sober and industrious" Indians the option of Canadian citizenship, as it once did, although its constraints on First Nations government and citizens are wide.

(ii) The Indian Act

The legacy of the Indian Act continues to this day. Our families were divided by its sexual discrimination. We were sent to residential schools or enfranchised. We lost control over our lands. Spiritual practices like the potlatch and sundance and traditional governing structures like the Longhouse or Haudenosaunee of the Iroquois Confederacy were banned. The effects of the Indian Act have threatened our survival as peoples and have subordinated us to the newcomers to our lands. We are seen in Confederation as wards of the federal government.

The Indian Act insults the First Nations; it does not treat us as equals or independent peoples who can govern their own lives in their own lands. It does not respect our place as the first peoples of Canada. It treats us as inferiors to the Canadian government, as though we are children in need of supervision and control. Because of the Indian Act and its consequences, many of

our people have lost control of their lives. First Nations communities cannot determine their own destiny. We cannot provide proper health, education, and social services to our own communities because the Indian Act gives the ultimate authority for these matters to the federal government and the federal Minister of Indian and Northern Affairs. The system we live under according to the Indian Act does not reflect our traditions, nor does it allow First Nations governments to meet the needs of their citizens. Too much of our time is spent reporting to the Department of Indian Affairs and meeting the bureaucracy's needs; our peoples' needs come second. We can only deal with our social and economic problems by directly meeting the needs of people in our communities, not the needs of bureaucrats or government officials.

The Indian Act system does not conform with the spirit of the treaty process. The treaties we entered into, both before and after Confederation, were based on equality between the First Nations and the Crown. The Indian Act made us wards of the federal government and even denied us access to Canadian courts to enforce our treaty rights and to restore the treaty land promised to many of our people over a century ago. We will return to treaties later in this discussion.

(iii) The Constitutional Changes

In 1978 the Trudeau government announced that the constitution would be returned to Canada and that a made-in-Canada constitution would be developed, including a Charter of Rights and Freedoms. A reform package was prepared and the federal government took sole responsibility for making constitutional changes. Neither the provinces nor the First Nations were invited to participate in this process.

The constitution, as it was approached in 1978, was seen as an important statement of what a country is and of how power is to be shared among provinces and levels of government. Four years later, when the 1982 Constitution Act was proclaimed, it included several provisions on aboriginal rights. These were developed without the direct involvement of the First Nations, although they did seem to hold out some hope for recognition of our equality and independence. The key provisions read:

Section 35:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.
(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

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

Section 25:

The guarantee in this Charter [of Rights and Freedoms] of certain rights and freedoms shall not be construed to abrogate or derogate from any aboriginal, treaty or other nights or freedoms that pertain to the aboriginal peoples of Canada including:

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

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

Section 35 is seen as the key to progress in restoring our rights. It was dropped completely from the package in 1981 when some premiers objected to it, only to be later added at the last moment in 1982 with the word "existing" inserted. The meaning of section 35 was too vague in the government's view, and so between 1983 and 1987 consultations were held to define and elaborate on the section. Quebec did not participate in this process except as an observer.

This process involved a series of First Ministers' meetings (Prime Minister and Premiers) to discuss section 35 with representatives of the four main aboriginal organizations: the Assembly of First Nations, the Metis National Council, the Inuit Taparisat of Canada, and the Native Council of Canada. These discussions ended in 1987 without any further amendments or elaborations on what section 35 meant. The Assembly of First Nations vigorously advanced the view that aboriginal and treaty rights include the inherent right of the First Nations to self-government and pushed for land rights, a process for negotiating self-government, and the financing of First Nations government. The only agreement reached by the negotiations was on sexual equality, and there was no movement on self-government.

After discussion broke down in 1987, there was much frustration over the fact that the First Ministers of Canada could not accept the inherent right of the First Nations to govern themselves--particularly when this was simply a reflection of the history of Canada. When the first white settlers came, we were here, governing ourselves. We never gave up the right to govern ourselves; it was suppressed by the Indian Act. The Assembly of First Nations stated the view that inherent self-government was already recognized in section 35 without any specific amendment, self-government exists; the only question is how to implement it.

Some communities went to court, using section 35 to challenge the government's view of the First Nations as its wards, subject to

the Indian Act. In 1990, the Supreme Court of Canada decided its first case on section 35 and brought in a new era in the relationship between the First Nations and Canada. In R. v. Sparrow, the Court held that the Crown must behave in a manner that respects aboriginal and treaty rights, honours its obligations, and is not adversarial or hostile toward First Nations. The Court acknowledged that section 35 requires a new way of dealing with aboriginal peoples. Much was left undefined, and this case did not deal with self-government. The Court in fact stated that the Crown sovereignty over aboriginal peoples and lands has never been questioned.

Despite the Supreme Court's pronouncements in Sparrow, the post-1987 relations between the First Nations and the Crown have not been characterized by honour and respect. The conflict at Oka in the summer of 1990 marked a new low in our relations with the Crown, both provincial and federal. The Meech Lake Accord, developed shortly after the breakdown of the aboriginal discussion process in 1987, was a further insult to us. Meech Lake - ultimately defeated in Manitoba by the Assembly of Manitoba Chiefs and MLA Elijah Harper - aimed to satisfy Quebec's constitutional demands in Confederation. The Accord was developed without any consultation with the First Nations. It intended to recognize Quebec as distinct society without meeting the First Nations' demand for constitutional justice, a demand that goes back long before 1867. It became clear in the summer of 1990 that the waiting was over. Justice for First Nations is no longer last on the political national agenda. The people of Canada now put it at the top of the list.

In 1991 we face a new Constitutional reform process. The Assembly of First Nations would like to see the relationship between the First Nations and the Crown restored to one that reflects the commitments made in treaties and the Royal Proclamation of 1763. We have promoted a relationship with the Crown based on honour, respect and equality. We have called this self-government in the past; it means having the authority to meet the needs of our people without interference in our affairs. It would require something fundamentally different from the Indian Act, something expressly acknowledging our place as the first peoples in Canada, not as onlookers in the dispute between two "founding" nations.

III. SELF-GOVERNMENT

Our Creator, Mother Earth, put First Nations on this land to care for and live in harmony with all her creation. We cared for our earth, our brothers and sisters in the animal world, and each other. These responsibilities give us our inherent, continuing right to self-government. This right flows from our original occupation of this land from time immemorial.

Before Europeans came to this land, we lived in well-defined, distinct societies that survive - however battered - to this day. Each had everything that it needed to survive, including laws providing for harmonious living with each other within our society. In many cases, our law was and is very complex, and is often based on our clans, houses, or kinship and family relationships. We governed ourselves.

Self-government means having the authority to control our own lives and manage our day-to-day affairs without having to ask permission to do so. It includes the authority to make and implement plans to meet the needs of the people, to allow people to have control over decisions directly affecting them. It also means having the necessary financial resources to carry out these plans. The right to self-government requires a land base for all First Nations peoples. It requires that our land rights be respected. The right to self-government is free-standing, it does not depend on government handouts. Its implementation will come from power-sharing agreements between the First Nations and the Canadian state.

A constitutional amendment is now required to undo the wrong created by the BNA Act and to place First Nations on an equal constitutional footing with the provinces and the federal government. The powers of self-government must be negotiated with the federal and perhaps provincial governments. These negotiations must be based on the wishes of First Nations peoples and these wishes will not be the same for all Nations. Some First Nations may want to control only a few areas, like health, education, social services. Others may want additional responsibilities, such as control over justice, wildlife, and natural resources. Governing means, among other things, making laws, enforcing them, developing and administering policies, developing and delivering programs. The key concept in self-government is flexibility so each First Nation can chart a course that suits its citizens. Areas in which the federal and provincial governments now have jurisdiction over us must be given up so that the First Nations can take over. Some areas might need to be shared, but each level of government would operate in its own right in its field of jurisdiction. The process must be flexible, and it must evolve by negotiation, not be set beforehand by Canadian governments.

We must keep in mind the future growth and development of our governments and the needs of generations to come. We must leave room for improvement. First Nations must seek the widest possible jurisdiction so future changes can be made and no one will be locked into an arrangement that does not work.

If each First Nation negotiated its own areas of responsibility (for example, education, social services, justice), would this result in a patchwork of First Nations government responsibilities?

Should there be blanket negotiations at the national level for all fields of jurisdiction? These are issues you should consider.

First Nations jurisdiction could include education, economic development, environment, justice, land and resources finances, policing, citizenship, residency and taxation. Each of these could be exclusive or shared with the federal or provincial government. In the case of a conflict, the powers of the First Nation would have to be paramount to avoid outside control.

Our people have been poor for too long, and we have suffered from second-class services. Our poverty has been criticized around the world by people concerned about human rights. Our poverty and fiscal dependence have been used by governments to manipulate us. To depart from this history and to be truly independent, First Nations governments must have a secure fiscal base. Negotiated fiscal arrangements with both levels of government must begin at once. Access to land and resources must be part of the discussion on fiscal arrangements. These arrangements must not reduce First Nations governments to merely administering programs designed outside our community. For greater autonomy, our fiscal authority must be direct and our governments must be directly accountable to the people. This will give us independence, and it will encourage responsible government.

Self-reliance and financial independence are part and parcel of self-government. We must have the power to meet our people's day-to-day needs. Governmental autonomy must go hand in hand with fiscal autonomy and increased scope for community development.

As First Nations become more self-governing and self-sufficient, fiscal arrangements could become less conditional. We <u>can</u> be self-sustaining. At present, the existing fiscal arrangements, coupled with our poverty, give us little autonomy. Moreover, without our lands and resources we will never be self-sufficient.

There is a difference made between self-government and self-administration. A First Nation government must have the political authority to decide what programs to provide, at what levels, and under what conditions, and by what process (if any) it should charge its own constituents for services. It must be able to decide whether to establish its own standards or to follow provincial standards for services like health care and education.

Economic development and self-government should grow together, so that greater political authority can be accompanied by greater self-sufficiency in economic and administrative terms. A government with a very limited economic base cannot be truly autonomous if it must get most of its funds from another government. We must plan for a future of economic security for our children and grandchildren.

What about our traditional forms of government, our teachings and laws? Should First Nations governments be patterned on traditional forms of government and leadership? We need to hear from you on this question. What is your view?

IV. ABORIGINAL TITLE AND ABORIGINAL RIGHTS

The so-called "discovery" of the Americas by Europeans led to many debates in Europe about land ownership and sovereignty in the "New World". Theories were put forward to lay claim to or to justify the taking of aboriginal lands by the Europeans. One such argument was that our lands were terra nullius - that is, First Nations homelands were vacant or unknown. In addition, Europeans argued that the First Nations, as "pagans" or "uncivilized" peoples, could not own land, since we were not "organized" societies. Instead, we enjoyed a mere right to occupy and benefit from the land. Finally, the notion of "discovery" was used to give European nations ownership merely because they were first to arrive. The first from Europe, that is. The new lands were not new to us. We were put on these lands long before the Europeans arrived.

The relationship between the European monarchs and aboriginal nations was initially governed by the papal donation of 1493, in which Pope Alexander VI resolved a dispute between Spain and Portugal about jurisdiction over the new-found Americas by giving jurisdiction to Spain. Spain afterward asked Franciscus de Vitoria, a well-respected jurist in his time, for a clarification of Spain's rights under the papal donation. De Vitoria rejected the term, holding that the Pope had no power to grant lands that belonged to the aboriginal nations. He held that neither discovery nor papal rights could convey any interest in land to the Spanish Crown. On the contrary, he recognized that the aboriginal people were like nations unto themselves, and therefore the law of nations applied to them. This meant that First Nations lands could not simply be taken under the pretence of discovery.

When the British established colonial government in what is now Canada, its legal system could not cope with aboriginal rights and land claims. Such matters had never before arisen and British common law relies on precedents or previous decisions. There was, however, a precedent of sorts: the union of England and Scotland. In a case to decide which law applied, the courts found that if the inhabitants of a territory that was purchased or conquered by England were civilized, their existing law applied until it was explicitly displaced by English law. If they were savages or pagans, it was assumed that they had no law and, therefore, the law of England immediately applied. If the land was an uninhabited "desert", the British took their law with them when they went to occupy it.

But for the lawyers, there was a major problem: can the discovery of the Americas be characterized as a military conquest? To deal with this issue, common law developed three basic principles to explain how England came into possession of the lands in the Americas: discovery, purchase, and treaties.

Discovery:

Discovery gave a right to trade or try to persuade indigenous peoples to give up their rights and tenure. According to common law, discovery did not give possession or title; it merely prevented other European nations from trying to trade or to buy land.

Purchase:

The British, during colonial expansion in the Americas, always had clear instructions as to aboriginal title: they could acquire territory only through legitimate purchase of the land from the Indians. In the case of The Queen v. Symonds, in 1847, the Court stated the British position as follows:

> The practice of extinguishing Native titles, is certainly more than two centuries old. It has long been adopted by the Government in our America colonies, and by that of the United States...Whatever may be the opinion of jurists as to the asserted strength or weakness of Native title...it cannot be too solemnly asserted that it is to be respected, and that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers.

One of the implications of buying land was that it brought the purchaser under the tenure system and law of the First Nation. The abuse of purchase by British subjects was largely responsible for the Royal Proclamation of 1763, which prohibited individual citizens from buying lands from the Indians. From then on, only the Crown or the government could purchase aboriginal interests in land. This policy continues to the present.

Treaty:

The British, mainly through the influence of John Locke, held that in a natural state, mankind lived without political superiors, and the relation of states to each other was one of independence. No state had dominion over any other. From this point of view, Locke characterized First Nations as independent states. Locke called the practice of entering into treaties for specific purposes "treaty federalism". Treaty federalism was limited to what was in the treaty agreement and did not imply subordination of one nation to the other. Many of the early treaties between England and the

First Nations were peace treaties. The treaties of peace were held to be of the same status as any other international treaty.

In view of the above history of aboriginal rights and land title, one can conclude that Britain and other European countries recognized and respected the land title of the First Nations. They had well-established rules for acquiring land from the Indians. The recognition of land title went hand in hand with the mutual acceptance of independence and equality between First Nations and European nations.

The Canadian Approach to Aboriginal Land Rights:

Canada has attempted to avoid the issue of how it gained title from the First Nations. Canada's attitude seems to be that only possession matters; the way in which it came into possession is beside the point. In specific conflicts over land or aboriginal rights, the usual assumption is that Canada has proper sovereignty over to this land.

The key case that set the Canadian position on aboriginal title is that of St. Catherine's Milling and Lumber Company v. The Queen (1908). The case was a dispute between the province of Ontario and the federal government over the location of the boundary between Manitoba and Ontario.

The federal government, having entered into a treaty with the Indians that dealt with the territory in question, argued that the Indians were the true owners of the land. Because the Indians ceded the land to the Crown, it came into the exclusive ownership and jurisdiction of the federal government. The province of Ontario did not disagree with this position. However, they argued that once the Crown comes into exclusive ownership and jurisdiction, Section 109 of the Constitution Act of 1867 comes into operation and shifts title to the province. Section 109 gives exclusive ownership and jurisdiction to the provinces of all natural resources, including land within their boundaries. The Privy Council in England, the highest court of appeal for Canada at that time, agreed with Ontario.

In looking at the nature of Indian title, the Privy Council held that Indians did not have absolute ownership rights in fee simple. It held that the nature of the Indian interest in the land was merely "a personal and usufructuary right" dependent on the goodwill of the sovereign. In other words, the Indians merely had the right to use and benefit from the land, but were never its true owners. This interest was held to be a restriction on the Crown's title to the land. When the restriction was removed, then the Crown's title was complete. How was this restriction removed? By treaty. When Canada talks about extinguishment of aboriginal title, what it means by this is that First Nations have given up

the right to use and benefit from the land. Our rights are extinguished so that the government's right increases.

The St. Catherine's Milling case can be viewed as early Canadian common law about aboriginal title. Canada is not prepared to deal with the issue of where its title to this land comes from. The fact that Canada still adheres to the ideas found in the case attests to the fact that it does not want to question its source of title because of the implications such an inquiry would have. The St. Catherine's Milling case is, however, questionable, because Indian interests were not represented by separate and competent counsel.

More recent court cases are beginning to deviate from the St. Catherine's Milling approach. For instance, in the case of Calder v. The Attorney General of British Columbia (1973), the Supreme Court of Canada held that the source of Indian title is not the Crown, but the First Nations' occupation of the land since "time immemorial". This basis of Indian title has since been upheld in other Supreme Court of Canada cases such as Guerin (Musqueam) (1983) and Sparrow (1990). Other cases are less hopeful. In Hamlet of Baker Lake v. The Minister of Indian Affairs and Northern Development (1980), the Court recognizes aboriginal title but holds that it can be "superseded by law" at the whim of the Crown. More recently, the Bear Island (Temagami) case and the Gitskan case in British Columbia are stark reminders that the First Nations are still haunted by the ghost of the British Privy Council.

One issue that needs closer examination is that of extinguishment of Indian title, through treaty, land claims settlement, or otherwise. In Canadian property law, an interest cannot be extinguished. It can be sold, given away, transferred, or traded for some other type of interest. Canada takes the position that a treaty or land claims settlement somehow turns aboriginal title into thin air.

Aboriginal rights and title have tremendous constitutional implications. These include recognition of our status as independent nation states with the right to enter into treaty agreements with other nation states, as well as, proper remedies and restitution for wrongful taking of aboriginal lands, and acknowledging our right to economic benefits from lands and resources. Should we continue to hold aboriginal rights and title sacred? How can we fulfil the responsibility given to us by the Creator to care for the land? As Thomas Berger observed in his book Village Journey:

> The European discoverers, their descendants, and the nations they founded...imposed their overlordship on the peoples of the New World. The Europeans can, and they claimed the land. No one has ever advanced a sound legal

theory to justify the taking of Native land from the Natives of the New World....

The pivotal issue for First Nations is how should aboriginal rights and title be used to relate to Canada? How should our land entitlements be protected in the Canadian constitution? How can our land base for self-government be secured?

V. TREATIES

The Treaty Rights of Indigenous Peoples is one of the most clouded and distorted in the entire colonial history of Canada. Failure to comprehend this issue in its correct perspective has caused historical, political and legal confusion. Canada is a product of imperialism, colonialism, foreign occupation and rule by European settlers. Through these forces led by France and Great Britain, the Indigenous Peoples were relegated to the footnotes of colonial history.

In any attempt to perpetuate the colonisation of the Indigenous Peoples, many methods have been used: Military suppression, economic exploitation, political oppression, distortion and mutilation of the country's history, its indigenous institutions and culture and the manipulation of International law.

One of the most notorious distortions invented by some European historians and other settler writers is that the Indigenous Peoples did not really own the lands. The lands were "discovered" by the Europeans. Early in the period of discovery of the New World, the papacy articulated the Doctrine of Discovery, which announced that Christian princes discovering new lands had a recognized title to them. This papal bull remains, in effect, to this date.

Using the European Settler concept of "terra nullius" (land belonging to nobody) and discovery, the settlers have tried to secure their title to our lands and resources. The euro-settlers have gone so far as to assert that the Indigenous Peoples came across the Bering Strait from Asia. Therefore, Indigenous Peoples' title to the lands were not secure since the Indigenous Peoples did not originate in the Americas. The history of the Americas, however, contradicts these obvious perversions of well-known and proven facts. Indigenous Peoples have occupied the lands of the Americas, everyone who arrived after 1492 is a settler or a non-Indigenous person.

In the alternative, if Indigenous Peoples' did occupy some of the lands, they did not occupy all the lands. European settlers, than, argue another form of definition upon the term "terra nullius". The European-settlers said that the term "terra nullius" meant not only land belonging to no-one, but also lands without a sovereign as understood in Europe. Indigenous Peoples without a sovereign could

not really own lands. The Indigenous Peoples could not really enter into Treaties with 'civilized' sovereigns. Who defines civilized? Who defines sovereign?

It has been a commonly held notion that the Indigenous Peoples have no land rights because, they did not till and use all the soil. This is an argument which was used in the Gitskan case. The judge was heard to say that the Gitskan had no beasts of burden and no wheeled vehicles which implied that they did not till and use all the soil. As a consequence the assertion was made that the Indigenous Peoples had an imperfect title to the lands.

Henry Reynolds, an Australian Professor of law, in LAW OF THE LAND at page 19 wrote:

> Common sense, let alone the law itself should tell us that this argument can't be justified. Only about half of Britain was farmed. There was much forest, mountain and coastal wetland in England. There was land with very few residents - waste and unfenced. but it was [very] (sic) all owned. Title to waste land in Britain was as secure as title to the best farm land. There was absolutely no obligation to cultivate...

Reynolds goes on to argue that the Australian Aboriginal possess their country, made use of it and took from it and lived on the lands in their own manner of life.

C. Wolff, one of the most respected jurists of the first half of the 19th century and regarded as the founder of a reasoned approach to international law wrote in his book, The Law of Nations, about the place of nomadic or Indigenous Peoples and the issue of land. He said that:

> if the people in question had no settled abode but wander through uncultivated wilds...they are understood to have tacitly agreed that the lands in that territory in which they change abodes as they please, are held in common, subject to the use of individuals, and it is their intention that they should not be deprived of that use by outsiders...they are supposed to have occupied that territory as far as concerns the lands of their use.

It is clear that even nomadic people who move from place to place cannot be legitimately dispossessed of their lands merely because their method of using land differed from that of the Europeans. G.F. Von Martens explained:

> From the moment a nation has taken possession of a territory in the right of first occupier, and with the design to establish itself there for the future, it becomes the absolute and sole proprietor of it and all that it contains; and has the right to exclude all other nations from it.
>
> International law dictates that the settlers cannot acquire title to the territory of Indigenous Peoples by merely asserting sovereignty or their legal system or idealogy upon the Indigenous Peoples.

In the historical context of settlement by the Europeans in the Americas, Great Britain and other European states began a system of signing Treaties with the Indigenous Peoples. These Treaties took many forms. Some Treaties were for the establishment of peace and friendship, other Treaties set aside lands to establish posts for farming, trading, still other Treaties set up boundaries and dealt with a number of issues which arose as a result of contact between Indigenous and non-Indigenous Peoples.

One well-known Treaty signed between Indigenous Peoples and non-Indigenous Peoples is the Two Row Wampum Treaty signed in 1645 between the Dutch and the Iroquois. The two rows represented their relationship: each independent and sovereign, never to interfere with each other.

The Treaty of 1645 set down the principles of Indigenous Peoples' Sovereignty which would guide the signing of Treaties with Indigenous Peoples. The Treaty signing between the Dutch and the Iroquois set out the boundaries and the political system of each signor. The Treaty was to guarantee the non-interference in each other's affairs. This is a basic principal of international law.

Another basic principle of International Law is: <u>All peoples have a right to self-determination</u>. Indigenous Peoples have the right to freely determine their own political and legal status without interference by another state. When Indigenous Nations entered into Treaties, they did not surrender their rights to self-determination. Indigenous Nations did not allow through the Treaty process for the implementation and interference by an alien legal system.

It is clear from the negotiations of Treaties between Indigenous Peoples and non-indigenous governments that there was no intention on the part of Indigenous Peoples to relinquish their governments and legal systems to the settler-governments.

In almost every Treaty, the concerns of the Indigenous Peoples were to preserve and ensure the continuing existence of the Indigenous Peoples for the future. It is this basic concept that non-indigenous people do not understand nor attempt to understand. The

Treaties for Indigenous Peoples is a sacred undertaking made by one people to another and required no more than the integrity of each party for enforcement. That the Government of Canada insists that the Treaties should be interpreted rigidly as strictly legal documents within the non-indigenous legal system has provoked disputes between the Indigenous Peoples and the settler government for the last hundred or so years.

What is the status of Canada in relation to the Treaties?

Canada did not sign any pre-confederation or any numbered Treaties with the Indigenous Peoples. Canada did not posses the authority to enter into International Treaties until after the Statute of Westminster in 1931.

The colony of Canada was a creation of the United Kingdom Parliament in 1867. Canada was subordinate to the Imperial Parliament and the legal system of Great Britain. Canada, often, refers to itself as a dominion. Under international law, there is no term nor a concept for dominion. In Webster's dictionary, dominion is defined:

> A self-governing nation of the British Commonwealth other than the United Kingdom that acknowledges the British Monarchy as Chief of State.

Canada under International law is a municipal government of the United Kingdom despite the Statute of Westminster. H.J. May, a Constitutional lawyer declares that "on strictly legal grounds the dominions were subordinate to Great Britain". He also pointed out that the term came into usage at the 1907 Imperial Conference when the colonial territories evolved from colonial to 'dominion'. It is a non-indigenous manipulation of the language to give apparent authority when none existed within International Law.

There is no valid reason why Great Britain should be deemed to have been correct in international law in designating her colony of Canada a 'dominion' supposedly 'independent' and thus confusing international law with her municipal law concepts.

International Law would be abetting British colonialism and its consequences of genocide and theft of resources and lands; if it were to lend any legal validity to the status of Canada as an 'independent' state based upon the abuse and manipulation of international law by Great Britain and Canada. Indigenous Peoples have long maintained that the only time Canada will be an independent state in international law shall be when the vast dispossessed Indigenous Peoples have regained control of our territories and political power in accordance with the international law principle of our inalienable right to self-determination.

Under International Law principles, Canada is a colony that was never decolonized. This case should be brought to the attention of the United Nations' Committee on Decolonization. When a colony is decolonized its control reverts to the Indigenous Peoples who were colonized. It does not remain in the hands of the settlers who were the instruments of colonization. Decolonisation is for the colonized peoples not for the settlers of the colonial power. Canada is the Americas' equivalent to South Africa of the African continent.

There are many tenets of International Laws which Indigenous Peoples can accept to help them regulate their lives. But there is one tenet of International Law which cannot be accepted in the twentieth century, that is: the support for the colonial powers to assert their sovereignty over our Peoples and territories in complete violation of our International Treaty Rights.

Our Treaties need to be recognized. Strictly speaking recognition is a matter of political or state policy rather than of law. It is not a legal act or a requirement. Recognition may be de facto (by fact) or de jure (by right). Our Governments exist as a matter of pure fact. Our government entered into Treaties with Europeans upon contact. That is a fact. It is a legal fact. Indigenous Peoples did not need any settler sovereign to give us a government to enter into Treaties. The Governments existed because we existed as Peoples.

Under Article I of the 1933 Montevideo Convention, in order for a nation to be recognized under International Law, it must possess four characteristics:

1. a permanent population
2. a definite territory
3. a government
4. a capacity to enter into relations with others.

When Canada, in 1982, formed themselves into an independent state, the Indigenous Treaties were never dealt with by the Government of Great Britain. Canada has tried to unilaterally assume jurisdiction over the Treaties. This is not acceptable and is contrary to the principles of International Law. When Great Britain and Canada failed to deal with the Treaties at an Imperial Conference as required by British Constitutional Law Convention prior to patriation, control over the lands and resources should have reverted to us as a matter of international law.

Indigenous Peoples are still maintaining their Treaty Rights. These rights have obligated the state of Canada to provide certain benefits to the Treaty Peoples. However, Canada has increasingly taken the position that the rights enjoyed by Treaty Indigenous peoples is a result of Canada's benevolent actions rather than as an obligation.

What is the Future of Indigenous Treaties?

Through the Constitutional process, do we want to have our International Treaties entrenched under the municipal laws of Canada? Do we want to have our Treaties subjected to interpretation by a system based upon oppression and outdated European notions of settlement, conquest and discovery? Or do we want to set up something outside of the Constitutional Process to deal with the issues related to the Treaties?

The Provinces of Canada do not possess any International Law Status to enter or sign International Treaties with Indigenous Nations. Do any First Nation want the Provinces to be part of the Treaty process? It would seem that the legal position is that the First Nations with Treaties must first come to some agreement with Canada on the recognition and implementation of the Treaties prior to involving any of the Provinces. Why would Indigenous Peoples want to elevate the status of the Provinces from their municipal law position in International law to that of being equal partners with Indigenous Peoples? It seems clear that the Indigenous Peoples are the ones possessing the real legal power on the Treaties. It remains for them to determine how best they want their treaties protected.

VI. PROVINCIAL SEPARATION

In recent years, political parties and interest groups in various provinces and regions of Canada have raised the possibility of separation from Confederation. In most cases, this reflects a dissatisfaction with perceived imbalances in the political and economic institutions of the country. In the case of Quebec, separation is also portrayed as an expression of political and cultural nationalism, as a means of ensuring the preservation of French culture and language in anglophone and multicultural North America. Groups usually raise the question of separation in order to press for the redistribution of power between the federal government and provinces or regions.

Only in the case of Quebec, however, is the prospect of provincial separation a real possibility, and one that carries the support of a significant portion of the province's population. Only in Quebec is the concept of separation an integral element of the province's political and popular culture, one that is being actively examined and promoted by legitimate political parties, social groups, and influential individuals. There is a very real possibility that, if Quebec is not given special status and powers in Canada's constitution, the province will leave Confederation.

The prospect of Quebec's separation is of critical importance to all people and governments in Canada. The implications are broad and profound. If Quebec leaves, what will the effects be for the

nature of Canada, for the viability of Canada as a nation and, specifically, for the protection and exercise of aboriginal and treaty rights, including First Nations' self-government?

Eleven distinct First Nations occupy traditional territories in Quebec. The Northern Quebec Inuit, the Crees of James Bay, and the Naskapi of north-eastern Quebec occupy lands under treaties that involve about half of the land mass of Quebec. The Montagnais, the Attikamek, the Algonquin, the Micmacs, the Mohawks, the Abenaki, the Maliseets, and the Huron-Wyandot claim aboriginal title to about one third of the rest of the province, in addition to their existing reserve lands. Clearly, any withdrawal by Quebec from Canada, or even any transfer of jurisdiction from the federal to the provincial government, would have a tremendous impact on the jurisdiction, lands and resources of these First Nations within Quebec.

The Status of First Nations:

How, specifically, would First Nations rights be affected by Quebec separation? To understand the implications, we need to examine first, the rights of First Nations, and, second, government obligations to and relationships with First Nations.

First Nations Rights:

Distinctiveness

The First Nations exist as distinct societies within both Canada as a whole and the province of Quebec in particular. First Nations are the original peoples of Canada and are co-founders of modern Canada. First Nations have distinct cultures, languages, political traditions, and territories.

Sovereignty

First Nations are sovereign peoples within Canada and within its provinces and territories, including Quebec. Before European settlement, we exercised this sovereignty by occupying and using our lands. We never surrendered this sovereignty; it continues today. This sovereignty was confirmed by such legal measures as the Royal Proclamation of 1763, by the treaty-making process, and by Supreme Court of Canada decisions in 1990. First Nations have always related to the other co-founding nations of Canada on a sovereign, equal, nation-to-nation basis.

Aboriginal and Treaty Rights

Some First Nations in Quebec (and elsewhere in Canada) have treaties with the federal Crown and are entitled to certain rights. All aboriginal peoples are entitled to aboriginal rights, including

title (ownership) to lands and resources and the right to self-determination. The Canada Constitution (Sections 25 and 35) recognizes and affirms existing aboriginal and treaty rights. First Nations can exercise these rights anywhere in Canada, including the province of Quebec. All governments of Canada are bound by law to respect these provisions of the Constitution.

Territorial Jurisdiction and Title

First Nations' sovereign jurisdiction over traditional territories in Canada has never been given up by conquest, sale, treaty, abandonment, or any other means. The aboriginal peoples in Quebec and other parts of Canada have never lost their original title to and jurisdiction over their traditional lands. These lands are not "owned" by the provinces; they are merely situated within provinces and within Canada (a reality which has grown up around us). Many governments recognize this legal fact, and are negotiating land claims agreements with First Nations, especially with those Nations without treaties with the Crown.

Self-Determination and Human Rights

In addition to the rights stated above, international law is evolving protection for the rights of aboriginal peoples worldwide. This law would be violated by the separation of a province from Canada. At the United Nations, for example, a convention made by the International Labour Organization and a draft Declaration on the Rights of Indigenous peoples together set standards for all nations to follow in order to respect aboriginal human rights to self-determination, protection of culture, and ownership and jurisdiction over traditional lands.

Government Obligations and Relationships to First Nations

The First Nations of Canada have a principal and special relationship with the federal government based in history and custom and recognized in law. Our relationship with provincial governments is secondary. Canada has constitutional and statutory obligations and responsibilities to First Nations under treaties, the Indian Act, and many other acts and agreements.

As mentioned earlier in this paper, sections 25 and 35 of the Canadian Constitution require all governments of Canada to respect existing aboriginal and treaty rights. The federal government also has obligations to First Nations under the treaties. As well, section 91(24) of the Canadian Constitution assigns specific responsibility to the federal government for "Indians and lands reserved for Indians". The federal Indian Act, passed by Parliament under the authority of section 91(24) of the BNA Act,

imposes certain fiduciary (trust) obligations on the federal government, including: protection of reserve land and resources held in trust; provision of services such as education, health care, and housing; and protection of our hunting, fishing, and trapping rights. In addition, certain rulings by the Supreme Court of Canada instruct the federal and provincial governments to respect fundamental aboriginal and treaty rights.

All of these political, legal and human rights of First Nations, and obligations and responsibilities of governments to First Nations, are lawful barriers to any declaration of independence or negotiated separation by any province, Quebec included.

The Position of the Province of the Province of Quebec

The Province of Quebec, with its francophone majority, is seeking special recognition in the Constitution of Canada of its distinctive culture, along with additional powers to preserve and promote French culture and language in Quebec. It claims a right to self-determination and to be different from any other province in Confederation. Many Quebecois believe that Quebec can never achieve self-determination as part of Canada and that the province should leave Confederation and become a sovereign state. If Quebec cannot achieve its goals through negotiations with the federal government and the other provinces, it will no doubt chart a course of separation from Canada.

While Quebec has not signed the Constitution of Canada since it was "brought home" from Great Britain in 1982, Quebec is politically and constitutionally a province of the Confederation of Canada. It has equal powers to any of the other nine provinces; it uses and is bound by the provisions of the Constitution; it participates in national institutions like Parliament and the Supreme Court; it accepts funding from the federal government. It also has special powers, which other provinces do not, such the as right to promote the French language and to use the French civil law system instead of British common law.

Great tension marks the relationship between the province of Quebec and the First Nations whose lands are within its boundaries. Quebec has never recognized and accepted the right of First Nations to be recognized as founders of Canada and as distinct societies, to be self-governing, to have the power to protect their cultures and languages, or to preserve their territories from outside interference. Yet these rights are exactly what Quebec demands from the rest of Canada. Quebec has clearly stated that it regards the land and rich natural resources within its current provincial boundaries - including the two-thirds of the province claimed by First Nations - as exclusively its own. If Quebec leaves Canada, it will try to take these lands and resources with it.

In summary, Quebec does not recognize First Nations' distinctiveness, sovereignty, aboriginal rights, territorial jurisdiction and land title, or right to self-determination. And events during the summer of 1990 at Oka (Kahnesatake) and Kahnawake showed little respect for the human rights of First Nations people. The plans for James Bay II Hydroelectric project have raised further concerns.

The Position of First Nations

The Assembly of First Nations, and particularly the First Nations inside Quebec, have expressed a clear and consistent position towards Quebec. This position can be summarized as including:

- The First Nations recognize Quebec's right to seek to change its political and constitutional status with the federal and provincial governments. First Nations merely seek recognition of the same right.

- The First Nations understand and accept Quebec's aspirations to be constitutionally recognized as one founding nation of Canada and as a distinct society, and to have the powers necessary to preserve and promote the French language and culture. First Nations merely seek the same recognition.

- No arrangements for Quebec can prejudice or diminish First Nations rights, interests, and aspirations.

- First Nations seek to have their own authority and right to self-determination as explicitly recognized and protected by the Canadian Constitution, in the same way that the internal sovereignty of Quebec or any other province is recognized and protected.

How should First Nations respond to Quebec separatism? How should we respond to Quebec's desire to be accommodated in Canadian Confederation?

- First Nations do not recognize, and will not recognize Quebec's claim to ownership and jurisdiction over traditional aboriginal lands. If the province of Quebec declares or negotiates independence from Canada, it cannot include the two-thirds of the province's land mass over which First Nations claim title and jurisdiction.

- There is no legal or constitutional way for Quebec to separate from Canada, either unilaterally or through negotiation and approval from Canada.

- The federal government is constitutionally obligated to protect the aboriginal and treaty rights of First Nations.

First Nations will take such measures as they decide are necessary to protect their own rights.

Although the First Nations support the legitimate political aspirations of Quebec within the Canadian federation, nevertheless the way in which Quebec achieves its objectives may strike at the very foundation of First Nations rights. First Nations in Quebec and across Canada have stated clearly that they will not allow any diminishment of their rights to occur as a result of new constitutional arrangements or because of provincial separation from Canada following a failure to reach new constitutional arrangements.

CONCLUSION

First Nations must respond to the demand for separation by Quebec. More than this, however, we must state our vision of our place within Confederation. This vision must be guided by the needs of our people on their homelands.

How can self-government be respected? How can we have healthy communities? We must ensure that our children grow up healthy, whole, and sure of themselves and their heritage. The effects of colonialism, racism, and government control must be erased. We are essential if the circle of Confederation in Canada is to be completed, and this can happen only when the lie of two founding nations in Canada is laid to rest. We must find pathways to our future survival as equal, independent peoples.

SPEAK NOW FOR OUR FUTURE.

QUESTIONS

The following are questions that you might want to consider for your presentation to the First Nations' Circle on the Constitution.

1. How can we built healthy strong First Nations communities?

2. What does self-government mean for you and your First Nation?

3. Should self-government be negotiated nationally or on a nation-by-nation basis?

4. What traditional values can become part of your aboriginal government?

5. What areas should First Nations governments control (for example, health, education, language, etc.)?

6. Are land rights relevant to the constitutional process? How should land rights be protected?

7. How can our treaties be renewed with Canada? Should self-government agreements take the form of treaties?

8. How should the First Nations respond to Quebec separatism?

9. Should the federal government protect First Nations' interest in Quebec if that province charts a course of separation from Canada?

10. How does/did your First Nation relate to other First Nations? Can we form nation-to-nation alliances for self- government?

FIRST NATIONS CIRCLE ON THE CONSTITUTION

COMMON CONCERNS NOTED IN 12 HEARINGS

1. Inherent right to self-government.
2. Protect aboriginal languages and culture.
3. Aboriginal women's rights musr be protected.
4. We need to unite and speak with one aboriginal representative voice.
5. Treaty rights must be recognized.
6. Settle our outstanding land claims.
7. We need to control all aspects of our lives.
8. There are traditional forms of aboriginal government ie. MicMac Grand Council, the Confederacies and Potlatches; these forms of government have looked after our people for thousands of years.
9. Ten years is too long, we must act now.
10. Property rights in the proposal is not acceptable for natives especially for women.
11. There are two basic philosohpies or world views - one is indigenous to North America and one that is foreign to this land therefore we need to have two distinct constitutions.
12. Quebec cannot separate without settling outstanding business with the aboriginal peoples.
13. Quebec is distinct so are aboriginal people.
14. We need a national aboriginal peoples summit to discuss our constitutional issues.

SUGGESTED QUESTIONS FOR COMMISSIONERS TO ASK PARTICIPANTS AT HEARINGS

1. What was the original relationship between First Nations and Europeans?

   How was this relationship understood by aboriginal people?

   What is a treaty?

   What do you understand treaties to mean?

   What did aboriginal people gain/lose/give up through treaties?

   What do you think are the obligations of Canada under the treaties?

   What is the importance of the Royal Proclamation of 1763 for aboriginal people? For government?

   What is the significance of the Ruperts Land transfer?

   Should the relationship with Canada be changed? If so, how?

2. What is aboriginal title?

   How do/did aboriginal people protect the environment?

   What were the original boundaries between First Nations homelands?

   How should the issue of land rights be reflected in the constitution?

   What were the original instructions by the Creator about the land?

3. How did your nation traditionally govern itself?

   How were leaders selected?

   What kind of issues and concerns did the traditional government make decisions about?

   What kind of issues and concerns required collected decision?

   How has the traditional form of government been affected by treaties? By the Indian Act?

   What is the source of the right to self-government?

Has this right been surrendered? Extinguished?

Should this right be constitutionally recognized? If so, how?

4. How did your nation relate to other nations?

What kind of issues and concerns lead your nation to enter into agreements about with other nations?

How did your nation ratify agreements with other nations?

How were violations of agreements redressed?

5. What was the original territory of your nation?

How were boundaries between First Nations determined?

What was the land traditionally used for?

How have treaties or the Indian Act affected traditional Indian lands?

How do you understand the original relationship between First Nations and Europeans about land?

Can lands ever be surrendered? If so, how? If not, why not?

Are land claims outright sales of First Nations lands?

If not, what is the purpose of land claims?

What is the relationship between land and government?

Should First Nations land rights be constitutionally protected?

6. What is the meaning of S.91 (24), S.35, S.25?

What is your understanding of these sections?

Should they be amended or simply re-interpreted?

Should the Charter of Rights and Freedoms apply to your First Nation? If so, why? If not, why not?

How did your First Nation protect the rights of individuals?

What kind of rights needed protection?

7. What is the role of Elders, women, and youth regarding religion, economy, leadership, government and education?

8. What should be the relationship between First Nations and provinces?

   Should provinces be involved in First Nations affairs?

9. What is your view of Quebec and its threat of separation?

   Should Quebec be given special recognition and special powers?

   Should the French language and culture be given special protection?

   What is your view of official bilingualism?

10. What specific reforms would you like to see of the constitution?

    What role should First Nations play in a new Canada?