SECTION 25 AND 35
COLLECTIVE RIGHTS v. INDIVIDUAL RIGHTS

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The Constitution Act, 1982 was enacted in 1982. Parts II, IV and IV.1 of the Act as well as almost one third of the Charter of Rights and Freedoms deals with collective rights of autonomous communities.[1] Section 25 of Schedule B protects and section 35 entrenches native rights, thus giving the aboriginal people special legal status. Those rights include aboriginal rights which arise from the fact that Canadian Indians were the original inhabitants of Canada, treaty rights which arise from the treaties that the Government of Canada used to swindle the Indians out of their land,[2] rights derived from land claim agreements and other rights. Section 25 and 35 rights are essentially minority group rights[3].

Minority group rights are not new to Canada. However, before the Charter, they were mere government policies towards minorities that were simply debated in parliament; now, they are enforced by our courts. Historically, our minority public policies could be placed into three categories: non-discrimination, special treatment based on a group's unique legal status, and group self-government. Non-discrimination means that racial, ethnic, or religious minority group members are not discriminated against because they are members of that particular group. Ensuring that government does not discriminate

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[1] Sections 16-23, 25, 27, and 29.

[2] As will be discussed later, there are around 500 outstanding specific land claims waiting to be settled and Canada still owes Indians millions of acres of land from the treaties.

[3] Unless referring to a specific right in sections 25 and/or 35, the rights will be referred to as native rights.

against minorities has always been part of Canada's unwritten constitution.[4]

Special legal status essentially means that an individual can be treated differently from everyone else because he[5] belongs to a minority group. Some special status rights can be traced back to the British North America Act, 1867 (BNA Act), where sections 93 and 130 proclaimed special denominational rights regarding education and language rights respectively. These rights were reaffirmed in the Charter. Special status for Aboriginal people goes back even further; for instance, aboriginal rights are recognized by The Royal Proclamation of 1763 and section 91(24) of the BNA Act authorized special legal status for Indians and the governing of affairs on reserves.[6] Special legal status for Indians was reaffirmed by section 25 and with section 35 recognize and protect native rights. "Affirmative Action" is a new form of legal status recognized in section 15(2), which allows government to enact programs, activities and laws designed to improve certain "disadvantaged" groups conditions.[7]

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[4] F.L. Morton, "Group Rights Versus Individual Rights In The Charter: The Special Cases of Natives And The Quebecois", in Allan Kornberg, ed., Minorities and The Canadian State (Oakville: Mosaic Press, 1985) __ at __.

[5] The author means no disrespect, however for simplicity, all singular references will be to the masculine gender.

[6] There are also provisions for indigenous people in the BNA Act of 1867, the Manitoba Act, 1870, the Rupert's Land and Northwestern Territory Order, 1870, the British Columbia Terms of Union and the Ontario and Quebec boundaries extensions Acts of 1912. Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada", (1983) 61 Can. Bar Rev. 314 at 316.

[7] Morton, at __.

The right for a group to be self-governing was not explicitly recognized in the BNA Act, however, Canada's form of government was adapted for the European immigrants to have regional self-government through provincialism. Similar self-government provisions were not provided for Canada's original inhabitants. However, Indian people have always maintained that they inherently had the right to self-government because they never gave up the right to govern themselves. Unlike groups such as women's groups, who want to be economically and socially assimilated, Indian people are desperately trying use self-government to avoid assimilation and to retain their traditions and cultural differences that set them apart.[8]

The United Nations has called on States to recognize collective rights and a Draft Universal Declaration on Indigenous Rights was drafted by one of their arms. And, clearly, the rights in section 25 pertain to both individuals and to aboriginal people as collectives. Todate, the courts have not had to reconcile aboriginal group rights with individual rights. However, the Court Challenges Program, which assists individuals to challenge Charter provisions, has increasingly been receiving requests for assistance from individuals wishing to challenge collective native rights. This paper looks at the problem by first going over the legislative history of sections 25 and 35 and section 25's effects. This is followed by looking at the need for strong native collective rights because individually based human rights are foreign to collectively based peoples, and because the cultural genocide that has been practiced on natives has resulted in a loss of dignity and

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[8] Morton, at __.

appalling social and living conditions. This is followed by international support for collective rights and then how the two sections should be handled.[9]

LEGISLATIVE HISTORY

Sections 25 and 35 are the result of political bargaining, and it can probably be safely assumed that various bargainers had, and still have, various versions of what the two were intended to mean. Therefore, the legislative history of the two sections probably provides little guidance as to what the provisions mean. However, section 25's origins date back to at least 1978 when Prime Minister Trudeau introduced Bill C-60 as a Constitutional Amendment. Section 26 of the proposed Charter of Rights read:

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

Douglas Sanders contends that the provision was to ensure that the Charter did not cancel rights emanating from the Royal Proclamation.

On October 6, 1980, after a First Minister's Meeting failed to come to an agreement on constitutional amendments, Trudeau tabled a Resolution in the House of Commons to amend the BNA Act. Although the resolution did not originally contain sections pertaining to native rights, section 24 was inserted into the draft because of successful

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[9] It is necessary to also look at section 35, because it entrenches some of the rights in section 25.

lobbying by moderate Indian leaders. Section 24 read:

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

In early 1981, the three national native organizations[10] agreed on new provisions and had them introduced to the Special Joint Senate and House of Commons Committee on the Constitution. Section 24 now became section 25 and it read:

> The guarantee in the Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

The native rights issue was thus alienated from the general rights saving provision and was incorporated into the resolution on April 24, 1981. Unfortunately, by then the status Indians were calling it "half a loaf" because there were no provisions for their participation in the amending process or for aboriginal self-determination. In addition, the Metis wanted a native veto to amendments to the aboriginal rights section.

In November, 1981 at a First Minister's Conference, back-room diplomacy saved the day and all the First Ministers agreed to the November 5 Accord except Premier Levesque

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[10] Native Council of Canada represents the Metis and non-status Indians, Assembly of First Nations represents status Indians, and the Inuit Taparisat of Canada represents the Inuit, formerly called Eskimos. Non-status Indians are Indians, but they are people who either had status and lost it for some reason or never got it in the first place ie. women who married non-status persons lost their status and their children were not eligible to be status Indians either until Bill C-31 was passed.

of Quebec. The Accord did not mention native rights, however, a resolution was introduced into the House on November 18, 1981. Although the resolution reinserted native rights, section 34 was deleted altogether and "treaty or other rights" was deleted from section 25. The body of section 25 simply read:

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

It seems that the premiers had not counted on the aboriginal people receiving very much public support. However tremendous public pressure forced the premiers to revive section 34, now numbered section 35. Nevertheless, Premier Lougheed, who had adamantly opposed the provision along with Saskatchewan, Manitoba and British Columbia, saved face by having the word "existing" included so that section 35 "recognized and affirmed" "existing aboriginal and treaty rights".

The Canada Act 1982 was enacted in 1982 and after meetings between the First Ministers and the Native Organizations, the Constitution Amendment Proclamation, 1983 was arrived at. It amended section 25(b) and added subsections (3) and (4) to section 35. The two sections today read:

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

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

(b) any rights or freedoms that now exist by way of agreements or may be so acquired. landc l a i m s

s.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 section (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.

The amendment also added section 35.1 which basically said that a constitutional conference with representatives of Canada's aboriginal peoples would be held before any amendment is made to Class 2, Section 91 of the Constitution Act, 1867 to Section 25 of this Act or to part II.[11]

WHAT IS THE EFFECT OF SECTION 25?

There seems to be three possible approaches to looking at section 25. The two extremes will explored first, and then the most probable and most widely accepted version will be looked at.

a) The Simple Rule of Construction

There have been those who prefer the rule of construction to interpret Section 25. They seem to think that where there is an irreconcilable conflict between the two, charter

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[11] Menno Boldt and Anthony Long, eds., Quest for Justice: Aboriginal Peoples and Aboriginal Rights, (Toronto: University of Toronto Press, 1985) at 364-65.

rights should prevail over native rights. For instance in 1983 Richard Bartlett wrote:

> Neither federal nor provincial governments are restrained by section 25 from abrogating treaty or aboriginal rights. Section 25 merely declares a rule of construction affording an ill-defined and perhaps illusory protection from other rights which are guaranteed in the Charter. The language of section 25 is to be distinguished from that of sections 21, 22, 50(92A(6), which expressly bar abrogation or derogation. Section 25 merely declares that the guarantee shall not be "construed" so as to do so.[12]

The wording of those sections should be looked at. Both sections 21 and 22 instruct that "nothing in sections 16 to 20 abrogates or derogates from" certain other rights or privileges.

> 21: Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English or French languages, or either of them, that exists or is continued by virtue of any other provisions of the Constitution of Canada
>
> 22: Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Note that the sections do not say that "certain rights and freedoms shall not be construed so as to abrogate or derogate" as section 25 does. Rather they say that "nothing in sections 16 to 20 abrogates or derogates from" certain language rights. "Nothing ... abrogates or derogates" seems more certain than "shall be construed as to abrogate", thus the section 25 wording does seem to be a little weaker than sections 21 and 22. However, section 26 also states that Charter rights "shall not be construed":

> 26: The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist

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[12] Richard H. Bartlett, "Survey of Canadian Law: Indian and Native Law" (1983) 15 Ottawa L. Rev. 430 at 498.

in Canada. (emphasis is mine)

And section 27 is clearly weaker than all of these forms:

27: This charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

The differences are by no means decisive. However, Bryan

Schwartz is also not sure of section 25's scope:

> Another uncertainty about s.25 is the scope to be given "construed"; unlike the Canadian Bill of Rights, it does not say "construed and applied"; the implication may be that in the case of a conflict that cannot be resolved by modifying the interpretations of the norms, the Charter prevails over the right of the aboriginal group.

Note the uncertainty; Schwartz says "the implication may be" that the Charter would prevail. In addition, a few lines later he says "a general assertion that can be made with some confidence is that s.25 will strongly discourage any Court from applying the egalitarian and individualistic norms of the Charter ... against self-government legislation."[13] Note that Bartlett and Schwartz were writing seven and five years ago respectively, and that neither had the advantage of recent court cases and/or other developments to use in their analyses. There views may have changed by now.

Wildsmith points out that only a few writers have supported "the mere rule of construction approach". He also notes that even though the Canadian courts have been greatly criticized for giving a restricted meaning to the rights and freedoms in the

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[13] Bryan Schwartz, First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1982-84 (Kingston, Ont.: Institute of Intergovernmental Relations, Queen's University, 1985) at 262,63.

Canadian Bill of Rights, "a majority of the Supreme court did reject the simple 'rule of construction' interpretation".[14] Ritchie J., speaking for the majority in R. v. Drybones, discussed and dismissed the interpretation approach:

> ... a more realistic meaning must be given to the words in question and they afford, in my view, the clearest indication that s.2 is intended to mean and does mean that if a law of Canada cannot be "sensibly construed and applied" so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized and declared by the Bill, then such law is inoperative "unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights"[15]

In an earlier case, Cartwright J. was speaking in dissent but he was the only judge to discuss this issue when he said that, "... where there is an irreconcilable conflict between another Act of Parliament and the Canadian Bill of Rights, the latter must prevail."[16] Wildsmith notes that judges who preferred the rule of construction for the Bill of Rights did so because the British notion of Parliamentary supremacy lingers. The British have an unwritten constitution; therefore the courts have traditionally believed that they had to "give effect to the clearly expressed words of Parliament. These ideas and attitudes are plainly inapplicable to Charter questions."[17]

Following the lead of the Supreme Court's dealing with the Bill of Rights and lower court treatment of the Charter provisions, which will be discussed later, it seems that the simple

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[14] Wildsmith, at 16.

[15] R. v. Drybones, [1970] S.C.R. 282, at 294.

[16] Robertson and Rosetanni v. R, [1963] S.C.R. 651, at 662.

[17] Wildsmith, at 17.

construction approach should not be followed.

b) Section 25 Guarantees Native Rights

Edward McWhinney's view may have changed by now, but in late 1982 he contended that section 25 does not merely shield native rights and freedoms from Charter guarantees, but that section 25 guarantees native rights and can be used as a sword.[18] Speaking about what is now section 35 he writes:

> Even if section 34 in the consolidated resolution were to be deleted ... it could not change the existing status quo. The effects would be political and psychological and not legal ... And no deletion of section 34(1) ... could legally derogate from the much more comprehensive definition of rights contained in section 25.[19] (emphasis is mine)

> It is arguable whether section 34 added anything not already included in section 25 ... or anything that the courts could not reach by ordinary interpretation of the constitutional category of aboriginal and aboriginal rights.[20] (emphasis is mine)

Professor Hogg states that "Section 25 ... does not create any new rights, or even fortify

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[18] McWhinney may have had support for his view from practicing solicitors as s.25 was unsuccessfully used as a sword and found to be a shielding device in Augustine and Augustine v. R.; R. v. Kent, Sinclair and Code [1986] 4 C.N.L.R. 93 at 98 (M.C.A.); Steinhauer v. R. [1985] 3 C.N.L.R. 187 at 191; A.G. Ont. v. Bear Island Foundation [1985] C.N.L.R. 153 1 (Ont.C.A.); R. v. Eninew [1984] 2 C.N.L.R. 122 at 125 (Sask.Q.B.); in addition in R. v. Nichols and Bear [1985] 4 C.N.L.R. 153 at 162 a Provincial Court Judge agreed that "their fishing rights are recognized by virtue of s.25(a)...".

[19] Edward McWhinney, Canada and the Constitution 1979-1982 (Toronto: University of Toronto Press, 1982) at 100.

[20] Ibid., at 107.

existing rights. It is simply a saving provision ..."[21] Professor McNeil agrees that "it seems fairly certain that section 25 is merely a saving provision -- it is not in itself a source of rights."[22]

It seems that most academics and the appellate courts agree with Hogg and McNeil that section 25 does not guarantee native rights. The next section looks at this more extensively, then concludes that section 25 is only a saving provision.

C) Section 25 Is A Saving Provision, Shielding Native Rights From Charter Guarantees

i) THE COURTS

Although there has not yet been a Supreme Court decision on point, this seems to be the most widely accepted view, by the courts and academics alike. For instance, in R. v. Steinhauer, Madam Justice Veit of the Alberta Court of Queen's Bench said that section 25 "is a shield and does not add to aboriginal rights". But, since his treaty stated "subject to such regulations as may from time to time be made by her Government", she held that section 25 did not protect a status Indian who was fishing in contravention of the federal Fisheries Act.[23]

In Augustine and Augustine v. R.; Barlow v. R. Stratton, C.J. of the New Brunswick

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[21] Peter W. Hogg, Constitutional Law of Canada, 2nd ed. (Toronto: Carswell, 1985) at 567.

[22] Kent McNeil, The Constitution Act, 1982, Sections 25 and 35, an oral presentation at "First Nations and the Constitution -What Now", printed in [1988] 1 C.N.L.R. 1 at 2.

[23] Steinhauer v. R., [1985] 3 C.N.L.R. 187 at 191.

Court of Appeal held that section 25 did not protect a status Indian who could not prove that an enforceable treaty existed to exempt him from the provincial regulations. Chief Justice Stratton notes that:

> Professor Hogg ... points out, however that s.25 "does not create any new rights, or even fortify existing rights. It is simply a saving provision, included to make clear that the Charter is not to be construed as derogating from 'any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada'. In the absence of s.25, it would perhaps have been arguable that rights attaching to groups defined by race were invalidated by s.15 ... of the Charter." I would respectfully subscribe to this view of s.25 of the new Constitution Act, 1982.[24]

In R. v. Agawa, when Blair J.A. of the Ontario Court of Appeal was discussing section 25, he stated that:

> This section confers no rights but rather shields the treaty and other rights of aboriginal people from interference from other Charter provisions.[25]

ii) ACADEMICS AND TEXT WRITERS

As stated above, both Professors Hogg and McNeil believe that section 25 merely ensures that Charter provisions do not cancel or detract from native rights. Professor Slattery says, "section 25 shields from the impact of the Canadian Charter of Rights ... aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada."[26] Professor Pentney writes:

> In particular, s.25 is intended to protect the rights of aboriginal peoples from obliteration by the equality rights guarantee contained in s.15 ... The terms of s.25 indicate that its operation is not limited to s.15 cases. In an appropriate factual situation any Charter right may need to be reconciled with the

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[24] Augustine and Augustine v. R [1987] 1 C.N.L.R. 35 at 44.

[25] R. v. Agawa, [1988] 3 C.N.L.R. 73 at 77.

[26] Understanding Aboriginal Rights, at 728

particular rights guaranteed to the aboriginal peoples[27]

Professor Sanders writes that, "Section 25 protects certain rights of the aboriginal peoples from the egalitarian provisions of the Charter of Rights and Freedoms."[28] This view is also shared by Professors Norman Zlotkin, Noel Lyon and Kenneth Lysyk as well as by Peter Cumming.[29]

Webster's Ninth New Collegiate Dictionary defines abrogate as "to abolish by authoritative action; annul; to do away with". For a synonym, it says "see nullify". Derogate is defined as "to take away a part so as to impair; detract; to act beneath one's position or character". This implies that native rights cannot be "annulled" or done away with or impaired or detracted from. By what? By "the guarantee in this Charter of certain rights and freedoms". Of course, nothing is certain until the Supreme Court decides on this issue; however, I agree that section 25 shields native rights from the guarantees in the Charter.

We now know that native rights are shielded from the Charter's guaranteed rights for

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[27] William Pentney, The Interpretive Prism of Section 25, (1988) 22:1 U.B.C. Law Rev. 20 at 28.

[28] Douglas Sanders, The Rights of the Aboriginal Peoples of Canada (1983) 61 Can. Bar. Rev. 314 at 321.

[29] Zlotkin in Unfinished Business; Lysyk in The Rights and Freedoms of the Aboriginal Peoples of Canada at 471-72; Lyon in Section 25 of the Charter of Rights and Freedoms at 2; Peter Cumming, "Canada's North and Native Rights", Morse ed., Aboriginal People's and the Law: Indian, Metis, and Inuit Rights in Canada (Ottawa: Carleton University Press, 1985) at 701.

non-natives. However, what happens when an individual aboriginal person wants to use the Charter to promote his own Charter protected rights over the collective rights of the aboriginal people. Or are collective rights even included? It is my contention that section 25 includes colective rights and that aboriginal philosophy and the need for aboriginal society to strengthen itself makes it absolutely necessary for the collective rights to prevail over the individual rights.

DOES SECTION 25 INCLUDE COLLECTIVE RIGHTS?

The "other" rights that section 25 refers to are probably rights and freedoms stemming from legislation such as the Indian Act, from government policy, and so on. However, government can terminate these types of rights, simply by amending/elliminating legislation or past practices[30]. On the other hand, section 35 entrenches aboriginal, treaty, and rights that "now exist by way of land claims agreements or may be so acquired".[31] These three rights can therefore be called the main rights in section 25.

Most of the main rights come from aboriginal title to land. The numbered treaties were

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[30] For instance, Indians claim that post-secondary education is a treaty right. Government claims that it is simply policy to provide post-secondary education, and they are therefore entitled to limit or even to elliminate it if they choose to.

[31] Hogg, at 566; Sanders, at 332; McNeil at 256-60; Slattery, Understanding Aboriginal Rights, at 781; Agawa case, at 78 (Ont.C.A.); Flett case, at 132 (Man.Crt.Q.B); Arcand case, at 118 (Alta. Crt.Q.B.); R. v. Hare and Debassige [1985] 3 C.N.L.R. 139 at 155 (Ont.C.A.); R. v. Nicholas and Bear [1985] 4C.N.L.R. 153 at 165(N.B.C.A.); . Note these cases are not on native rights in general but on treaty rights; it is assumed that all rights mentioned in s.35 would receive similar ruling.

entered into to get the Indians to give up title to their land and land claims are also being negotiated to extinguish aboriginal title to land. In addition, aboriginal rights encompasses aboriginal title.[32] It is therefore paramount that aboriginal title be reviewed.

Brian Slattery indicates that most indigenous groups claimed exclusive rights to the lands whose resources they exploited, although in some cases, such lands were shared with allied neighbouring peoples. Title to land was normally vested in a group, be this a family, lineage, village or tribe, with members having rights to use and enjoy the lands in question. Title was thus communal rather than individual.[33] The court in Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development[34] seems to have agreed with this, since it concluded:

> The elements which the plaintiffs must prove to establish an aboriginal title cognizant at common law are:
> 1. That they and their ancestors were members of an organized society.
> 2. That the organized society occupied the specific territory over which they assert the aboriginal title.
> 3. That the occupation was to the exclusion of other organized societies.
> 4. That the occupation was an established fact at the time sovereignty was asserted by England.[35]

There does not seem to be any recent decisions disputing these conditions that have to

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[32] Understanding Aboriginal Rights, at 732 and 737.

[33] Brian Slattery, The Land Rights of Indigenous Canadian Peoples, Thesis at University of Oxford, 1979 at 2.

[34] (1980), 107 D.L.R. (3d) 513 (F.C.T.D.). (Hereinafter referred to as Baker Lake)

[35] Ibid., at 542.

be met before a group can claim aboriginal title over an area.[36] Element (a) indicates that only an organized society could pass on aboriginal title to its descendants. This implies that aboriginal title is a collective title. It follows that if a collective title is being extinguished, the rights that the collective receives in return for extinguishment must also be collective.

In addition, any nation has the right to self-government. The fact that Canada entered into various types of verbal and written treaties with Indians indicates that Indians are nations. If they were not nations, why did Canada treat them as such. This is analogous to Calder v. B.C., where Hall J. explains that if the Indians in British Columbia did not have aboriginal title, the government would not have bothered to get them to sign treaties and concludes with, "If there was no title extent in British Columbia in 1899, why was the treaty negotiated and ratified...?"[37] Indian nations should be classified as nations in the international sense. If they are not to be recognized as international nations, since Canada has treated Indians as nations in the past and still does by going through elaborate rituals every year at treaty time, at least indigenous peoples should be treated as such. In fact, the UN Seminar on Relations Between Indigenous Peoples and States made recommendations that "fundamentally equated indigenous peoples with states". Since nations have the right to self-determination, aboriginal rights should include the

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[36] In a recent discussion, Professor Roger Carter informed me that he does not know of any cases that could have changed this criteria.

[37] Calder v. B.C. (1973) 34 D.L.R. 145 at 203.

right to self-determination. It is difficult to envision one person having the right to self-determination; it therefore follows that the aboriginal right to self-determination is also a collective right. Section 25 rights should therefore include collective rights.

WHY IT IS NECESSARY FOR COLLECTIVE NATIVE RIGHTS TO PREVAIL OVER INDIVIDUAL RIGHTS

A. Individual Rights Foreign to Aboriginal People

First, it is important to recognize that Western-liberal and Native American tribal philosophies concerning the individual have different origins and are thus different. The dominant Western-Liberal concept is that each individual has his own interest, society is an "aggregate of individuals", and the individual is considered morally prior to any group. This doctrine originated from the European belief in the inherent inequality of man that was associated with feudalism. The need for constitutionally protected individual rights reflects the need to protect the individual from centralized state powers and from various forms of personal authority. In addition, competition and individual initiative are the cornerstones of a capitalistic market economy. Thus, western capitalist politics and economics produced the need for individuals to be protected from being overwhelmed by forces within western society; individual rights have emerged in response to these conditions.

On the other hand, Indian tribes did not experience feudalism and while they were highly organized, their social order was not based on centralized political authority with hierarchical power. Power and authority was vested in the tribe as a whole, not in the

individual or a tribal subset. The community performed all governmental duties in an undifferentiated manner. In addition, the church and the state were not separated, but each remained an essential community component. The basis for social order was spiritual solidarity that came from the moral integration secured through acquiesence to tribal custom. In fact, there was no need for coercive personal power or a separate ruling hierarchy to maintain order, because Indians unconditionally accepted custom or customary authority to guide them while living and working together. Thus, individuals did not need protection from authority in the form of individual rights, because there were no rulers or "the state".

As well as offering a well defined system of individual duties and responsibilities, if all tribal members observed the customs, then equality, personal autonomy, justice, self-worth and fraternity naturally followed. In other words, human dignity was protected.[38] Protection was in the form of unwritten, positively stated duties, not in the form of negatively stated, individual legal rights. Things proscribed by custom were not viewed as infringing on personal autonomy, because custom was regarded as sacred and ultimate wisdom. "Anything not proscribed by custom was permitted."

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[38] Jack Donnelly says human dignity is more encompassing than human rights and that human rights is only one means to realizing human dignity. Some societies choose other routes to human dignity, because individualized human rights conflict with their concept of human dignity. (1982: 303) Similarly, Charles Beitz expounds that individualized human rights is a very limited concept lacking an adequate concern for the broader issues of human dignity and collective well-being. Some rights may have greater priority in some circumstances than some other rights; for instance, the right to eat over the right to a higher education. (1979: 45-63)

Since all members collectively participated in the decision making, for the common good, there was less potential for offenses against the individual. Rights were consequently defined for the welfare of the group rather than for the individual's welfare. Indians therefore, saw individual rights as jeopardizing the collective, and thereby jeopardizing the individual member. In other words, all rights should serve the common interest, which in turn serve the individual's interest. Individual rights that threaten the collective interest, and in turn the individual interest, are therefore of no value.

This in no way implies a lack of respect or concern for the individual member. In fact, Indian communities traditionally required a consensus by all members for all decisions that affected the group, and an extensive consultation process was undertaken whenever leaders were selected. Today, however, the federal government has imposed a representative electoral system on Indians. Native people are trying to incorporate tribal collective philosophies into their modern world and some of their governments are turning back to consensus decision making. For instance, all decisions at Dene Nation and S.U.I.S.A. meetings are made by consensus.[39] In addition, the "United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States" held in Geneva in January, 1989

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[39] Dene Nation represents all status Indians and declared Dene in the Northwest Territories. S.U.I.S.A. is the newly formed Saskatchewan Union of Indigenous Student Associations.

symbolically adopted their full report by "consensus".[40]

The aboriginal people were already in Canada when the Europeans arrived. Yet, they are often treated like any other minority group[41]. They are not shown the respect that should be shown to the first people of a country. For instance, the aboriginal groups were forced to fight to get sections 25 and 35 included into the Charter after Schedule B, which includes the Charter, was already drawn up. Proper respect would ensure that Canada's first inhabitants were adequately represented during the framing of a Charter of Rights. Proper respect would ensure that human rights formed through a philosophy that is foreign to indigenous people, and contrary to their philosophy, is not forced on them.

B. The Federal Government's Assimilation Attempts

One of the main reasons why Canada must allow indigenous collective rights to prevail over individual rights is because government policies and practices have caused the current deplorable state of indigenous people. Indigenous people are the lowest people on the totem pole, even lower than "boat people" and other refugees who arrive here seeking refuge. Criminals go to court and are held accountable for their crimes;

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[40] Douglas Saunders. Another Step: The UN Seminar On Relations Between Indigenous Peoples and States. 37 C.N.L.R. 4 at 43.

[41] In UN Seminar, at p. 39, Saunders correctly says that Indigenous leaders around the world have rejected being designated as "minorities" because the term avoids the acknowledgement of the colonial origins of their situation and excludes arguments for economic and political rights.

similarly, Canada must be accountable for its actions. Following are only some of the past policies, practices, and criminal acts perpetrated on Indians.

Treaties

Europeans began settling Canada by exterminating the first aboriginal people it came into contact with. England claimed Newfoundland in 1583, and by 1829 the last known survivor of Newfoundland's aboriginal inhabitants, the Beothuk Indians, died in captivity in St. Johns. In Acadia, the French simply gave the Indians reserves in return for their lands without signing any treaties that provided for establishment of reserves. The British also began passing orders-in-council that established reserves and/or granted huge tracts of land to absentee British proprietors. For instance, all of Prince Edward Island was granted without providing for the MicMacs. In 1763, Chief Pontiac became tired of this, and led a rebellion that resulted in the British declaring the Royal Proclamation of 1763. It recognized that Indians had title to the land and enunciated that Indian land could only be surrendered to the Crown at public meetings:

> ... that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement; but if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some public Meeting or Assembly of the said Indians to be held for that Purpose ...[42]

Government decided that signing treaties would satisfy the public meetings stipulated as necessary for Indians to surrender title to the land. As hunting areas were required for

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[42] R.H. Bartlett, Parallels in Aboriginal Land Policy, [1988] 4 C.N.L.R. 1 at 10-11.; see appendix for whole text of Proclamation.

settlement or for economic development purposes, government officials took treaties prepared by their lawyers and met with the Indians, who for the most part could not even speak English. The Indians were promised homelands where non-Indians would not be allowed, as well as economic aid if they signed treaties, but they were not told that it would be compulsory to live there.[43] Government made many other extravagant promises to the Indians, who wanted huge tracts reserved because they were hunters. For instance, Indians were assured that Government would not interfere with their religion or try to alter their culture. In addition, the Commissioner's report of Treaty #1, from which the Manitoba Indians got reserves totaling less than one percent of their traditional homelands, states that the Indians:

> wished to have two-thirds of the Province as a reserve ... they have been led to suppose that large tracts of ground were to be set aside for them as hunting grounds, including timber lands of which they might sell the wood as if they were proprietors of the soil ... (such demands are) utterly out of the question...
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> [44]

The Indians accepted the treaties because they knew that their resources were being depleted. In most cases, they moved onto their designated lands immediately and waited for the promises to be fulfilled; however, due to a desire for economy, until 1880 government did little except provide annuities, ammunition and twine to the Indians. Government took so long to implement the reserve system with the promised tools and

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[43] J.L. Tobias, "Indian Reserves in Western Canada: Indian Homelands or Devices for Assimilation." Approaches to Native History in Canada: Papers of a Conference held at the National Museum of Man, Ed. D.A. Muise, Ottawa, 1975, 89 at 90.

[44] Ibid., at 14.

farm equipment, that Indians were dying from starvation. People sent to teach farming spent most of their time issuing rations to starving Indians.[45]

Indian Act

Through treaty relations, need for a consolidated Indian policy became apparent. This resulted in the 1876 Indian Act, which is the main instrument that is still used to control Indians. As with all later amendments, Native input into the Indian Act was minimal.[46] The Act had two aims: first, civilizing Indians and achieving assimilation and integration as soon as possible, and secondly, "protection of the Indians and their land from abuse and imposition...until such time, as being civilized, such protection was superfluous."[47] However, civilizing the Indians can be said to be the most singular feature, as was made clear in the Annual Report of the Department of Interior in 1976:

> Our Indian legislation generally rests on the principle, that the aborigines are to be kept in ... tutelage and treated as wards or children of the State. ... through education and every other means, to prepare him for a higher civilization by encouraging him to assume the privileges and responsibilities of full citizenship.[48]

Taking Back Reserve Land

Large scale immigration was encouraged, and once the immigrants occupied the best

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[45] Tobias, pp. 90-92.

[46] James Frideres, Native People In Canada: Contemporary Conflicts: Ontario: Scarborough, Prentice-Hall Canada Inc., 1983, p. 24.

[47] Richard H. Bartlett, "Indian and Native Law Cases and Materials. College of law, University of Saskatchewan, 1989, p.IX-147.

[48] Bartlett, p. IX-81.

lands, they began to look at Indian lands. A formal surrender by the majority of adult male band members was required to sell reserve lands; however, Indian agents frequently pressured the Indians to secure surrenders. Amendments to the Act reduced protections on the lands. For instance, one amendment immediately distributed up to fifty percent of the purchase price of surrendered land to band members. Another allowed companies or municipalities to take reserve lands for public purposes without a surrender, but with the consent of the governor-in-council. The "Oliver Act" permitted Indians to be removed from any reserve next to or partly within a town of eight thousand inhabitants or more, with or without Indian consent.[49]

The Pass System

The Pass System, implemented until the 1930's, required Indians to get a pass before going off their reserve. The pass had to be signed by the Indian agent or farm instructor specifying the purpose and duration of absence. The System was used to prevent resistance to government policies, because Indian leaders were meeting and asking for revised treaties. Assimilation was also being interfered with because Indian parents who visited their children at the off-reserve residential schools, often removed the children without permission.[50] Enforcement of the System was facilitated by Indian Act amendments enabling the Indian Agent to enforce vagrancy and loitering sections of the

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[49] Brian E. Titley, A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada. Vancouver: University of British Columbia Press. 1986, at 20-21.

[50] Barron, pp. 30-32.

Criminal Code.[51]

Education;

The main objective for educating native children was to destroy the children's link to their ancestral culture.[52] Indian agents pressured parents into send their children to school by withholding rations. Later, Indian Act amendments forced parents to send their children to residential schools, from which some children were not allowed home for several years. In addition, children were physically abused if they spoke their own language instead of English, and a high percentage of them died from diseases contracted at school.[53] Children returned home unable to speak to their parents; they no longer fit into reserve life and were not accepted into non-native society either.

Traditional Practices Banned

The government tried to do away with traditional religious and ceremonial practices. For example, the Sundance concerned officials because it entailed ideological rituals which protected and reinforced the Indian social system, as well as integrating the youth into Indian society.[54] Laws outlawed certain activities; for instance The Potlatch Law stated in part:

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[51] Tobias, at 94.

[52] Titley, p. 75.

[53] Titley, p. 78.

[54] Barron, p. 32.

> Every Indian or other person who engages in celebrating the Indian festival known as "Potlatch" or in the Indian dance known as "Tamanawas" is guilty of a misdemeanour and shall be liable to imprisonment ...[55]

Because secret dances were held in remote areas, this resulted in Indians breaking the law and becoming criminals when convicted.[56]

Indian Government Undermined

Government decided to move at the heart of Indian culture: the tribal system. When the Metis Rebellion was put down, troops had also moved against prominent Indian leaders. The rest of the Chiefs and councilors who opposed government policies were deposed or left in office until they died or resigned. No new leaders were allowed until government decided that the Indians were civilized enough, at which time traditional leader selecting methods were forcibly replaced by elections. This meant total dependency on government employees for leadership for a long time. An amendment to the Indian Act was made to facilitate this policy. In addition, Indian Agents were instructed to deal with individual Indians instead of Bands as a whole, and only Indian leaders who showed strong support for Indian Affairs policy were to be shown any deference; the rest were treated as incompetents. The final measure taken to destroy the Indians' ability to live in a traditional manner was to subject him to game laws, contrary to promises made at the signing of the treaties.[57]

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[55] Bartlett, p. II-1.

[56] Tobias, p. 96.

[57] Tobias, pp. 94,95.

Communal Cultivation Banned

Government felt that atomizing Indian society would speed up assimilation. Government broke up the reserve villages and stopped successful communal farming and ranching by subdividing the reserves into forty acre plots and giving individuals their own parcels of land to farm. Laws forbade Indians selling anything on the reserve without a permit. A non-Indian could also be fined, for buying goods from an Indian who did not have a permit. Using farm machinery and labour saving devises was forbidden, even if the Indians had purchased them with personal funds. The Indians resented the way they were being treated and refused to farm, causing drastic reductions in crop production.[58]

Enfranchisement

By 1920 Government was convinced that the assimilation policy had failed. Laws had already made it easier to surrender lands, but the Indians still regarded the reserves as their homelands. More amendments gave government the power to lease out reserve land without surrenders. Provincial laws on general police matters were made applicable to Indians. Previously, a "civilized" Indian was tested on reading and oral knowledge of English or French. Then after demonstrating that he owed no debts, was of good moral character, and was able to look after a farm of at least 50 acres, he was enfranchised: he was no longer Indian, and he had the same rights as any other whiteman. More amendments to the Act were passed making enfranchisement easier. Still very few Indians took the tests, so government appointed boards who chose then examined reserve

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[58] Tobias, pp. 95,96.

Indians' enfranchisement qualifications. Those found capable of assimilation were enfranchised without their consent, and were forced off the reserve because it was illegal for non-Indians to live on a reserve. This remained in the Act until 1951.[59]

Land Claims

Aboriginal rights derive from the fact that aboriginal people were already in North America when the Europeans arrived. Those rights include aboriginal title to the land. Until recently, it had been believed that aboriginal title derived from the Royal Proclamation. However, two recent Supreme Court decisions, the Calder case and the Guerine case have verified what aboriginal people have maintained all along; aboriginal title to the land derives from the fact that Indian peoples' ancestors lived on these lands from time immemorial. There are two types of land claims: comprehensive claims and specific claims. Comprehensive claims arise where there were no treaties signed. Negotiations for these claims include self-government, trapping, hunting and fishing rights, cash compensation for resources lost, and so on. Specific claims arise where the government has not lived up to its treaty obligations or where the government has acquired reserve land without adequate compensation or if it has allowed a third party to acquire the land without adequate compensation. Specific claims are for a specific item only.

Todate, Government still has not turned over many, many millions of acres of land to the

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[59] Tobias, at 97, 98.

Indians, which the treaties state they were to receive.[60] For instance, the Government of Saskatchewan has acknowledged that Saskatchewan Indians are entitled to over one-and-one-half million acres of land. In addition, after the Guerin case established that the federal government had a fiduciary duty to ensure that Indians were adequately compensated for surrendered lands, many bands submitted claims because they had not received adequate or, in some cases, no compensation at all for land. Virtually every reserve across Canada lost land, and some bands did not receive any land or other things promised in the treaties; most of them have submitted claims, resulting in over 500 specific claims that need to be settled.[61]

C. Effects of Government Policies and Practices[62]

First, it must be remembered that before the arrival of the Europeans, the North American Aboriginal people were arranged in societies that had no need for social assistance, because their forms of communal property and distribution made it incidental. They had a form of taxation, but the main cost of modern taxation was not necessary as voluntary participation and contribution precluded the need to finance public institutions.

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[60] George Erasmus states that since they have still not received lands, some bands are claiming that their aboriginal title has not been extinguished. If this is established, it follows that they should be entitled to a comprensive claim.

[61] Conversation with Grand Chief of Assembly of First Nation, Georges Erasmus.

[62] These rates are all from the late 1970s. Note that since the Indian rates are included in the national average, they either raise or lower the national average. In other words, if the Indian people's figures were taken out of the over-all figure, the national average would be lower in cases like fire deaths and higher in cases like life expectancy. A comparison to the non-native population would be even more dramatic than to the national average. ie. instead of 3 to 1, it might go to 5 to 1.

They had legal systems that were firm, yet as elastic as needed to fit the situation that presented itself. They had an intra-continental trade system that used emissaries and trade missions sometimes took whole seasons to accomplish because of the distances and delicacy of the missions involved. Trade was not only based on the barter system, but also on well defined "currency". Some tribes already had a written language and had well developed agriculture. When the war of 1812 was over, aboriginal people were still totally self-reliant; so what did the government's policy establish in less than 200 years?

The strength and stability of family units appeared to be in tatters. The divorce rate was catching up to the national average and there were increased adoptions of children by non-Indians. In addition, there were eight times as many Indian children in care, per capita, as the national average, 47% of all Indian children were born out of marriage, more than 4 times the national average, and juvenile delinquency was 3 times higher than the national average.[63]

One in three families lived in crowded conditions; in fact, 14.8% of reserve dwelling units had two families and 4% had 3 families living in them. Less than 50 percent of reserve homes were properly serviced with water and sewer, compared to a national level of over 90 percent. Lower quality housing, overcrowding, poor construction materials, and so on

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[63] Conditions, at 25. The children born out of wedlock can no doubt be partially attributed to women not wanting to lose their status for both themselves and their children.

accounted for fire deaths being more than 7 times the national rate.[64]

Social assistance is increasingly being provided: in 1964, an estimated 36 percent of the Indian population received social assistance; by 1977-78, between 50 to 70 percent were receiving it. University enrollments were less than one half that of the national average. Hospital admissions for alcoholic psychosis and alcoholism for the 25-55 age group was 5 times the national rate, with about 50-60% of health problems being alcohol related. There were 280 Indians per 100,000 population in penitentiaries compared to the 40 per 100,000 national average: this comes to .28% of Indian population compared to .04% national average or 7 times the national average. In Saskatchewan, 40 percent of the jail and penitentiary population is aboriginal.[65]

Violent deaths are three times the national levels. Suicides are more than three times the national average with the 15 to 24 age group being more than six times the national average. The death rates for various age groups, in 1976, ranged from 2 to 4 times the national average. For instance, ages 1-4 and 20-44 are 4 times higher, while 45-64 are slightly less than two times higher than the national average. All of this accounts for Canadian Indians having a life expectancy that is ten years less than the national average.[66]

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[64] Ibid., at 30-36.

[65] Ibid., at 15-36.

[66] Conditions, at 15-19.

After all the destruction that our federal government directly and the rest of Canada indirectly (through representatives) has inflicted on the aboriginal people, Canada owes its aboriginal people the opportunity to rejuvenate their society. This can only be achieved through possession of both collective and individual rights that are virtually absolute; additionally, the collective rights must prevail over individual aboriginal rights if our aboriginal people are to survive as a people. Although it has not said this in the same way, the United Nations supports this concept.

SUPPORT IN THE INTERNATIONAL COMMUNITY

A) UN SEMINAR ON RELATIONS BETWEEN INDIGENOUS PEOPLES & STATES

In recent years, international support has surfaced for the revival, survival and promotion of indigenous peoples culture. In 1978, the UN World Conference to Combat Racism and Racial Discrimination was held in Geneva. It was the first UN conference that addressed indigenous peoples' rights in its formal conclusions.

> The conference endorses the right of indigenous peoples to maintain their traditional structure of economy and culture, including their own language, and also recognizes the special relationship of indigenous peoples to their land and stresses that their land, land rights and natural resources should not be taken away from them...[67]

The Conference endorsed "the right of indigenous peoples to maintain their traditional ... culture". Since Canadian indigenous culture maintained that an individual right is of no value if it threatens the collective interest, it can be said that the Conference endorsed

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[67] UN Seminar, at 37.

the right of Canadian Indians to have their collective rights prevail over an individual's native rights. The Conference also formulated a Programme of Action which called upon States to recognize several "rights of indigenous peoples". One such right was "to carry on within their areas of settlement their traditional structure of economy and way of life...".[68] Canadian indigenous peoples' "traditional culture or way of life" was to define rights for the welfare of the group and indirectly for the individual, therefore the Conference could be said to be calling on Canada to recognize that Indian peoples should once again be allowed to do this.

In 1982, the UN Working Group on Indigenous Populations was established. In 1987 the Working Group's parent body the Sub-Commission on Prevention of Discrimination and Protection of Minorities approved a seminar to exclusively discuss indigenous issues.[69] Ten Non-Governmental Organizations (NGOs) and ten states each named one "expert" who participated in the 1989 seminar. As well, three experts from Canada, Mexico and Thailand prepared background papers for the seminar.[70] The papers perceived the recognition of collective indigenous rights as an essential part of the recognition of

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[68] UN Seminar, at 38.

[69] The Human Rights Commission and the Economic and Social Council confirmed it and the "United Nations Seminar on the Effects on Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States" was held in Geneva, January 16-20, 1989. Earlier UN usage had been "Indigenous Populations". But now the term "peoples" was decided upon instead of "populations", because "populations" implicitly implied a lack of cohesiveness and was seen as a misdescription.

[70] UN Seminar, at 39. Sanders speculates that this may be why Canada and Mexico were not invited to participate.

human rights, and generally supported the positions of the indigenous representatives. The Seminar's report, approved by consensus on the last day, rejected labelling indigenous peoples as ethnic and linguistic minorities and confirmed the need to protect the collective rights of indigenous peoples. It recommended that indigenous peoples should be recognized as proper subjects of international law and essentially likened indigenous peoples with states, while not suggesting secession or independence. The report stated that:

> ... the effective protection of the individual human rights and fundamental freedoms of indigenous peoples cannot be realized without the recognition of their collective rights.p.42

The call to recognize collective rights could not be any plainer.

B) Revised Draft
Universal Declaration on Rights of Indigenous Peoples

In addition, the three papers and the seminar discussions strongly endorsed a paper requested by the UN Working Group and prepared by it's chair, Madame Daes: Revised Draft Universal Declaration on Rights of Indigenous Peoples.[71] The preamble of the Declaration says, in part, that the General Assembly,

> Recognizing the specific need to promote and protect those rights and characteristics which stem from indigenous history, philosophy of life, traditions, culture and legal, social and economic structures, especially as these are tied to the lands...

If this declaration is adopted, the General Assembly would recognize the need to promote and protect those rights stemming from indigenous history, philosophy of life,

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[71] UN Seminar, at 43.

culture, and so on. This implies that, in areas where it was traditionally true, the General Assembly would promote that individual indigenous rights that threaten the collective would not prevail, and individual rights did not prevail in Canada. The preamble continues:

> Convinced that all doctrines and practices of racial, ethnic or cultural superiority are legally wrong, morally condemnable and socially unjust...

Section 25 shields and 35 entrenches aboriginal rights. Presumably aboriginal rights include the right to practice their culture. Canadian indigenous peoples culture dictates that their collective rights should prevail over the individual rights of indigenous peoples. However, it is conceivable that political and social pressure could force an interpretation that would not allow the collective rights to prevail. If this occurred, the fact that Canada imposed an individually based, western-liberal human rights doctrine on collective based peoples without native input or consent, would imply that the Government of Canada is practicing cultural superiority over the natives. If the western-liberal doctrine was not deemed to be superior, a constitutional provision that guarantees aboriginal collective rights would not be interpreted so that collective rights do not prevail. Individual rights would not be held to be superior or equal to the collective rights of collective based peoples. The General Assembly, then, could find that imposing this interpretation on Canadian Indians is "legally wrong, morally condemnable and socially unjust." The preamble goes on:

> Endorsing calls for the consolidation and strengthening of indigenous societies and their cultures and traditions through development <u>based on their own</u>

needs and value systems...[72] (underline is mine)

As demonstrated earlier, Canadian indigenous society desperately needs to be strengthened, not only culturally, but in education, health, and generally. The UN clearly recognizes this. Indian society being strengthened through development based on their own value systems necessarily implies that development through collective rights prevailing over individual rights would be endorsed by the General Assembly because that is what is needed and it is according to indigenous values. In fact twenty percent of the thirty articles in the declaration on rights of indigenous peoples that follows the preamble deal with collective rights. If accepted the General Assembly would call "upon all States to take prompt and effective measures to implement the declaration in conjunction with the indigenous peoples."[73] In other words it would call on all states to implement collective rights.

The collective rights in the articles include:

3. The [collective] right to exist as distinct peoples and to be protected against genocide...
4. The [collective] right to maintain and develop their ethnic and cultural characteristics and distinct identity ...
5. The individual and collective right to protection against ethnocide. This protection shall include ... any form of forced assimilation or ... imposition of foreign lifestyles[74]

Part of the Canadian indigenous distinct identity is the collective and all that flows from

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[72] Draft, at 45.

[73] Draft, at 44,45. Articles that specifically name and deal with collective rights are 3, 4, 5, 12, 23, and 28.

[74] Declaration, at 46.

it. Imposing a foreign Charter of Rights based on individual rights prevailing over collective rights would be imposing a foreign lifestyle over the native people. This declaration would ask states to protect Canadian natives from the imposition, and thus promotes the prevalence of indigenous collective rights.

> 23. The [collective] right to autonomy in matters relating to their own internal and local affairs, including education, information, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions.[75]

This article supports the collective to be autonomous in all internal and local areas. This, in effect, is self-government. Being autonomous in all these areas indicates that the collective could make its' own rules in these areas. First, the fact that it is a collective right implies that collective rights are predominant. Second, since collective rights have historically been predominant in indigenous society, an autonomous state would surely have the rights to insist that, collective rights prevail over individual rights, in all internal matters. The right would not be restricted to the areas mentioned in article 23, because it says "including". This implies that the article only names some of the areas, and that others not named still exist.

The UN Working Group's mandate, when it was established, was to draft international standards in the form of a declaration to govern how States treated their indigenous peoples. It was understood that this declaration would be enacted by the United Nation's General Assembly, and while initially the declaration would not be legally binding, it

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[75] Declaration, at 48.

would indicate what the majority of states see as proper. Just as the Universal Declaration of Human Rights was followed by two general UN human rights covenants, it is logical to expect that the Universal Declaration On Rights of Indigenous Peoples would also be followed by a treaty/covenant.[76] States that sign a treaty orncovenant are bound to follow it, and if enough countries sign the covenant, in time it becomes customary international law. Even states that have not signed a covenant are bound to follow it once it becomes recognized as customary international law. Just as the human rights covenant is now recognized as customary international law, the indigenous peoples declaration may also become customary international law, which would mean that it would be binding on Canada whether or not they signed the convention.

In addition, the general assembly's conclusion and the Working Party's work todate indicates that the UN is working towards having indigenous peoples collective rights recognized. They have endorsed the fact that indigenous peoples have a right to "maintain" or practice their cultures. They also called on all States to recognize these rights. Since collective rights historically prevailed over individual rights, it cannot be denied that if the majority of Canadian indigenous peoples want to continue this practice, the UN has called on Canada to respect this wish. It must also be noted that the Declaration's second last article states: "These rights constitute the minimum standards for the survival and the well-being of the indigenous peoples of the world."[77]

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[76] Declaration, at 44.

[77] Declaration, at 48.

Are S.25 Rights Absolute?

In addition to guaranteeing the rights and freedoms that are "set out" in the Charter of Rights and Freedoms, section one can also be used to limit those rights[78]. However, section 25 does not "set out" or guarantee native rights and freedoms against all the world; it only shields them against the Charter guarantees. The guarantee of native rights comes from section 35; thus section one would not directly apply to the native rights and freedoms that section 25 refers to. Is it possible for section 1 to indirectly limit section 25 by limiting the rights guaranteed in section 35? Section 34 is in Part I and states "This Part may be cited as the Charter of Rights and Freedoms." Section 35 is the first and only section in Part II, thus the limits from section 1 only apply to the rights that are guaranteed from sections 1 to 34, and not to section 35. The Alberta Court of Queen's Bench concurs with this conclusion:

> Section 35 is the only section under Part II of the Constitution. It is not covered by the guarantee under section 1 of Part I ... and is not subject to the limitation contained therein ..."[79]

The Manitoba Court of Queen's Bench agrees that "Section 35 is in Part II of the Constitution Act and not subject to the limitations in s.1."[80] The Ontario Court of Appeal also stated that "the rights protected by s.35 cannot be limited under s.1,

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[78] Section 1 reads: The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The limit is imposed in a two step approach as set out in R. v. Oakes, (1986) 26 D.L.R. (4th) 200, 24 C.C.C. 321 (S.C.C.).

[79] R. v. Arcand [1989] 2 C.N.L.R. 110 at 118.

[80] R. v. Flett [1989] 4 C.N.L.R. 128 at 132.

overridden under s.33, or enforced under s.24 of the Charter.[81] It seems safe to assume then, that section one does not limit native rights; but, does this mean that the rights are absolute?

Section 35 will have to be looked at because there does not seem to be any section 25 cases that looked at this; at any rate, the rights are essentially the same. In R. v. Arcand, the Alberta Court of Queens Bench ruled on a violation of section 5(4) of the Migratory Bird Regulations:

> The inclusion of s.35, coupled with s.52 ... does entrench existing treaty rights ... Section 52 of the Constitution provides that any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect ... I am of the opinion that the regulation, being in breach of the treaty, is inconsistent with the right provided in s. 35 of the Constitution and is to that extent of no force or effect.[82] (emphasis is mine)

The status Indian's acquittal on the charge of hunting ducks out of season was therefore upheld. This may seem inconsistent with Steinhauer v. R., where they had found that treaty rights did not extend to treaty Indians fishing without a licence. However, there the decision was based on the treaty itself, which stated that fishing was "subject to such regulations as may from time to time be made...".[83] The decisions are therefore consistent.

In R. v. Flett, Schwartz J. adopted the reasoning and remarks from Arcand, stating that "For these reasons, I agree that s.35(1) entrenches existing Indian treaty rights." Again,

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[81] Agawa, at 78.

[82] Arcand, at 118.

[83] Steinhauer v. R. [1985] 3 C.N.L.R. 187 at 190 (Alta.Q.B.).

a status Indian was acquitted of the charge of unlawfully hunting migratory birds out of season, which is contrary to the Migratory Birds Convention Act.[84] Since this point has yet to be decided at their Appellate Courts, the Alberta and Manitoba positions seem to be that rules inconsistent with treaty rights are of no force or effect; there has been no mention of limitation.

However, in Agawa the Ontario Court of Appeal held that since requiring a licence for gill net fishing "applies to all residents of Ontario and serves a valid conservation purpose", it was a reasonable limitation on treaty rights.[85] Similarly, in R. v. Horse, the Saskatchewan Court of Appeal held that "section 35.1 has no effect on the application of provincial game laws to treaty Indians...".[86] I agree that there has to be some limitation, but conservation regulations should not be blindly applied. The B.C. Court of Appeal has taken what seems to be a more reasonable approach. In Sparrow v. R., it ruled that "there continues to be a power to regulate the exercise of fishing by Indians even where that fishing is pursuant to an aboriginal right, but there are now limitations on that power."[87] Magnet thinks that treaty rights will at least be subject to the Migratory Birds Convention Act:

> the section was never intended to revive aboriginal or treaty rights which had been legally ended in the past. Therefore, treaty protected hunting rights will

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[84] Flett supra, at 132.

[85] Agawa, at 89-91.

[86] R. v. Horse [1984] 4 C.N.L.R. 99 at 106 (S.C.A.).

[87] Sparrow v. R. [1987] 1 C.N.L.R. 145 at 177 (B.C.C.A.).

> continue to be subject to the Migratory Birds Convention Act ... as held in various pre-1982 cases[88]

The problem with Magnet's reasoning seems to be that treaty protected hunting rights that were restricted by the Migratory Birds Convention Act did not legally come to an end. Blair J.A. comments in R. v. Agawa:

> the effect of s.35(1) has been carefully examined by scholars concerned with the rights of aboriginal peoples in Canada. They are almost unanimous in their view that a treaty right which has not been extinguished but merely limited or restricted by federal legislation, is an existing treaty right within the meaning of s.35(1).[89]

Professor Kent McNeil has a good test to distinguish between "dead rights" which are incapable of revival and "sleeping rights" which are protected under s.35(1):

> A workable test that might be applied to determine whether a particular right has been extinguished or merely rendered unexercisable would be to ask whether the right would be restored if the legislation affecting it was repealed. If the answer is no, then the right must have been extinguished; if yes, it must still exist and therefore is entitled to constitutional protection under section 35(1).[90]

Professors Norman K. Zlotkin,[91] Douglas Sanders,[92] W.F. Pentney and Professor Brian

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[88] Joseph, Elliot Magnet, Constitutional Law of Canada, Vol 2, 3rd ed. (Toronto: Carswell, 1987) at 974.

[89] R. v. Agawa supra, at 85.

[90] Kent McNeil, The Constitutional Rights of Aboriginal Peoples of Canada (1982), 4 Sup.Ct.L.Rev. 255 at 257.

[91] Professor Norman K. Zlotkin, Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference, Discussion Paper No. 15, (Institute of Intergovernmental Relations, Queens University, 1983).

[92] Douglas Sanders "The Rights of the Aboriginal Peoples of Canada, Beck and Bernier eds., Canada and the New Constitution, The Unfinished Agenda, Vol.1 (1983) at 331.

Slattery have all approved this test and it has been approved and followed by the Ontario Court of Appeal,[93] and the Alberta Court of Queen's Bench[94]. As Slattery says, "in order to determine what treaty rights are covered by section 35 one looks to the texts of treaties in force as of 17 April 1982, not to legislation.[95] Hogg also says:

> The most plausible interpretation of s.35 is that it "constitutionalizes" aboriginal and treaty rights prospectively. Past (validly enacted) extinguishments continue to be legally effective, but future legislation that purported to extinguish or alter the protected rights would be of no force or effect....[96] (emphasis is mine)

Note that Hogg says "(**past** validly) enacted **extinguishments**" are effective. Yet, when speaking about future legislation, he says "future legislation that purported to extinguish or alter protected rights would be of no force or effect". It seems reasonable to assume that if Hogg had meant legislation that altered rights in the past were still effective, he would have said "(past validly) enacted extinguishments and alterations"; however, he did not. Thus one can infer that Hogg did not mean that past alterations are effective; in fact because Hogg did not include alterations in speaking of past legislation, one can infer that just as future alterations are "of no force or effect", past alterations are similarly "of no force or effect".

However, aboriginal philosophy would not agree that rights are to be blindly followed if

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[93] Agawa, at 89.

[94] Arcand, at 115.

[95] Brian Slattery, The Constitutional Guarantee of Aboriginal and Treaty Rights, (1983), 8 Queens L.J. 232 at 264.

[96] Hogg, at 566.

it means that others or the collective itself would be needlesssly harmed. As Hogg points out, rights cannot be absolute. Many guaranteed rights in the American Bill of Rights are expressed in unqualified terms, yet the courts have implied limitations on those rights; Canadian courts can use that and section one as authority that rights can be limited.[97] I agree that there has to be limitations, but to what extent?

How Native Rights Should be Protected

It seems reasonable to assume that if the framers of the Constitution had wanted aboriginal and treaty rights to be limited to a great extent, section 35 would have been in Part I. The mere fact that section 35 is in Part II, where section 1 cannot reach it implies that any limits to section 35 should only be for exceptional circumstances. First, it must be recognized that section 25 seems to encompass more rights and freedoms than section 35 does. Section 25 rights include aboriginal rights and freedoms, treaty rights and freedoms, rights and freedoms recognized by the Royal Proclamation, rights and freedoms created by land claim agreements and other rights and freedoms pertaining to aboriginal peoples. Meanwhile section 35 rights only include existing aboriginal rights, existing treaty rights, and rights that now exist or that may be derived through negotiations of land claims agreements. It is also clear that aboriginal people will have differing rights, because different treaties and land claims necessarily give aboriginal peoples in different areas different rights. In addition, some people's ancestors never

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[97] Hogg, at 680. In the footnote to this assertion, Hogg states "in my view, there is merit in a frank avowal that the guaranteed rights are not absolutes." Wildsmith says at 25 "the answer for me comes from the notion that no right is absolute."

signed treaties, some signed treaties but will not negotiate land claims, and still others will have signed treaties and in addition will negotiate land claims.[98] Thus some Indians would have both treaty and land claims rights, some would have neither and some could have either.

Just as different aboriginal people have different rights, so too each case has different circumstances, and each case would be tried on its own merits. Where the situation warrants it, the native rights would prevail, and where it is not appropriate, the right could be restricted or the collective right could be waved in favor of the individuals rights. For hunting, fishing, and other regulations, it is appropriate that all cases proceed on the premise similar to strict liability, with no absolute liability. In R v. Sault Ste. Marie, the Supreme Court said that in all cases where a person may receive a jail term, there should not be absolute liability, but that the person should be allowed to show that he used due diligence.[99] Similarly, an aboriginal person should not automatically be found guilty merely on proof that he committed the prohibited act either. For the regulation to be enforceable against an established native right, it should not be sufficient to merely show that the regulation is for conservation purposes. After all, because it may

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[98] If a band can show that Canada has not lived up to its obligations through the treaties it signed to obtain Indian land, land claims are negotiated to finally "pay" for the property the crown has acquired. Also, if a band can show that its people did not know that they were signing a land agreement, then again a land claims agreement must be negotiated. This is what is occurring in the Northwest Territories. As Hall J. says at page 208 in Calder, "Once aboriginal title is established, it is presumed to continue until the contrary is proven."

[99] R v. Sault Ste. Marie [1978] 2 S.C.R. 1299 (S.C.C).

be necessary to prevent twenty-five million people from doing something, does not mean it is necessary to prevent only a few people from doing the same act. It must be remembered that perhaps only a very few people would have the right to hunt/fish in an area and that allowing them to hunt/fish would not harm the species at all. If it is not threatening to the protected species, then it should not be enforceable; in all cases, the aboriginal person could have the opportunity to prove

that it is a guaranteed right. The Crown would then have to prove that it is a valid conservation measure and that it is necessary to prohibit aboriginal people, as well as non-native people, from exercising their right in order to preserve the resource. Even then, the aboriginal person could provide a legitimate reason for exercising the right.

Everything would depend on the circumstances. For instance, if a person and/or his children are starving at home, the right might legitimately allow him to kill an endangered animal for food. But, this would necessarily depend on the circumstances. For instance, if the children are starving because the person was simply too lazy to go down town to buy some groceries, it would not do to allow an animal that belongs to an endangered species to be shot. However, if that person was in the bush, and his kids were starving, it would be alright to kill anything. Similarly, if the aboriginal person kills a duck out of season, it does not necessarily mean that he will be convicted if he is not starving; the crown would first have to show that it is necessary to prevent aboriginal people from hunting ducks to preserve the species. In other words, it would almost have to be an endangered species to be against the law. Therefore, it has to depend on the

circumstances. Some of the circumstances that would have to be considered would include whether or not the species is endangered, whether the person lives off wild game or is out on a drunken lark shooting anything moving; whether he is simply sport hunting or going to use it for food, and so on. Of course, situations that endanger human lives, like shooting in municipal boundaries or near roads, could not be allowed.

In the case of collective rights versus individual rights, it is necessary to remember that individual rights are limited for the good of the collective, the rest of Canada, all the time, through section one. In addition, by the United Nations calling on all States to recognize that indigenous peoples have the right to
"carry on...their tradional...way of life" they are advocating that collective rights prevail over individual rights.

It is therefore, necessary to begin with the premise that native rights are absolute and that different aboriginal people have different rights depending on such things like whether they are party to a treaty or are party to land claims agreements. Then, remembering that traditional Indian culture respects the individual and would not want to harm an individual unless it endangers or harms the collective, because harming the individual also harms the collective, it can be assumed that where warranted the collective right can be restricted if need be.

It should operate somewhat like paramountcy where both Provincial laws and Federal

laws coexist and where the laws are inconsistent, the provincial law is rendered inoperative. Hogg explains what happens when inconsistency occurs:

> ... the provincial law must yield to the federal law. The most usual and most accurate way of describing the effect on the provincial law is to say that it is rendered inoperative to the extent of the inconsistency ... The doctrine will not affect the operation of those parts of the provincial law which are not inconsistent with the federal law, unless of course the inconsistent parts are inseparably linked up with consistent parts ... If the federal law is repealed then the provincial law will automatically "revive" (come back into operation) without any reenactment by the provincial legislature.[100]

In the case of native rights, where there is an inconsistency, the collective rights will be paramount. However, unlike paramountcy, the collective right may be waved if it will harm the individual. One must then remember that the preamble The Declaration of Indigenous Rights preamble endorsed "calls for the consolidation and strengthening of indigenous societies and their cultures and traditions through development based on their own needs and value systems..."[101] If it is necessary for group preservation or advancement, the collective right prevails even if it harms the individual, but if the individual is being harmed and group preservation or advancement would not be threatened by waving section 25, then the individuals rights could prevail until it is necessary for the collective rights to reemerge. For instance, pretend a tribe has picked itself out of the gutter by using some means that seem questionable to some human rights activists, leaders, and/or students. An example is that they only allow one church in their town, the Baptist Church. In addition to this seeming quite extreme, can it even be

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[100] Hogg, at 367.

[101] Draft, at 45.

classified as exercising a native right. It seems likely that it would be a right. Every nation has the collective right to survival as well as the right to self-determination. No treaty or land claims agreement signed in Canada gives away those rights. There are also those who argue that even where aboriginal title has been extinguished by legislation, the people still have the aboriginal right to self-determination. Limiting anything that threatens survival or self-determination could be exercising an aboriginal right, or even a land claims right.

Again, the circumstances would have to be looked at. The town says that having more than one denomination in town causes dissention that it can ill afford at this time. The people need unity or some people who are have extricated themselves from desperate situations may regress ie. back to alcohol and/or welfare. If it can be shown that having more than one church in town would cause disruption that may not be overcome, then the freedom of religion would have to be curtailed. Ten years later, however, the community may be sufficiently strong to enable restrictions to be relaxed. If an individual then challenged the right, a court might find that it was okay to declare open season on the souls in Stillwater. Similarly, if the tribe had absolutely no reason for having only one religion and an individual could show that the limitation was harming him, then the collective right might have to be curtailed in favor of the individual right.

Conclusion

Section 25 shields native rights from the guarantees in the Charter. Those rights, if they

are also mentioned in section 35, are also entrenched. Since many of these rights originate from collective ownership of land and from a communally oriented society, they not only include rights for the individual, but also for the collective. The cultural genocide practiced on aboriginal people by our federal government has left the Canadian aboriginal people in poor health, on welfare and in our jails. Canada owes these people the right to re-establish themselves as self-respecting, self-governing, independent people. These people are owed the opportunity to preserve their culture and to exist as a collective. It is therefore, necessary for collective native rights to prevail over individual native rights, if exercising the individual's rights would harm the collective or threaten its harmony. However the collective right may be waved if exercising it would harm the individual. It depends on the circumstances. Because the government is responsible for the mess that aboriginal people are in today, they should also take the initiative in resolving this issue. The rights encompassed in sections 25 and 35 must be defined. It should not be left completely up to the courts. Government should meet with the aboriginal associations and work out at least a framework that the courts can work with.

WORKS CITED

F.L. Morton, "Group Rights Versus Individual Rights In The Charter: The Special Cases of Natives And The Quebecois", in Allan Kornberg, ed., Minorities and The Canadian State (Oakville: Mosaic Press, 1985)

Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada", (1983) 61 Can. Bar Rev. 314 at 316.

Menno Boldt and Anthony Long, eds., Quest for Justice: Aboriginal Peoples and Aboriginal Rights, (Toronto: University of Toronto Press, 1985)

Richard H. Bartlett, "Survey of Canadian Law: Indian and Native Law" (1983) 15 Ottawa L. Rev. 430

Bryan Schwartz, First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1982-84 (Kingston, Ont.: Institute of Intergovernmental Relations, Queen's University, 1985)

Edward McWhinney, Canada and the Constitution 1979-1982 (Toronto: University of Toronto Press, 1982)

Peter W. Hogg, Constitutional Law of Canada, 2nd ed. (Toronto: Carswell, 1985)

Kent McNeil, The Constitution Act, 1982, Sections 25 and 35, an oral presentation at "First Nations and the Constitution -What Now", printed in [1988] 1 C.N.L.R. 1

William Pentney, The Interpretive Prism of Section 25, (1988) 22:1 U.B.C. Law Rev. 20

Douglas Sanders, The Rights of the Aboriginal Peoples of Canada (1983) 61 Can. Bar. Rev. 314

R.H. Bartlett, Parallels in Aboriginal Land Policy, [1988] 4 C.N.L.R. 1

J.L. Tobias, "Indian Reserves in Western Canada: Indian Homelands or Devices for Assimilation." Approaches to Native History in Canada: Papers of a Conference held at the National Museum of Man, Ed. D.A. Muise, Ottawa, 1975, 89

James Frideres, Native People In Canada: Contemporary Conflicts: Ontario: Scarborough, Prentice-Hall Canada Inc., 1983

Richard H. Bartlett, "Indian and Native Law Cases and Materials. College of law, University of Saskatchewan, 1989

Brian E. Titley, A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada. Vancouver: University of British Columbia Press, 1986.

J. Philip Nicholson ed. Indian Conditions: a survey. Ottawa: Minister of Indian Affairs. 1980 Queen's Printer?

Professor Norman K. Zlotkin, Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference, Discussion Paper No. 15, (Institute of Intergovernmental Relations, Queens University, 1983).

Douglas Sanders "The Rights of the Aboriginal Peoples of Canada, Beck and Bernier eds., Canada and the New Constitution, The Unfinished Agenda, Vol.1 (1983)

Brian Slattery, The Constitutional Guarantee of Aboriginal and Treaty Rights, (1983), 8 Queens L.J. 232

CASES CITED

R. v. Drybones, [1970] S.C.R. 282.

Robertson and Rosetanni v. R, [1963] S.C.R. 651.

Augustine and Augustine v. R. [1987] 1 C.N.L.R. 35.

R. v. Kent, Sinclair and Code [1986] 4 C.N.L.R. 93 (M.C.A.).

Steinhauer v. R. [1985] 3 C.N.L.R. 187.

A.G. Ont. v. Bear Island Foundation [1985] C.N.L.R. 153 1 (Ont.C.A.).

R. v. Eninew [1984] 2 C.N.L.R. 122 (Sask.Q.B.).

R. v. Nichols and Bear [1985] 4 C.N.L.R. 153.

R. v. Agawa, [1988] 3 C.N.L.R. 73.

R. v. Oakes, (1986) 26 D.L.R. (4th) 200, 24 C.C.C. 321 (S.C.C.).

R. v. Arcand [1989] 2 C.N.L.R. 110.

R. v. Flett [1989] 4 C.N.L.R. 128.

Steinhauer v. R. [1985] 3 C.N.L.R. 187 (Alta.Q.B.).

R. v. Horse [1984] 4 C.N.L.R. 99 (S.C.A.).

Sparrow v. R. [1987] 1 C.N.L.R. 145 (B.C.C.A.).

R v. Sault Ste. Marie [1978] 2 S.C.R. 1299 (S.C.C).