The right to self-government of the aboriginal peoples of Canada under domestic and international law

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ABSTRACT

This thesis examines the legal foundations of the right to self-government of the aboriginal peoples of Canada, with particular regard to the Constitution Act, 1982 and to the relevant provisions of international law.

The first part provides an overview of the political background, namely, the recent policy of the federal government relating to aboriginal peoples, the constitutional negotiation process and the positions taken by the aboriginal peoples.

The second part discusses the relevant constitutional provisions, namely s.25 of the Charter of Rights and Freedoms and s.35 of the Constitution Act, 1982, and examines the sources of a right to self-government in the domestic context.

The third part analyses the relevant concepts and norms of international law, in particular the right to self-determination of peoples.

The conclusion deriving from the analysis of domestic and international law is that aboriginal peoples have an inherent right to self-government, based on the concept of original occupancy and deriving from their retained sovereignty, and that they qualify as subjects of the right to self-determination of peoples.

The fourth part describes existing and proposed models of self-government, discusses their legal character and determines to what extent these models may be considered as implementing a right to self-government.

RÉSUMÉ

Le présent mémoire analyse les sources du droit à l'autonomie gouvernementale des peuples autochtones du Canada, en particulier à l'égard de la Loi Constitutionelle de 1982 et des normes pertinentes de droit international.

La première partie donne un aperçu de l'arrière plan politique, à savoir la politique récente du gouvernement fédéral envers les peuples autochtones, le processus de négotiation constitutionnel et les positions des peuples autochtones.

La deuxième partie examine les articles de la constitution cncernant les droits des autochtones, à savoir l'article 25 de la Charte des Droits et Libertés et l'article 35 de la Loi Constitutionelle de 1982, et les sources du droit à l'autonomie gouvernementale dans le système juridique Canadien.

La troisième partie analyse les concepts et normes pertinents de droit international, en particulier le droit des peuples à disposer d'eux-mêmes.

La conclusion tirée de l'analyse du droit Canadien et du droit international est que les peuples autochtones du Canada ont un droit inhérent à l'autonomie gouvernementale, fondé sur le concept d'occupation originaire et dérivant de leur souveraineté encore existante, et qu'ils ont la capacité de sujets du droit des peuples à disposer d'eux-mêmes.

La quatrième partie décrit plusieurs formes d'autonomie gouvernementale, existantes et futures, examine leur charactère juridique et dans quelle mesure elles peuvent être considérées comme applications du droit à l'autonomie gouvernementale.

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INTRODUCTION

The recent First Ministers' Conference relating to aboriginal constitutional matters, held in Ottawa on March 26 and 27, 1987 (hereinafter referred to as 1987 FMC) has shown that the issue of aboriginal rights and in particular the right to self-government of aboriginal peoples is still a matter of particular political and legal significance in Canada. It also demonstrated the continuing and growing awareness and articulacy of the aboriginal groups of Canada with regard to their rights in both the domestic and the international context. The inherent right to self-government of aboriginal peoples was at the centre of the political and legal discussion of the 1987 FMC. It will be the object of this thesis to analyse the legal foundations of this right from the point of view of both domestic and international law. Recent developments in the field of international law suggest that there is a growing recognition of the rights of aboriginal peoples, the extent of which will have to be determined. The right to self-determination of peoples, as expressed in various international documents and instruments, is of particular relevance in this context. Norms and concepts of modern international law, and of the law of nations also become relevant, as will be seen, for the examination of the historic roots of a right to self-government. The notion of aboriginal peoples and the relevant norms of international law suggest that a distinction has to be made between the rights of peoples and the rights of minorities. The distinction between minority rights and the rights of aboriginal peoples is also one between collective and individual rights. This distinction is also apparent in the relevant norms of Canadian constitutional law. In the domestic context, the importance of the issue of aboriginal rights is reflected in the Constitution Act, 1982[1], and in the Charter of Rights and Freedoms[2] (hereinafter

referred to as Charter) contained therein. The express reference to aboriginal rights in s.25 of the Charter and in s.35 of the Constitution Act, 1982, represents a new and unique feature in Canadian constitutional law in that it is the first recognition of the rights of all the aboriginal peoples in Canada. The interpretation of these provisions with regard to the right to self-government becomes particularly important in view of the fact that the 1987 FMC, which was the last constitutionally mandated conference on aboriginal matters, failed to secure a constitutional amendment expressly recognizing the right of aboriginal peoples to self-government. These provisions shall be interpreted with reference to international law. The character of the Charter as an instrument for the protection of fundamental rights and freedoms suggests that it should be interpreted in the light of the relevant international human rights instruments to which Canada has adhered. The issue of aboriginal rights and of the right to self-government may thus provide an illustration of the impact of international law on Canadian constitutional law. The examination of the right to self-government in the context of the Charter and of international law also raises the issue of the relation between collective and individual rights. Insofar as the recognition of a right to self-government would entail the establishment of a third order of government within Canada with corresponding jurisdiction, the question arises as to the application of the Charter to aboriginal governments. Similarly, the impact of international treaty obligations of Canada in the field of human rights on an autonomous aboriginal jurisdiction would have to be determined. An attempt will thus be made to describe the legal implications of the recognition of an inherent right to self-government of aboriginal peoples.

PART I: POLITICAL AND LEGAL BACKGROUND

To place the legal analysis in a proper perspective, this first part will give an overview of the political context surrounding the legal discussion of an aboriginal right to self-government and briefly indicate the relevant legal developments prior to 1982.

Introductory Chapter

I. The aboriginal peoples of Canada

For the purposes of the present discussion, it is appropriate to give an overview of the constituent elements of the "aboriginal peoples of Canada". That term is defined in s.35(2) of the Constitution Act, 1982 as including the "Indian, Inuit and Métis peoples of Canada". The total aboriginal population of Canada is estimated at about 1,100,000 people. The Inuit are estimated at a total of 25,000, the rest of the population is divided among the so-called "status Indians"[3], "non-status Indians" and the Métis (or "Half-Breed"). However, there appears to be a substantial divergence between unofficial and official figures, so that a reliable estimate is not possible[4]. The "status Indians" belong to approximately 580 bands living on over 2,000 reserves[5]. It is important to note that the "aboriginal peoples" do not constitute a homogenous entity. There are several distinct linguistic groups and numerous different dialects[6]. Correspondingly, there is a wide ranging cultural diversity. The aboriginal population is also geographically diversified. The Inuit are located in the northern and polar regions. Some of the Indian peoples, such as the Dene, are also located in the northern regions, the others are spread from British Columbia to the eastern

maritime provinces and in the south near the U.S. border. Geographical factors also contribute to the cultural diversity. A political and legal analysis relating to the "aboriginal peoples" as a whole will therefore necessarily overstate or oversimplify the problems relating to specific aboriginal communities. In the following analysis, the term "aboriginal peoples" will be used except when the relevant legal provisions are not applicable to one of the three main aboriginal groups identified in the Constitution Act, 1982.

At the political level, in particular during the constitutional negotiation process, the "aboriginal peoples of Canada" were represented by four national organizations, namely: the Assembly of First Nations, formerly the National Indian Brotherhood (hereinafter respectively AFN and NIB) representing the "status Indians", the Native Council of Canada (hereinafter: NCC), representing the "non-status Indians", the Métis National Council (hereinafter: MNC) representing the Métis and the Inuit Committee on National Issues (hereinafter: ICNI) representing the Inuit.

II. Legal background

The starting-point of the present analysis is the Constitution Act, 1982. It was noted in the introduction that it represented the first constitutional recognition of the rights of all aboriginal peoples in Canada. This does not mean that prior to 1982 there did not exist any constitutional recognition of aboriginal rights. The new feature introduced by the Constitution Act, 1982 is that it recognizes the rights of Indians, Métis and Inuit. The rights of the two latter groups did not receive any express recognition in the constitution prior to 1982. Earlier constitutional provisions did however make reference to Indians and to Indian rights. S.91(24) of the Constitution Act, 1867[7] provides for the competence of the federal Parliament to legislate for "Indians, and Lands reserved for the Indians". This provision indicates

that Indians were recognized as a legally relevant entity. Prior to confederation, the 1763 Royal Proclamation[8] placed the Indians under the special protection of the Crown. In particular, it provided that the Indians "should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as ... are reserved to them or any of them" and that consequently only the Crown could make any transactions with regard to Indian lands. The Royal Proclamation is not expressly included in the definition of the "Constitution of Canada" provided by s.52(2) of the Constitution Act, 1982. Although that definition is technically not exhaustive, it cannot be presumed that the Royal Proclamation is part of the Canadian constitution[9]. However, s.25(a) of the Charter makes reference to the aboriginal rights protected under the Royal Proclamation. It has thus received indirect constitutional recognition as an instrument protecting aboriginal rights.

Another example of constitutional recognition of Indian rights prior to 1982 is provided by the Constitution Act, 1930[10]. It confirmed agreements between the Parliament and the legislatures of Alberta and Manitoba securing hunting rights to the prairie Indians. These hunting rights thereby received constitutional protection.

The concept of "aboriginal rights" as a special category of rights also received judicial recognition prior to 1982. Early decisions recognized the Royal Proclamation as a source of aboriginal rights[11]. In the more recent jurisprudence, the 1973 decision of the Supreme Court of Canada (hereinafter: S.C.C.) in the Calder case[12] can be considered as the "turning point" in the jurisprudence relating to aboriginal rights, in that it implicitly recognized the concept of an aboriginal title based on the fact of original occupancy. This decision will be examined in more detail below. Subsequent decisions of the S.C.C. and of other courts, in particular those reached after 1982, demonstrated a gradually more liberal approach to the interpretation of aboriginal rights and their scope. These recent decisions will be addressed in the legal discussion below.

Chapter 1

The constitutional negotiation process since the "patriation" of the Canadian Constitution

Introduction

The constitutional expression of aboriginal rights is a direct result of a political process underlying the constitutional amendment negotiations[1]. The above-mentioned 1987 FMC was the last mandated conference with a view to amend the constitution in respect of aboriginal rights. The constitutional negotiation process thus represents an important aspect of the political process relating to aboriginal peoples. The constitutional negotiation process can be seen as part of the federal government's policy towards aboriginal peoples. The other part finds its expression in negotiations held by the federal government with specific aboriginal groups outside the framework of the conferences. Both aspects of the government's policy will be described to place the legal analysis in a proper perspective.

The constitutional negotiation process can be divided into two main parts. Its first part comprises the constitutional amendment process which led to the passing of the Canada Act, 1982[2] by the British Parliament and the coming into force of the Constitution Act, 1982, containing the Charter and constitutional amendment procedures enabling the Canadian Parliament to amend the Canadian constitution without the consent of the British Parliament[3]. Before April 17, 1982, the Canadian constitution could formally only be amended by an Act of the British Parliament, pursuant to s.7 (1) of the Statute of Westminster, 1931[4]. The Canada Act, 1982, by virtue of s.2 also legally terminated the power of the British Parliament to legislate

for Canada. This so-called "patriation" process[5] represented a major step in the Canadian political and legal scene. For the aboriginal peoples of Canada, the "patriation" issue became one of primary importance. At the time when the political discussions on the constitutional amendment process started, aboriginal peoples had developed a strong awareness of their political and legal position and potential role in the Canadian federation[6].

During the political process prior to the coming into force of the Constitution Act, 1982, aboriginal leaders succeeded in building up enough political pressure to obtain the inclusion of aboriginal rights provisions in the draft constitutional amendment.

The second part of the constitutional negotiation process took place during the constitutional conferences on aboriginal matters mandated by the Constitution Act 1982. Between 1982 and 1987, four of these conferences were held, with the aim of reaching a definition of the recognized aboriginal rights and to include specific rights in the Constitution.

I. The inclusion of s.24 and s.34 in the draft constitutional amendment.

It is beyond the scope of this paper to provide a detailed description and analysis of the political process which led to the "patriation" of the Canadian constitution. The following account will thus only attempt to provide an overview. The proposals of the government went before a Special Joint Committee on the Constitution of the Senate and House of Commons (hereinafter referred to as Joint Committee) that held hearings in 1980 and 1981. The process prior to these hearings was not recorded for the most part and is therefore difficult to assess. Even direct participants in the process sometimes did not have a clear understanding of apparent changes in the policy of the government[7]. A number of meetings between aboriginal leaders and ministers were held. Promises and commitments on the part of the

federal government to include aboriginal matters on the agenda and to secure aboriginal participation in the constitutional amendment process were made. The process was further complicated by the changes in the government. The Trudeau government was replaced in 1979 by the Clark government for a period of nine months, then came back to power. The positions taken by aboriginal leaders also appeared to be ambivalent and subject to changes[8]. Aboriginal groups not only tried to influence the political debate in Canada, but also in the United Kingdom[9]. These various attempts by aboriginal groups to exert influence on the constitutional process were successful in that the draft constitutional amendment contained two clauses relating to aboriginal rights and further provisions concerning constitutional conferences to be held subsequently. The original governmental proposal which was submitted to the Joint Committee had only contained s.24 (now s.25) which was intended to protect aboriginal rights from the exercise of rights guaranteed by the Charter, in particular the equality clause (s.15)[10].

In subsequent negotiations, described as "hasty and emotional public bargaining"[11], an additional provision recognizing aboriginal rights was agreed upon (s.34). S.24 was altered to include a reference to rights recognized under the Royal Proclamation of 1763. However, the draft proposal did not provide for any aboriginal participation in the constitutional amendment procedures. It also appeared that the NIB, acting as a representative for the "status Indians", did not have the necessary support from its constituents. The NIB then reversed its position and opposed the federal proposal, together with the NCC. Conversely, other aboriginal groups such as the Inuit favoured the proposal[12]. In 1981, several Indian groups instigated judicial proceedings in the United Kingdom (U.K.) , seeking a declaration that treaty obligations entered into by the Crown to the Indian peoples of Canada were still owed by the Queen in right of the U.K. government, thus attempting to prevent the British

Parliament from passing the Canada Act without prior Indian participation[13].

After the decision of the SCC concerning the patriation of the constitution and the question of provincial consent to the amendment package[14], s.34 was dropped, apparently due to the opposition of several provinces[15]. The provision was eventually reinserted in the proposal after public protest and pressure from aboriginal groups. The word "existing" was however added to the wording[16].

The overall picture emerging from the various descriptions of the political process prior to the patriation of the constitution is one of confusion. There seem to be concurring opinions that there was not at any time a proper forum to discuss and negotiate the issue of entrenching aboriginal rights and that aboriginal peoples were denied the opportunity to effectively participate in the process[17]. Although the federal government expressed support for the aboriginal cause and for the participation of aboriginal peoples in the constitutional discussions[18], a number of factors, such as the opposition of some provinces and the division among aboriginal groups themselves prevented these commitments from being translated into effective and concrete measures. For various reasons, the political will to include aboriginal peoples as equal participants in the discussion was lacking or did not materialize.

Thus, it is difficult to state whether the inclusion of s.24 and s.35 in the draft constitutional amendment was a political success for aboriginal peoples or not. The political pressure exerted by aboriginal groups did on the one hand eventually lead to the insertion of these provisions, thus yielding a palpable result. On the other hand, the contents of the provisions did not prove satisfactory to aboriginal groups. Opposition to the final proposal was maintained after the inclusion of the aboriginal rights provision, in particular because of the addition of the word "existing"[19]. The aboriginal groups did not succeed in entrenching any reference to self-determination, self-government or sovereignty, concepts which were at the core of their political

and legal demands[20].

From a legal point of view, in particular from the perspective of Canadian constitutional law, the inclusion of aboriginal rights provisions in the Charter of Rights and Freedoms and in the Constitution Act, 1982 represents a new feature and an important landmark.

II. The Constitutional Conferences between 1982 and 1987

The Constitution Act, 1982 contained a mandate for a constitutional conference to be held within one year after its coming into force. Under s.37(2), one of the agenda items was to be the "identification and definition of the right of those (aboriginal) peoples to be included in the Constitution of Canada". S.54 of the Constitution Act, 1982 provided that Part IV thereof, which included s.37, was to be repealed one year after its coming into force. The 1983 conference resulted, inter alia, in the enactment of Part IV. 1. (s.37.1), which contained a mandate for at least two more constitutional conferences on aboriginal matters to be held within five years of the coming into force of the Constitution Act, 1982. Three more constitutional conferences were held, in 1984, 1985, and 1987. Part IV.1. was repealed on April 18, 1987, pursuant to s.54.1 of the Constitution Act, 1982, which was also added as a result of the 1983 conference.

1. The 1983 constitutional conference

One of the features of the 1983 conference was that its agenda included a wide range of matters. This was due to aboriginal concerns that the conference could be the last of its kind, since s.37 of the Constitution Act, 1982 only provided for one conference to be held after its entry into force[21].

During the conference, agreement was reached on several points, among them

the need for a constitutional amendment guaranteeing further meetings at the ministerial level.

A provision on sexual equality was added to s.35 (para.(4)), and the wording of s.25 (b) was altered to make reference to modern land claims "agreements" (the original version spoke of "settlements"), for the reason that the term "agreement" was taken to be broader than "settlement". The conference did however not succeed in identifying and defining the aboriginal rights referred to in s.35. The mandate for further conferences no longer mentioned the definition of aboriginal rights as a necessary item on the agenda, but only referred to "constitutional matters that directly affect the aboriginal peoples of Canada".

No reference to self-determination or self-government was included in the amendment, although these were items on the agenda. This may be imputed to what an observer of the conference identified as "flaws in the process", namely "the lack of technical preparation by many parties, the initial non-attendance of the Assembly of First Nations, Québec's refusal to recognize the new amending formula, the gratuitously objectionable parts of the federal draft, the frenetic atmosphere of the backroom ministerial drafting sessions"[22]. From the point of view of the procedure, it is apparent from the observer's description that there was considerable confusion and unclarity. It appears that the federal government "slipped a new wording" of one clause into the amendment package after the political accord had been signed, the text of the amendment itself not being ready on time, due to delay with the translation[23]. According to the same observer, "a number of serious alterations were made to the package, as a result of last-minute discussions which hardly anyone could have fully followed, understood and evaluated"[24]. Some of the important drafting sessions appear to have taken place without aboriginal participation. "The essential work of analyzing and refining the federal proposal took place in a closed

ministerial level meeting", a meeting which was conducted "under intense pressure"[25]. Federal officials worked overnight to carry out the results of the evening's discussions, which had only resulted in vague commitments[26]. The observer noted that this procedure could lead the federal government to "adopt legal phraseology that suited its own policy purposes but severely frustrated the aspirations of other participants"[27]. Similar observations were made by aboriginal representatives. One of the delegates of the AFN in his account of the conference noted that the negotiation of important clauses in the draft amendment was conducted under time pressure[28], that "one of the handicaps which emerged from the tumult of the Conference was that we were not able to see the final typed version of the Accord and the resolution until moments before it was signed"[29] and that "Because of the confusion, certain corrections had to be made to part of the text of the resolution"[30].

The procedure on the whole thus appears to have been disorganized and under extreme pressure, subject to individual initiatives and without any overriding framework. Participants do not appear to have had a full understanding of the legal and political implications of the various amendments and proposals. The publicity aspect for aboriginal groups seems to have had at least as much importance as the achievement of concrete results[31].

The evaluation of the results is therefore as difficult here as with the outcome of the patriation process. For the aboriginal groups, a positive outcome was the certainty of an ongoing process, even though specific rights were not entrenched. On the part of the federal government, a general political will to reach an agreement was apparent but no specific commitments were articulated.

2. The 1984 Conference

The 1984 conference took place in March 1984. At that time, the Special Parliamentary Committee on Indian Self-Government (hereinafter referred to as Special Committee) had released its report (the so-called "Penner-Report"), which recommended inter alia that the right of aboriginal peoples to self-government be expressly entrenched in the constitution[32]. Self-government was also one of the agenda items which were agreed upon at preparatory meetings of officials[33]. The issue apparently became the focus of the discussions at the conference, but no attempts were made by the federal government to clarify the meaning of s.35. The government appeared to be willing to consider different approaches to self-government, but was criticized as having started its reflections on the matter "very late for the purposes of working out an adequately well-understood set of substantial guidelines on self-government"[34]. The government eventually tabled a proposal on self-government. However, criticisms similar to those expressed over the 1983 conference concerning the attitude and policy of the federal government were made, which was apparently influenced by the possibility of losing power at the next election. The federal government "could not or did not supply the necessary assurances that all the above-cited "ifs" (concerning previous governmental proposals for "accelerated negotiations" with selected aboriginal communities on self-government would become realities"[35].

As the governmental proposals for negotiations on self-government were rejected by aboriginal groups, the commentator noted "the inability of the federal government to satisfy requests from both the provinces and the aboriginal organizations that it specify what proposal it would lay before the First Ministers' Conference"[36]. It was also noted in this respect that the federal government's

official response to the Penner-Report was only made public three days before the beginning of the conference[37], which did not leave aboriginal groups much time to assess what might be the federal position at the conference. As during the 1983 conference, the discussion and negotiation procedure seemed unclear, under pressure and dependent on initiatives on the part of participants. It was thus noted that "The federal government took no initiative on arranging backroom meetings of officials and ministers to work on draft amendments or an accord .."[38]. Agreement on an amendment to the equality rights section (s. 35 (4) based on the federal draft eventually seemed possible in a meeting towards the end of the conference, but aboriginal support was analyzed as being "attributable, among other things, to the limited opportunity for delegations to explore and explain to their membership the legal implications of the last minute proposal"[39]. The conference ultimately failed to reach any agreement on a constitutional amendment.

The cause of this failure may partly be ascribed to the fact that the federal government only released its proposal on the first day of the conference. The consequence was "that there was little opportunity for its weaknesses to be understood by delegations and the media ..." and "that there was no adequate opportunity for the proposal to be improved through negotiations"[40]. The conference discussions were furthermore characterized by political tactics which tended to overshadow the real positions of the participants. The statements of aboriginal groups on the federal proposal were described as being " wise diplomacy".

"They were able to make it look like the provinces, rather than the aboriginal groups, were the real obstructionists ... One side-effect of the tactic, however, was that the federal government's proposal looked much more acceptable to aboriginal organizations that it actually was"[41].

Thus, it can be seen that the 1984 conference appeared to suffer from the

same deficiencies as the 1983 conference. The political will expressed by the federal government still did not materialize in concrete results, permitting some doubt as to its sincerity.

3. The 1985 Conference

The failure of the 1984 conference inevitably exerted pressure on the participants of the next conference. In the meantime, also, the Turner government had been replaced by the conservative government of Brian Mulroney, which fact also was likely to raise expectations about the conference's outcome. Prime Minister Mulroney said in his opening statement "The key to change is self-government for aboriginal peoples within the Canadian federation"[42].

This time, the federal draft was submitted to the participants the day before the conference, which was acknowledged by the aboriginal groups[43]. The position of the government appeared to be circumscribed more clearly than in 1984. Correspondingly, the aboriginal groups expressed their criticisms and demands in a straightforward manner[44].

The spirit of the discussions following the opening statements was described to be "heated" and even "acrimonious"[45]. The task of drafting a federal proposal incorporating the differing positions was conferred on the Minister for Indian Affairs, David Crombie. This proposal was discussed publicly by the participants. It appeared that two of the aboriginal groups were not prepared to accept the federal proposal and that some of the provinces would only give their support if the aboriginal groups would accept an amended proposal. In an apparently deadlocked situation, the Prime Minister then adjourned the conference to allow the participants to reconsider their positions[46]. The subsequent meeting of ministers and aboriginal leaders, at which the postponed decisions of the conference were to be taken,

however failed to secure an agreement. As a result, it was only decided to delay holding a further conference until 1987, with two ministerial meetings to be held prior to the conference. Although the 1985 conference did not succeed, it appears that the discussion on self-government was more open and frank and that efforts of the federal government seemed to be more sincere than during previous conferences. It was commented that "The new 'window of opportunity', as it is called, in inter-governmental relations, imbued with a fresh spirit of Federal-Provincial cooperation, has not closed" and that "progress since 1982 has been significant"[47]. However, the federal government's motivation remained unclear and controversial in many respects, as was shown by the decision to adjourn the conference, and by the announcement of a meeting to be held during the conference on the specific subject of sexual equality, but which never took place[48].

4. The 1987 Conference

The 1987 F.M.C. was the last conference to be held pursuant to s.37.1 of the Constitution Act, 1982, since that section was to be repealed on April 18, 1987, pursuant to s.54.1 thereof.

The conference was held in Ottawa on March 26 and 27, 1987. Even though the constitutional negotiation process since 1982 had been described as having made significant progress[49], the fact remains that the constitutional conferences did not yield any concrete agreement. Consequently, the pressure to achieve a result had to be even greater than before the 1985 conference. The latter conference had at least clearly identified what the positions of the participants were. The focus of the 1987 conference was thus also likely to be on the right to self-government. In the months and weeks leading up to the conference, aboriginal groups drew the public's attention to their cause, which led opposition parties and other influential groups to exert

pressure on the Prime Minister[50]. The federal government appeared to be determined to work out an agreement[51]. Opinion polls indicated support for an entrenchment of aboriginal rights from the Canadian public[52].

Meetings held between federal and provincial ministers and aboriginal leaders two weeks before the conference however indicated that there was still strong disagreement between the two sides[53].

Increasing publicity was given to the conference in the days immediately before the conference, with efforts by the media to present an overview of the different issues and the participants of the conference in a series of articles[54]. Two one-page advertisements, sponsored by the four participating aboriginal groups successively appeared in one of the national newspapers, urging support for the aboriginal cause[55]. Aboriginal leaders also attempted to draw attention to their cause outside of Canada[56] and before international organizations. Two observers from the United Nations, albeit in their personal capacity, attended the conference as invitees of the AFN[57]. The Canadian ambassador to the United Nations remarked that "Canada must reach agreement next week on native rights or face international embarrassment"[58].

In his opening remarks, Prime Minister Mulroney affirmed the federal government's intention to "make self-government a practical reality for Canada's aboriginal people"[59] and said that "now is the time to translate the dream of aboriginal self-government into reality"[60]. Furthermore, he identified the diverging positions of the participants concerning self-government[61]. This divergence was expressed in similar terms as in his opening statement at the 1985 conference, the fundamental position of the federal government on self-government thus appeared to be unchanged. Mulroney in 1985 proposed "self-government for aboriginal peoples within the Canadian federation"[62] and to work out self-government arrangements on

a "case-by-case basis"[63].

These proposals were reaffirmed in 1987, namely, in the form of a commitment "to ensure that Canada's Indian, Inuit and Métis are given the means of establishing their rightful place within Canadian society. In short, we welcome self-government ..."[64] and a statement that "...self-government, in its application, must be flexible enough to take into account the differing requirements of aboriginal communities across Canada"[65]. This time, it was made clear that these differing requirements should be negotiated individually and that "... the result of these negotiations should receive constitutional protection"[66]. The diverging position of the aboriginal groups, in particular of the AFN, was equally made clear in the opening statement of national chief George Erasmus[67]. These opening statements confirmed what was already apparent before the conference, namely the sharp opposition between the federal government advocating a "contingent" right to self-government, i.e. to be defined through negotiations, and the aboriginal groups pressing for the entrenchment of a free-standing, "inherent" right to self government to be subsequently implemented by negotiated agreements[68]. (The aboriginal position will be examined in more detail below). The fundamental opposition between the participants then, was apparent from the beginning and set the stage for the conference from the outset, not leaving much hope for an agreement.

The day before the conference, Prime Minister Mulroney held a private meeting with aboriginal leaders in an attempt to seek a compromise solution for a constitutional amendment[69].

Most of the first day of the conference was taken up by the opening statements of the seventeen participants, as had already been the case at previous conferences[70]. At the beginning of the conference, the AFN delegation presented a reading of a wampum-belt to the Prime Minister, symbolizing one of the earliest

treaties the Indians had concluded with the European colonizers. The Indian delegation thereby maintained their habit of holding a traditional ceremony at the beginning of the conference, a practice which denotes one important function of the conference for aboriginal groups, namely to be a forum through which they can get widespread publicity and emphasize their distinctness in respect of tradition, culture, religion and language. The co-chairperson of the INCI thus included statements in his native language in his closing remarks at the end of the conference[71].

The participants failed to reach an agreement at the end of the first day. Federal officials then worked overnight to draft an amendment acceptable to the opposing provinces and to the aboriginal groups, for the first time, however, without the participation of the aboriginal groups. The resulting federal proposal was made available to participants early the next morning during a private breakfast meeting. The chairman then adjourned the conference to hold a private morning session, as it was apparent that aboriginal groups were fundamentally opposed to the draft. This procedure also illustrates the dual nature of the conference, the actual negotiations mostly taking place in private sessions, and the "publicity" side with its eloquent statements of principles taking place in the public sessions. When the conference re-convened publicly in the early afternoon, it was only for the announcement that the private morning session had failed to produce any results and that the conference thus had not achieved its goal. The conference was then closed after brief statements by each of the participants.

Several aspects of the procedure followed are worth noting. To the outside observer, it appears that the procedure was unilaterally in the hands of the federal government and that there was no framework of procedural rules. The aboriginal groups had the first opportunity to discuss the federal draft on the morning of the second day. The time left for discussion was thus limited. In the late morning of that

day the ICNI had tabled an additional proposal[72], which differed from the joint aboriginal proposal and could possibly have served as a basis for a compromise since it avoided the use of the term "inherent" in relation to the right to self-government. For reasons that are totally unclear, this proposal was never discussed. It appears that the federal government tabled a proposal to which the aboriginal groups were so fundamentally opposed that they were able to present a united front against the federal and provincial governments. Before the conference, it had seemed possible that the ICNI would depart from the position expressed in the joint aboriginal proposal and be willing to accept less than the entrenchment of an inherent right to self-government[73].

The fact that the federal government tabled a proposal which was predictably unacceptable to the aboriginal groups permits some doubt as to its political will to achieve a result. However, this fact can be partly explained by the Prime Minister's unwillingness to strike a deal without first securing the consent of the provinces. For this reason, he attempted to work out an acceptable draft proposal with the provinces first, which was then to be discussed with the aboriginal groups. It would probably have been more clever tactically to work out a proposal which the aboriginal groups could have accepted as a basis for discussion, and to attempt to secure the provinces' consent subsequently, as was suggested to Mulroney by AFN chief George Erasmus. The P.M. made clear, however, that "it does matter if the provinces are on side" and that he was not going to "go behind their backs in trying to make a deal"[74]. It is apparent that Mulroney felt under pressure not to repeat past experiences, probably having the 1982 process in mind when the then Prime Minister Trudeau attempted to patriate the Constitution without the consent of all the provinces. This situation illustrated the inherent difficulty of aboriginal constitutional conferences involving the provinces and the awkward position of the

Prime Minister as a mediator between provinces and aboriginal groups. As was noted by commentators, what was at stake during the 1985 conference was "the reputation of the federal government as a conciliator of federal-provincial tensions"[75]. The position of the federal government must be seen against this background.

Another difficulty affecting the character of the conferences is that the political actors on the federal and provincial side often changed during the period between 1982 and 1987, whereas the aboriginal groups were able to maintain more continuity, thus allowing for more experience and a better understanding of the relevant issues. This was pointed out, not without humour, by Zebedee Nungak, co-chairperson of the ICNI in his closing remarks at the 1987 conference, when he said "I, myself, in my involvement in this process, have gone through four Prime Ministers, half a dozen Premiers, and 20 or so assorted ministers. Incidentally, I am working on my ninth Minister of Indian Affairs"[76]. This statement aptly illustrates the problem that the aboriginal groups have to face at the constitutional conferences, namely changing political actors from different political backgrounds and with different political ideologies, inclined to approach the issue of aboriginal rights through the filter of their political orientation and to subject the issue to other considerations of a general political nature. The issue of aboriginal rights is only one of several issues for the Canadian politicians directly involved in the negotiation process, whereas it is one of the central issues for the aboriginal groups represented at the conference. Self-evident as this statement may be, it indicates a fundamental disparity between the negotiating parties which is likely to adversely affect the success of negotiations. It may be noted in this respect that among the recommendations of the Special Committee were the establishment of a Minister of State for Indian First Nations Relations to "manage and co-ordinate the Federal government's relations with Indian First Nation governments"[77] but also the establishment of a monitoring agency

separate from that ministry and independent of all government departments[78]. Thus, the need for independent and neutral institutions to deal with the issue of aboriginal self-government was recognized.

It may indeed be questioned whether the provinces should participate in the constitutional conferences on aboriginal matters. The AFN had at the beginning of the constitutional process taken the position that in view of the federal competence under s.91 (24) of the Constitution Act, 1867, the federal government alone should be a negotiating party[79]. The constitutional amendment procedures in Part V of the Constitution Act, 1982, however requires the participation of the provinces. This constitutional fact may justify their presence at the conference table, although it would legally not be necessary. Politically, however, it would hardly seem possible to stage a constitutional conference without the provinces' participation. Furthermore, the mandate of s.37 of the Constitution Act, 1982 clearly required a conference composed of the Prime Minister, aboriginal representatives and the provinces, as did the former s.37. These provisions, however, were themselves the result of a political negotiation process. From the point of view of constitutional law, a participation of the provinces in the conferences on aboriginal matters was not mandatory. On the whole, though, it seems doubtful whether the provinces would have given their consent to a constitutional amendment negotiated without their prior participation. For this reason, provincial participation from the early stages of the negotiation process onwards appears to be a necessary factor. This was eventually acknowledged prior to the 1983 conference by the AFN which had initially boycotted its preparatory meetings on the ground that only the federal government should be a negotiating party but subsequently changed its position and participated in the meetings[80].

The abrupt and early ending of the 1987 conference casts doubt on the federal government's political will to achieve a result. At the recent First Ministers'

Conference on the so-called "Meech Lake Accord", which was destined to bring the province of Québec into the constitution[81], the negotiations seemed to be in a deadlock towards the end of the two-day conference. Nonetheless, Prime Minister Mulroney, acting as chairperson of the conference, continued negotiations throughout the night and an agreement was eventually reached in the early hours of the next morning[82]. Such lengthy and intensive negotiations stand in sharp contrast to those at the 1987 FMC , which were broken off at midday on its second day, in spite of the tabled ICNI proposal which appeared to contain some potential for a compromise solution. This was criticized by ICNI co-chairperson Zebedee Nungak who said in his closing remarks, referring to the draft, "we tabled it at a quarter to one, knowing that March 27th does not end till midnight and thinking that perhaps it could be ... the talk of this meeting (...), so we came here thinking we had a two-day conference but we had a day-and-a-half-conference[83]".

The 1987 conference marks the end of the constitutional process. The Constitution Act, 1982 no longer contains a mandate to hold further conferences. Although Prime Minister Mulroney affirmed that "We were unsuccessful this time, but we will try again"[84], a specific commitment was not made and the prospects for another constitutional conference seem slim.

It may be noted that the draft amendment agreed upon at the recent First Ministers' Conference on the so-called "Meech Lake Accord" makes reference to aboriginal rights in its last paragraph, albeit only in the form of a non-derogation clause[85]. The "Meech Lake Accord" was the object of hearings before a special parliamentary committee, which submitted a report on September 21st, 1987.[86]. Chapter XI of the Meech Lake Report deals with aboriginal peoples. It notes that although the latter succeeded in raising the awareness of the Canadian population for their concerns, their principle objective (the right to self-government) "remains an

elusive vision"[87]. The committee further states that the status of aboriginal peoples as "distinct societies" was not denied by the accord[88]. With regard to the participation of aboriginal peoples in the constitutional process, the committee rejects the aboriginal demand for a permanent seat at First Ministers' Conferences[89], however affirms that the "important constitutional issues raised by aboriginal peoples remain on the nation's agenda as unfinished business"[90]. This position was reaffirmed by the Prime Minister in the House of Commons[91]. These ambivalent statements indicate that the question of aboriginal rights is still a matter of concern. However, it is also apparent that this "concern" is not likely to materialize in effective participation of aboriginal peoples in the political process.

One track of the governmental policy in relation to aboriginal peoples thus appears to have led into an impasse. The overview of the four conferences raises some questions and doubts about the readiness of the federal and provincial governments to give up hardline positions and engage in a compromise. The federal government at no point in the process indicated any willingness to accept the aboriginal demand of the recognition of an inherent right to self-government. Throughout the process, the government's position remained that a right to self-government could only be entrenched subject to its definition by negotiated agreements and to the consent of Parliament and the provincial legislatures.

The aboriginal peoples may now have to resort to the courts to test the constitutional validity of their claims to self-government. Courts have not previously been confronted with the issue of a right to self-government. A few cases have led courts to give interpretations of s.35 of the Constitution Act, 1982, but only in respect of fishing and hunting rights[92]. Aboriginal groups may, in the near future, attempt to develop self-governing institutions according to their own traditional forms of organization. The potential conflicts with federal or provincial laws may

eventually result in judicial claims based on a right to self-government. Several examples of aboriginal groups taking their destiny into their own hands indicate that this may be a growing development for the years to come. For instance, the Haida Indians of British Columbia have consistently refused to accept federal and provincial control of their lands, resources and political organization, and have now drafted their own constitution containing their basic principles of political organization and a statement of collective and individual rights[93]. The Inuit of Labrador have similar plans to set up their own institutions and make their own laws according to their own procedures[94].

Before examining the legal aspects of these developments, the federal government's policy outside the constitutional process will be described and evaluated.

Chapter 2

The aboriginal policy of the federal government outside the constitutional process

This chapter will discuss three aspects of the federal policy towards aboriginal peoples. The Indian Act as the main legislative instrument dealing with the largest aboriginal group, will be considered first. The evolution in the federal government's policy will then be described, and finally the most recent policy statement of the federal government will be assessed.

I. The Indian Act

The Indian Act of Canada[1] was first passed in 1876, under s.97 (24) of the Constitution Act, 1867, which confers on Parliament the power to enact laws in relation to "Indians and Lands reserved for Indians. Section 91 (24) of the Constitution Act, 1867, was itself the expression of the perception that Indians should and could be better protected against the settlers under federal, central authority[2]. The Indian Act regulates the administration of Indian reserves and treaties by the Department of Indian Affairs and Northern Development (hereinafter: D.I.A.N.D.) and the degree of control exercised by band councils over their members. The characteristics of Indian self-government under the act will be examined in another chapter. The legislation will be evaluated here only as an expression of federal policy.

The Indian Act was in effect a consolidation of various other statutes relating to Indians, their lands and the management thereof[3]. The policy finding expression in

these acts and eventually in the Indian Act is described as being one of "civilizing the Indian population and achieving assimilation and integration as soon as possible"[4]. Examples of measures taken to achieve these goals were the legislative prohibition of Indian traditional cultural and religious activities[5]. The reserve system established prior to and continued under the Indian Act was also "part of a long-term plan of assimilation"[6]. The Indian Act was subsequently amended a number of times, but these changes did not alter the basic substance of the act, thus indicating that the underlying policy goals had not changed[7]. "The astonishing feature of the amendments up to 1950 is how little, despite their frequency, they sought to accomplish. They were always preoccupied with details and never contradicted the basic rationale of the Indian Act, which demanded 'civilization' and responsibility from the Indian population while denying them control over the forces affecting their lives"[8]. This was even recognized by the D.I.A.N.D in a publication relating to the Indian Act[9]. What appeared to be a major revision of the act in 1951 did not significantly depart from the previous policy. "...the policy of encouraging 'citizenship' - assimilation - was continued. The accomplishment of the 1951 statute was the removal of the most paternalistic of the excesses in governmental authority introduced in the first half of the 20th century. It in no way, however, conferred any power resembling self-determination or self-government upon the Indians"[10]. In respect of self-government it was said of the Indian Act that it "historically and today totally rejects such claims"[11].

The examination of the various provisions of the Indian Act relating to the limited powers conferred upon band councils leads the same author to the conclusion that "Federal policy and its instrument, the Indian Act, has failed to keep faith with the treaties made with the Indians or confer any meaningful powers of self-government on the Indian People"[12].

More recently, the Special Committee stated that "The Committee does not support amending the Indian Act as a route to self government. The antiquated policy basis and structure of the Indian Act make it completely unacceptable as a blueprint for the future[13]. With particular reference to the band councils established under the Indian Act, the report of the committee quotes from a publication issued by the D.I.A.N.D, which recognizes that "band governments are more like administrative arms of the Department of Indian Affairs than they are governments accountable to band members"[14]. The Minister of Indian Affairs appeared to acknowledge the need to review the Indian Act in submissions made to the Sub-Committee on Self-Government established by the Special Committee. He proposed inter alia new legislation which would be based on the concept "that the primary locus of decision-making is within the Indian band itself"[15], a wording which confirms that the Indian Act does not allow bands to govern themselves effectively. The most recent amendment to the Indian Act did provide for some more significant change, in that it repealed s.12 (1)(b) of the act, a section which had a discriminatory character against Indian women since it provided that Indian women would lose their Indian status by marrying a white man, but that an Indian man would not lose his status by marrying a white woman. The amendment also made provision for greater control of membership by the band[15a]. Greater control over band membership had been one of the persistent demands of Indian groups. These recent amendments thus mark some progress, albeit in a very limited field, towards more autonomy for Indian groups.

On the whole, however, the current Indian Act illustrates a policy which does not significantly depart from the original concepts underlying it and does not appear to be an adequate vehicle for effective self-government; as has been noted by the Special Committee on Self-Government. However, it is important to note in this respect that Indian groups do not advocate a repeal of the Indian Act without its

replacement by appropriate legislation. Although Indian groups reject the Indian Act because it still reflects assimilationist policies, they do recognize its importance as an instrument securing their special status and distinctness[16]. The acceptance of the Indian Act is partially rooted in the fear of Indian groups that the federal government might otherwise transfer its responsibilities to the provinces, which would endanger their special status. This paradox has been noted in the report of the Special Committee[17]. Illustrations of this ambiguity can be found in the reactions of Indian groups to purported changes in the policy of the federal government. The following part will describe the main stages of the government's policy in the period post 1950.

II. The evolution of the federal government's aboriginal policy

It was noted above that the federal government's policy historically was one of assimilation and that this policy did not change fundamentally from the 19th century until 1950 and even after that date. That the goal of assimilation was still present then is illustrated by the fact that in 1947, a corresponding plan was submitted to a Parliamentary Joint Committee[18]. This plan was not implemented. The federal government however proposed a similar policy in 1969, made public in a White Paper. The then Prime Minister Trudeau explained the policy in a speech given in Vancouver, where he said inter alia that "It's inconceivable, I think, that in a given society one section of the society have a treaty with the other section of the society. We must all be equals under the laws ... They (the Indians) should become Canadians as all other Canadians and if they are prosperous and wealthy and they will be paying taxes for the other Canadians who are not so prosperous ... and this is the only basis on which I see our society can develop as equals. But aboriginal rights, this really means saying 'We were here before you came and you took the land from us and perhaps you cheated us by giving us some worthless things in return for vast expanses of land and

we want to re-open this question. We want you to preserve our aboriginal rights and to restore them to us'. And our answer - it may not be the right one and may not be one which is accepted (...) -our answer is "NO"[19]. This plain and even radical language indicates how little the political awareness of the position of Indians and aboriginal groups generally had evolved since the colonization by the first European setttlers. The White Paper policy proposed the abolition of Indian special status, the repeal of the Indian Act and of s.91(24) of the Constitution Act, 1867, and thus the transfer of legislative competences in relation to Indians to the provinces[20]. Its proposals were however not implemented. Their announcement provoked a storm of protest on the part of aboriginal groups, who tabled a "Red Paper" in 1970 to denounce the government's policy. The federal government then officially abandoned the White Paper[21].

It is interesting to note that Prime Minister Trudeau by 1983 had completely reversed his position. In his opening statement at the 1983 First Ministers' Conference on Aboriginal Constitutional Matters, he said "Clearly our aboriginal peoples each occupied a special place in history. To my way of thinking, this entitles them to special recognition in the Constitution and to their own place in Canadian society, distinct from each other and distinct from other groups who, together with them comprise the Canadian citizenry"[22]. This statement appears to illustrate that a definite change in the attitude towards aboriginal peoples has taken place, of which the constitutional recognition of aboriginal rights is one expression. However, it may be questioned whether the underlying goals of policy have fundamentally changed since the White Paper was officially withdrawn. It has indeed been asserted that the White Paper , although officially withdrawn, was unofficially continued[23].

After the official withdrawal of the White Paper in 1971, the federal government and the D.I.A.N.D. made several proposals purporting to confer a larger degree of

self-government on aboriginal groups. The government also made efforts to institute a dialogue with the NIB, as shown by the establishment of a Joint Cabinet/NIB Committee in 1974 to discuss the issue of Indian self-government. The committee however failed to produce any substantial results, due to the characteristics of the NIB as an uncohesive pressure group and the government's inability to adapt to these special features and circumstances[24].

That self-government was to become the central issue of government-aboriginal relations became apparent in the "Red Paper" released by the Indian chiefs of Alberta and in the 1975 Dene Declaration. The Dene Declaration however also illustrated the limits of the federal government's acceptance of aboriginal demands, since it was rejected as being too radical[25]. The declaration makes several references to the right to self-determination of peoples and to the distinct character of the Dene Nation, seeking "independence and self-determination within the country of Canada".

The proposals made by the D.I.A.N.D. were however focussed on amendments to the Indian Act, whereas Indian groups advocated self-government outside the statute and the entrenchment of their rights in the constitution[26]. The federal government eventually appeared to respond to aboriginal positions on new legislation concerning the recognition of self-government. In 1982, the Parliamentary Task Force on Indian Self-Government was appointed (the Special Parliamentary Committee on Indian Self-Government), which released its report in 1983 (the "Penner Report")[27]. That report provided a comprehensive review of Indian demands and a thorough examination of the political, legal, sociological, historical and economic factors relating to self-government for Indians. The committee heard testimonies of Indian representatives from bands of all the provinces and territories and of various Indian organizations, experts and lawyers. It was thus able to reflect Indian demands adequately, to present a realistic picture of the current problems affecting Indians,

and correspondingly to make a number of concrete recommendations. The report on the whole was judged positively by various commentators, although it was criticized on individual points[28].

With regard to the legal implications of Indian self-government and to their practical implementation, for example, the report lacked in specific proposals.

However, it was generally approved by aboriginal groups[29].

This process eventually led to the tabling by the government of Bill C-52 in 1984[30], which was to be a framework legislation under which aboriginal groups would be granted more powers than under the Indian Act.

Bill C-52 was introduced in Parliament pursuant to the recommendations of the Special Committee report. The federal government had announced its intention to introduce legislation to implement the recommendations of the committee in its response to the report[31]. Responses of commentators to the proposed legislation were controversial. The policy reflected in Bill C-52 was qualified as marking a "sharp departure -- and in the direction of Indian demands -from the policy pursued since Confederation" and representing "major progress towards Indian self-government"[32].

The language of Bill C-52, entitled "An Act relating to self-government for Indian Nations" indeed introduces certain new concepts into the official terminology up to that date. The preamble recognizes that "Indian communities in Canada were historically self-governing" and declares the commitment of the government to provide for "the recognition of the Constitution of Indian Nations and the powers of their governments". Compared with the language of the Indian Act, Bill C-52 certainly marks a definite change. However, it was questioned whether this change in the language reflected a real change in policy and "major progress" towards Indian self-government. The governmental proposal which eventually became Bill C-52 was

criticized as bringing "no alterations in the basic relationship between Indians and the federal government" because the authority of Indian governments would be delegated by Parliament instead of deriving from the Indian constituency itself[33]. Viewed as a whole, the proposed legislation was considered to represent the "culmination of a policy thrust that began in the early 1970s after the goverment was forced to confront the disastrous consequences of its proposed assimilation policy" in an "attempt by the government to balance the demands by an increasing number of Indian bands for greater control over the internal affairs with a desire to retain the historic legal relationship between the Canadian government and the Indian peoples"[34].

The AFN referred to the bill as being "a beautifully designed machine that is full of technical flaws"[35]. In a study commissioned by and prepared for the Sub-Committee on Indian Self-Government[36] of the House of Commons Standing Committee on Indian Affairs and Northern Development, two major policy alternatives in relation to Indian government were identified, one being "the modification of a colonial framework for the governance of Indian people, i.e. continued integration of band governments and tribal councils in a statutory system of local government" (called the "devolution scenario"), and the other being "the development of Indian government as a distinct and unique order of government in the Canadian policy, with some form of 'home rule', i.e. limited sovereignty, constitutionally entrenched, and with the democratic institutions and resources to conduct responsible self-government in Indian jurisdictions" (the "self-government scenario")[37]. The study finds that the "devolution scenario", i.e. the municipalization of Indian bands has been a deliberate policy of the Canadian government since the last century[38]. The modern adaptation of this scenario would be to confer upon Indian bands a greater dose of autonomy to regulate their own affairs. Seen from this perspective, Bill C-52

appears to fall more under a modern devolution scenario than under a self-government one, since it does not recognize any limited sovereign power of Indian Nations to govern themselves. The study thus points out that a proposal for a municipal type of Indian government could still be based on a long-term strategy of "historic termination and assimilation policies"[39] by seeking to integrate Indian bands as municipalities coming under provincial jurisdiction. The language of Bill C-52 itself does therefore not conclusively indicate a fundamental change in policy. The preamble of the bill does contain new concepts, as noted above, but leaves enough room for an interpretation denying Indian Nations any inherent right to self-government. For example, it refers to the need to develop a "special place" for Indians in the Canadian society, but "in the context of the Canadian federal system", a formulation which does not seem to contemplate a distinct order of Indian government. One important feature of the bill is that Indian Nations will have to draft their own constitutions in order to be recognized as nations (s.6 (a) of the Bill). It was noted in this respect by commentators that the term "constitution" is fraught with differing ideological concepts and may be understood in a different way by aboriginal groups than by the government, the former associating the term with the concept of inherent sovereignty, the latter using it as indicating a form of delegated authority[40]. Bill C-52 does not define the term "constitution", but indicates the elements such a constitution should contain in order for an Indian Nation to be recognized as such. It is apparent from these elements and from the other provisions relating to the Constitution of Indian Nations that their authority would not derive from the constituents of the Nation but from the act of the Canadian Parliament, this legislation "allowing" the individual members of the Nation to participate in subsequent electoral proceedings, but not recognizing any original authority or power to constitute themselves.

Thus, it may be questioned whether Bill C-52 represented a fundamental change in policy. The bill never became law due to the fact that a new government was elected shortly after its introduction in Parliament, so that its practical implementation could not be assessed. The constitutional conferences before and after Bill C-52 seem to confirm the doubt as to the real character of the government's policy.

It was already noted in 1981 that "internal native self-government" was acceptable, "self-determination within Canada" unacceptable terminology for the federal government[41]. As illustrated by the last constitutional conference, this position does not appear to have changed, as was noted above ("inherent" vs "contingent" right to self-government). Although the terminology may have changed over the past 20 years, its analysis does not reveal a significant change in the government's position towards aboriginal self-government.

The last part of this chapter will examine two recent aspects of the government's policy outside the constitutional process.

III. The current policy of the federal government outside the constitutional process

In December 1986, the D.I.A.N.D. announced its "New Comprehensive Land Claims Policy"[42]. The policy was made public after the March 1987 FMC. Although purporting to deal with land claims, it also refers to aboriginal self-government arrangements. This new policy, as will be seen, also introduces a new terminology. Nonetheless the same doubts as those previously mentioned arise as to the underlying strategy.

In addition to this new policy, the federal government is pursuing a so-called "community-based" approach to self-government, announced in a policy statement in 1986[43].

The new claims policy announced in December 1986 supplements and partly

supersedes the previous policy of the D.I.A.N.D., namely the comprehensive claims policy announced in 1981[44] and supplemented by a specific claims policy in 1982[45]. Whereas these policies only dealt with aboriginal land claims, the present policy also makes reference to self-government negotiations[46]. In this respect, it seeks to coordinate the community-based approach on self-government with the comprehensive claims policy[47].

The previous policy of the federal government outside the constitutional process consisted in negotiating claims and self-government arrangements on an individual basis, i.e. with a specific band or tribe, in return for an extinguishment of rights the band or tribe in question may have had. Examples for this type of negotiated arrangement are the 1975 James Bay and Northern Québec Agreement[48] (hereinafter: James Bay Agreement) and the recent 1986 settlement reached with the Sechelt Indian band of British Columbia. The James Bay Agreement was concluded in 1975 between the federal government, the Québec government, the Cree Indians and the Inuit of Québec and the power companies involved in the James Bay hydro-electric project. The agreement was reached after protests and judicial proceedings instituted by the Cree Indians and the Inuit successfully halted the project, which was to be executed on a territory in respect of which Québec had in the past assumed obligations towards the native peoples living on it[49]. The agreement provides for a larger measure of self-governing powers for the aboriginal tribes concerned. The Sechelt band concluded an informal self-government agreement with the federal government, which was implemented by legislation in 1986[50]. Under the legislation, which replaces the Indian Act in respect of the band, a wider range of powers can be exercised by the band government than under the Indian Act.

The essential feature of these two arrangements is that in exchange for greater

self-governing powers, the rights of the concerned aboriginal groups to the lands in question were either surrendered or changed in their character. The relevant provision of the James Bay Agreement reads:

(s2.1) "In consideration of the rights and benefits herein set forth in favour of James Bay Crees and the Inuit of Québec, the James Bay Crees and the Inuit of Québec hereby cede, release, surrender and convey all their native claims, rights, titles, and interests, whatever they may be, in and to land in the Territory and in Québec, and Québec and Canada accept such surrender".

S.23 (3) of the Sechelt Indian Band Self-Government Act provides that "All rights and interests of the Indian Act Sechelt Band in respect of lands referred to in sub-section (1) cease to exist on the coming into force of this section". Sub-section(1) of s.23 provides for the transfer of all reserve lands in fee simple to the band. The effect of the James Bay Agreement appears to be a complete surrender of rights. The provision of the Sechelt Act, while not explicitly extinguishing rights, may nonetheless have the same indirect effect by altering their legal character. The policy of extinguishment of rights has encountered growing opposition from aboriginal groups[51], due in part to the uncertain scope of the extinguishment. Although the extinguishment only concerns the rights to land, it is not clear to what extent a right to self-government would be affected. It seems difficult to view the concept of self-government independently from a corresponding land-base. Self-government in the fullest sense can only properly be exercised on a specific land base over which an Indian band would have some degree of control.

That self-government is linked to land is acknowledged by the government itself. In his statement introducing the new claims policy, the minister for Indian Affairs remarked, "Obviously, self-government and the settlement of claims are related. The administration of lands and resources, and the management of settlement

benefits are clearly issues of a governmental or quasi-governmental nature. Recognizing that the resolution of claims is inextricably linked to questions of authority and control over aboriginal lands, a new feature of the policy will be to allow for negotiation of a broader range of self-government matters"[52] (emphasis added). This relation is also expressed in the part of the so-called "blue book" relating to self-government: "In the context of the comprehensive land claims policy, self-government is an issue that is tied closely to the expressed need of aboriginal peoples for continuing involvement in the management of land and resources ..."[53]. In view of this relationship between self-government and the settlement of land claims, qualified as "inextricable" by the government, it is difficult to conceive that the extinguishment of aboriginal rights to land would not affect their right to self-government (assuming arguendo that this right exists). Aboriginal groups have demanded "that a recognized territorial base be established to serve as a lever for the creation of native governments" and, in the same context, "that the federal government cease to make extinguishment of right a pre-condition for any negotiation"[54].

The aboriginal opposition has apparently led the government to acknowledge the difficulty inherent in the concept of extinguishment of rights. That concept no longer appears in the new policy. The question again arises as to whether the change in language reflects a change in policy. The Minister for Indian Affairs acknowledged in his statement that "the language of extinguishment has long been a concern to many claimant groups"[55], and that in respect of the disposition of lands and resources "certainty must also be provided to the aboriginal group for the lands they select through the claims settlement"[56] The latter statement seems to imply that there was previous uncertainty in relation to the rights affected by the surrender. The Minister therefore announced that the government "was prepared to consider two

alternatives to achieving certainty of title"[57].

The new concept introduced by the government is that of "conveyance" of title. In the words of the Minister, the first alternative "would involve the conveyance to the Crown of the aboriginal title claimed throughout all of the settlement area ...", the second alternative "would involve conveyance by the aboriginal group to the Crown of the aboriginal title to certain specified lands within the claimed area[58]. The legal implications of the term "conveyance" itself are nowhere explained in the statement nor in the text of the policy itself. The only distinction apparent from the statement between "conveyance" and "extinguishment" of title is in the words of the Minister that the aboriginal title would be conveyed - in the first alternative -"but without the requirement for the use of the terminology of extinguishment"[59]. This statement seems to indicate no more than the government's willingness to renounce to the use of terminology offensive to aboriginal peoples. To what extent the underlying policy has actually changed remains unclear. Prima facie, the term "extinguishment" has been replaced by "conveyance", but the implications of the change are nebulous. The "blue book" is careful to point out that it is not a statement of law[60]. However, it does affirm that aboriginal rights not related to land "are not affected by the policy"[61]. The mere affirmation that an aboriginal right to self-government will not be affected by the process is however not sufficient in itself to dispel the ambiguities contained in the statement and in the policy.

The onus thus remains on the government to prove that the "conveyance" of aboriginal title does not amount to its "extinguishment" and that it will not affect an aboriginal right to self-government. Canadian courts have so far not been confronted with the task of determining the legal implications of the process. The remaining part of this analysis, in attempting to determine the legal foundations of a right to self-government, may also provide indications as to the relation between self-

government and land and consequently as to whether the "conveyance" of a title to land affects a right to self-government.

Before addressing the legal issues, the last chapter of this part will provide an overview of the aboriginal positions on self-government.

Chapter 3

The positions of the aboriginal peoples on self-government

Some of the aboriginal positions have already been briefly referred to in the preceding chapters. This chapter shall give a summary overview of the aboriginal demands and describe their evolution. It will also point out some of the difficulties inherent in the political demands of aboriginal peoples, difficulties which also have an impact on their legal analysis.

I. Inherent difficulties of an analysis relating to the "aboriginal peoples of Canada"

It has been noted above[1] that the aboriginal population of Canada is composed of a relatively large number of different groups having different cultures and languages. Regional disparities and geographical factors lead to different aspirations and demands in relation to self-government. Northern groups are likely to have a different approach from southern groups which are located in industrialized areas or near urban centers. Due to these factors, "Self-government" may have a different meaning for different groups. The examples of the Cree and Inuit of Québec and of the Sechelt band indicate that some aboriginal groups are willing to negotiate individual self-government arrangements which they deem to be in their interest. In the northern parts of Canada, the Dene Indians and the Inuit are attempting to establish self-government based on public government principles rather than adopt an ethnic government model as advocated by other groups[2]. This diversity makes it difficult for aboriginal organizations to formulate general principles of policy reflecting the aspirations of their constituents. Thus, during the constitutional process in 1980, the NIB was faced with the difficulty that the position taken by the leaders did not have the support of its members[3]. The positions of aboriginal leaders

therefore do not necessarily represent the demands of the local aboriginal communities. It has indeed been questioned by political analysts whether the concept of Indian government advocated by aboriginal leaders was related to the level of the national organizations or to the level of the local communities[4]. Another aspect of the problem is that the four aboriginal organizations represented at the First Ministers' Constitutional Conferences have differing positions on self-government. It was noted above that during the last FMC, the ICNI appeared willing to compromise on the concept of an inherent right to self-government, whereas the AFN maintained its hardline position. Only the fact that the federal government's proposal was unacceptable even to the ICNI led the four aboriginal groups to present a united front[5]. The concept of self-government espoused by the Métis National Council is likely to differ from the AFN or ICNI concept, due to the fact that the Métis population does not have a well-defined land-base and would accordingly exercise a right to self-government under different circumstances[6]. The implementation of a right to self-government without a defined land-base will necessitate different structures and processes than those required on a particular territory.[7] The question of self-government off a land-base will however not be addressed in this analysis.

It is not the purpose of the present analysis to examine the political process within aboriginal organizations and to assess the extent to which the aspirations and needs of local communities find expression in the political demands made by the aboriginal organizations[8]. For the purposes of this paper, the positions taken by the latter will serve as a basis for the legal analysis. Thus, the concepts of self-government discussed in this paper will necessarily be broad. These broad models may however be used as framework models for more specific ones at the community level.

The positions taken by aboriginal groups on self-government, in spite of sometimes

differing approaches, nevertheless contain a number of common elements.

II. The main features of the aboriginal positions

The essential element of the aboriginal positions was illustrated at the 1987 FMC. The aboriginal organizations advocated the entrenchment of an "inherent" right to self-government not to be subjected to the outcome of negotiations. Although the term "inherent" was not always used before, the underlying concept remained the same since aboriginal groups began to assert their right to self-government[9].

One of the first documents clearly asserting a right to self-government and to self-determination was the 1975 Dene Declaration[10]. The Declaration inter alia stated "we insist on the right to self-determination as a distinct people and the recognition of the Dene Nation ... What we seek is independence and self-determination within the country of Canada". The 1979 Declaration of Rights of the Native Council of Canada, which at that time represented both non-status Indians and Métis also affirmed "That we have the right to self-determination - and shall continue (...) to express this right as equal partners in Confederation". In addition, the declaration affirmed a number of specific rights such as the right to land, resources and their development, the right to preserve the cultural identity, the right to educate the children according to tribal customs and traditions[11].

In 1980, the AFN adopted a Declaration of the First Nations[12] which emphasized the historic and religious roots of a right to self-government. The declaration stated inter alia "We the Original Peoples of this Land know the Creator put us here (...). We have maintained our freedom, our languages, and our traditions from time immemorial (...). The Creator has given us the right to govern ourselves and the right to self-determination". During the constitutional process in 1980-1981,

aboriginal groups made submissions before the Joint Committee (on the Constitution). The demand for the recognition and assertion of a right to self-government and to self-determination within the Canadian federation was again the essential point of most submissions[13]. The submissions also asserted the historic roots of a right to self-government[14]; in the context of self-government and self-determination, the concepts of "Nation"[15] and of "sovereignty" as underlying the right to self-government[16] were repeatedly referred to.

The political and legal implications of "self-government within the Canadian federation" were described in most of the submissions. Subsequently, the aboriginal organizations which appeared before the committee advocated the establishment of a "third order of government"[17] as the legal corollary "of the demand for recognition as distinct Nations having special status[18] within Canada.

The meaning and the elements of self-government were identified by several organizations. Self-government was defined as control over the exploitation of lands and control over political, social, economic, educational and cultural institutions[19]. The Native Council of Canada stated that "Self-government and self-determination would mean to us that we want to decide for ourselves how we will fit into this country and not have a patronizing body do the work for us, such as Indian Affairs does for the Indians or has been carried on through time"[20]. The Algonquin Council said "Our concept is a country-wide native constituency with the equivalent powers of a province, which would elect members of Parliament on a per capita and territorial basis. They would represent the indigenous entity in the same manner as the established governments represent the economic, social, civil and political rights of other Canadians. This is our view of native self-determination within the structure of the Canadian nation"[21]. The Federation of Saskatchewan Indians said "We would view the band as being the basis for Indian government in Saskatchewan

..." and "that it is time that the governments start addressing the clear areas of Indian jurisdiction which do exist on the reserve lands under treaty and that there are shared areas of Indian, provincial and federal jurisdiction within treaty territory"[22].

The ICNI referred to the proposed Nunavut government, the proposal being ..."to create a new territory above the treeline which would become a province after an orderly transition period. The Nunavut government would initially have powers similar to the existing government in Yellowknife. All residents could vote, the government would be for all those in Nunavut, and Nunavut would adhere to the highest standards of human rights"[23]. The INCI was therefore advocating a so-called "public government" as opposed to the ethnic governments envisaged by the Indian organizations.

The reference to the protection of human rights represented a new feature in the positions of aboriginal organizations relating to self-government. The concept of collective rights (as opposed to individual rights)[24] and aboriginal rights as collective rights of aboriginal people[25] were also mentioned in this context. Another related and distinct feature of the submissions made to the committee were the frequent and detailed references to international law[26], in particular to the international human rights instruments subscribed to by Canada, such as the International Covenant on Civil and Political Rights[27], or the U.N. Convention on the Elimination of All Forms of Racial Discrimination[28]. The obligation of Canada under the covenant and under other international instruments to promote and respect the right to self-determination of all peoples was pointed out several times in this context[29].

The numerous invocations of international law also represent a new feature in the demands of aboriginal peoples of Canada. The previous documents and declarations of aboriginal organizations did not contain any specific references to international law. Although advocating a third order of government and the recognition of their

distinct status, most of the aboriginal organizations made clear that they did not seek to separate from Canada but on the contrary to join the confederation, albeit as a distinct entity. It was thus stated "We are not interested in declaring some form of sovereignty, but rather we just want the opportunity to work with each other (...). We want to participate with them and develop, but we also want to retain our Canadian identity"[30]. "We are not talking in a separatist way (...), we have always talked in a way of wanting to build a stronger Canada"[31].

"We wanted to share. We wanted self-determination in local government; (...) so that we could live side-by-side with the rest of the people in Canada - the sharing of our resources"[32].

"We have not been a part of your Confederation; we have always been basically on the outside of it. We would like to join it"[33].

"What we as Indian nations want is clear. We want to be self-governing nations with Confederation"[34].

This view was reiterated by David Ahenakew in his opening statement at the 1983 First Ministers' Conference, in which he made clear that "Indians did not want to set up a separate state[35] and most recently by Chief George Erasmus in his opening statement at the 1987 First Ministers' Conference ("We are not trying to dismember Canada's territorial integrity")[36].

The positions taken by aboriginal organizations in 1980-1981 essentially remained the same throughout the post-1982 constitutional process. Aboriginal organizations continued to assert a right to self-government based on the fact of original occupancy, on concepts of retained sovereignty and on international law[198]. The aboriginal positions at the constitutional conferences have already been referred to above[37]. The essential demand was for the recognition of an inherent aboriginal right to self-government. This concept was defined most recently by the AFN as

being a fundamental natural right possessed individually or collectively by aboriginal peoples, from which it originates, not created by law or granted by the government but legally recognizable. "Self-government" was defined as being the "capacity to pass laws over territory and citizens without being subject to outside authority"[38].

In spite of some differing approaches between aboriginal groups - e.g. as far as the form of government ("public" or "ethnic" government) is concerned - this overview of the aboriginal positions indicates a number of common elements, namely, the concept of the historic roots of a right to self-government, the concept of unsurrendered sovereignty, the reference to the international law of human rights and to Canada's international obligations, the distinction between individual and collective rights, and the concept of autonomous governments having jurisdiction over matters such as land, resources, education, culture, although operating within the Canadian federation[39].

The above description of the aboriginal positions provides an adequate framework for the examination of the legal aspects. The following analysis of the legal foundations of a right to self-government will address the different elements and concepts identified in the aboriginal positions.

The first chapter will examine the relevant provisions of the Constitution Act, 1982. Aboriginal groups argue that s.35 (1) of the latter already protects and entrenches a right to self-government[40]. This contention will be the object of the following chapter.

PART 2: THE DOMESTIC LEGAL CONTEXT

Introduction

As indicated in the description of the aboriginal positions, the constitutional recognition of a right to self-government plays an important role in their political demands.

This part will focus on the relevant constitutional provisions relating to aboriginal rights. The concept of an inherent right to self-government implies that this right does not derive from the constitution, and is not granted by an act of Parliament, but that its sources are located outside the constitution. An inherent right can however be recognized in the constitution, which can thereby provide a legal framework and a protection for the exercise of the right.

This part will attempt to analyze the sources of an inherent right to self-government and to determine whether the existing constitutional provisions protect this right.

Chapter 4:

The Constitution Act, 1982

The Constitution Act, 1982, which came into force on April 17, 1982, contains two provisions specifically referring to the rights of aboriginal peoples, namely s.25 of the Charter and s.35 of the Constitution Act, 1982.

With respect to these provisions, a commentator wrote that one could say of them that they "lead us from darkness to darkness, that they substitute impenetrable

obscurity for what was formerly mere shadowy gloom"[1].

The interpretation of the two provisions is indeed rendered difficult by a number of factors. The circumstances surrounding their insertion in the constitutional draft do not permit to determine with precision what the intentions of the drafters were. Their wording presents discrepancies. They do not provide definitions of the rights they purport to protect. The jurisprudence relating to the two provisions is to date very sparse. S.25 and s.35 of the Constitution Act, 1982 have a special position among constitutional provisions, reflecting the special position of aboriginal peoples in Canada.

This chapter will attempt to determine the scope and character of the provisions, taking into account these factors and the special character of the rights of the aboriginal peoples.

I. S. 25 of the Charter

S. 25 is located among the general provisions of the Charter. It reads:

"The guarantee in this 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 now exist by way of land claims agreements or may be so acquired."

1. Derogation from the Charter

a) Interpretative clause

The position of s.25 among the "general provisions of the Charter and its negative

wording indicates that it is not a positive guarantee of rights to the same effect as its substantive provisions. There appear to be concurring opinions that s.25 thus does not purport to create new rights or freedoms, but only seeks to protect the rights of the aboriginal peoples from the exercise of the rights guaranteed by the Charter[2]. In particular, s.25 was drafted with regard to the equality clause[3]. Although s.15(2) specifically provides for the possibility of affirmative action programs, it would not have afforded sufficient protection for the rights of aboriginal peoples. At first glance then, s.25 can be characterized as an interpretative provision, limiting the scope of the rights guaranteed in the Charter, but not as an additional protection and positive guarantee of rights[4]. If s.25 does not amount to a positive but only to a negative protection, the question still remains what the scope of this protection is, i.e. whether s.25 is a saving clause (excepting aboriginal rights from the Charter) or a derogating clause (limiting the scope of Charter rights). It is not clear from the wording of the provision whether in cases of conflict the aboriginal rights protected under s.25 will automatically prevail or whether the other rights guaranteed in the Charter will find application, although limited by s.25 as an interpretative clause. A related aspect of the same question is whether the effect of s.25 is to protect the collective status of aboriginal peoples from interference through the exercise of Charter rights, or whether s.25 contemplates the exercise of a right to self-government allowing for example for the infringement of individual rights, these alternatives not being mutually exclusive. An illustration of the problem linked to the latter alternative is provided by the conflict between a right to self-government, a corollary of which would be the right of the collectivity to determine its membership, and the individual right of the band member under s.15 of the Charter.

b) Wording of related provisions

A comparison with the wording of other Charter provisions may be helpful to

determine the effect of s.25 in this respect. S.26, which protects other rights not expressly mentioned in the Charter says

"The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms ...".

S.29, protecting rights in respect of certain denominational schools, reads

"Nothing in this Charter abrogates or derogates from any rights or privileges ..."

The term "construed" in s.25 (as in s.26) indicates that the provision is to be an interpretative guideline in conflicts between the exercise of the rights guaranteed in ss.2-23 of the Charter and the rights of aboriginal peoples. It does not prima facie, convey the meaning that the latter rights are override any other right guaranteed in the Charter, in particular if the wording of s.29, which is stronger, is taken into account.

The French wording of s.25, however, reads

"Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte au droits et libertés ..."

without any reference to "construction" of "interpretation". The French version of s.29 uses the same terms ("ne porte pas atteinte").

S.26 of the French text uses the terms "Le fait que la présente charte garantit certains droits et libertés ne constitue pas une négation des autres droits et libertés ...", which appears to be a more faithful translation of the English text.

c) Principles of interpretation

Under s.57 of the Constitution Act, 1982, the French version is equally authoritative. One principle of interpretation of constitutional texts postulates that they should be given a broad interpretation, in particular in the context of fundamental rights and freedoms[5]. The interpretation should also be chosen with a view to giving effect to the purpose of the relevant provision[6].

In Québec Protestant School Boards v. A.G. Québec et al (No. 2)[7] Chief Justice Deschênes of the Québec Superior Court said that "The whole thrust of constitutional law is aimed at ensuring a liberal interpretation and a generous and uniform application across the country"[8] and that "Therefore we should not hesitate to give the Charter the broad and liberal interpretation to which it is entitled as an important chapter of the Canadian Constitution"[9]. The S.C.C. in A.-G. Québec v. Blaikie et al (1979) also held that the constitution should be given a broad interpretation[10], a view more recently reaffirmed in Hunter et al v. Southam Inc., in which Dickson, C.J.C. noted that a constitution should be flexible in order to accommodate social, political and historical changes and be interpreted accordingly[11].

With respect to discrepancies between the English and the French versions, a meaning compatible with both texts should be chosen[12]. The problem however is that this approach may lead to the adoption of a narrower meaning (the lowest common denominator) the use of which would be inconsistent with the principle of broad and effective interpretation[13]. In the present case, however, the comparison between the relevant provisions and their respective English and French wordings makes it possible to adopt a broad interpretation compatible with both linguistic versions.

d) Aboriginal rights not affected by the Charter

The fact that s.25 and s.29 have the same wording in the French text suggests that the corresponding English sections should be interpreted in the same manner and that the words "shall not be construed" are implicitly contained in the wording of s.29 "Nothing in this Charter...". The words "shall not be construed" used in s.25 and s.26 do not have a direct equivalent in the French wording whereas the terms "abrogate or derogate" in s.25 and s.29 are both translated as "ne porte pas atteinte". Similarly, the part of the English s.26 which is faithfully translated in the French text is

"denying the existence" ("ne constitue pas une négation"). It may be inferred from these wordings that the terms "shall not be construed as" do not affect the essence of the provision and therefore cannot be interpreted as giving s.25 a narrower scope than s.29. The essential element of s.25 and s.29 thus appears to be that the other provisions of the Charter shall not "abrogate or derogate" from the rights referred to in these provisions. The method or technique adopted to achieve the purpose of s.29 must necessarily be a corresponding interpretation or construction of the other provisions. Adding the words "shall not be construed as" would not have changed the meaning and the object of s.29. Therefore, it may be assumed that these words do not limit the scope of s.25. It may further be noted in this context that the non-derogation clause in the "Meech Lake Accord" uses the terms "Nothing ... affects section 25 ..., section 35 ..."[14].

Further help may be found in the marginal notes accompanying the sections of the Charter, which can be used to interpret its operative provisions[15]. The marginal notes of ss.29 and 26 both state that the rights referred to therein are "not affected" by the Charter. The marginal note of s.29 confirms that the rights referred to in it are "preserved". In the French version, however, the marginal notes for all of these sections all read "Maintien des (autres) droits (et libertés)...". This may be taken as an indication that all three sections must be interpreted in the same manner. This result would also most probably be consistent with the English version, since "preserved" may be considered as synonymous with "not affected"[16]. The terms "not affected" would also be a faithful translation of the terms "ne porte pas atteinte". Harrap's Standard French and English Dictionary (Part Two) offers "porter atteinte" as one of the translations of "affect"[17].

It is therefore submitted that the effect of s.25 is that the rights that pertain to aboriginal peoples remain unaffected by the Charter.

This result would seem to indicate that s.25 is a saving clause or a notwithstanding clause in respect of the Charter, not only limiting the scope of the other rights guaranteed in the Charter, as they may apply to aboriginal peoples, but excepting the specific rights belonging to aboriginal peoples from the application of its operative provisions. With respect to a potential aboriginal right to self-government, this would imply that the Charter would not be applicable to the aboriginal entity exercising the right. Even if the Charter would be applied to the self-governing entity, the result would be the same since s.25 - saving the right to self government from the application of the Charter's substantive provisions -would also apply to the aboriginal government. The characterization of s.25 as a saving clause would imply that the right to self-government of aboriginal peoples would take precedence in case of a conflict with the substantive rights guaranteed by the Charter. In other words, the effect of s.25 would be to protect the right to self-government both from external interference and from the inside, in that it would override individual rights.

2. Constitutional status of aboriginal rights

Although s.25 does not amount to a positive protection of the rights of aboriginal peoples, it is an indication that they have received a special constitutional status. The function of s.25, if the above interpretation is adopted, is to ensure that those rights remain unaffected by the exercise of substantive rights guaranteed by the Charter.

This raises the question of whether s.25 may have the effect of entrenching the rights referred to in it. If s.25 is to be read in conjunction with s.52(1) of the Constitution Act, 1982, then any law inconsistent with s.25 would be of no force or effect. Technically, it is difficult to see how a statute could be inconsistent with

s.25 if it is only an interpretative provision with no substantive character of its own. If s.25 does not entrench the rights of aboriginal peoples, then it is conceivable that a statute such as the Indian Act abrogates or derogates from the rights referred to in s.25 since s.25 only states that the rights remain unaffected by the Charter. It has thus been held that ordinary federal and provincial statutes as well as other constitutional provisions could affect the rights referred to in s.25[18]. If s.25 is interpreted strictly, its main object - the protection of the rights of aboriginal peoples from the egalitarian provisions of the Charter - could be be undermined by the enactment of the same provisions in an ordinary statute. For example, the Canadian Bill of Rights[19], enacted as a federal statute, s.1(b) of which recognizes the right of the individual to equality before the law and rejects racial discrimination, could be interpreted as limiting the scope of the rights protected by s.25. In the decision R. v. Drybones[20], the S.C.C. indeed held that s.95 of the Indian Act was in violation of the equality guarantee of the Canadian Bill of Rights. Subsequent decisions have conversely upheld other provisions of the Indian Act providing for a special status[21]. These decisions nonetheless indicate that a challenge of Indian special status under the Canadian Bill of Rights is in theory still possible, even after the coming into force of s.15(1) of the Charter, the Canadian Bill of Rights still being in force. However, in the light of the general acceptance of Indian special status in Canada[22], it seems unlikely that Canadian courts would rule against the special status of aboriginal rights recognized by s.25, even though it would be technically possible if s.25 is interpreted narrowly. Such a narrow interpretation would run counter to the object and purpose of s.25, namely to preserve the special status of aboriginal rights.

If s.25 (read with s.52(1)) is interpreted in a broad and liberal manner, then it should be read as resulting in a limited entrenchment, protecting the rights

referred to therein against the effect of the rights guaranteed in the Charter and similar statutory rights.

Further support for the contention that s.25 is "more" than a mere interpretation clause may be inferred from the term "pertain". S.35 mentions the rights "of" the aboriginal peoples, whereas s.25 refers to the rights that "pertain to" the aboriginal peoples. Black's Law Dictionary defines "pertain" as "to belong or relate to, whether by nature, appointment or custom"[23]. "To belong to by nature" indicates a stronger tie between the right in question and its subject than the one expressed by the terms "rights of". The particular choice of words in s.25 would not have been necessary if s.25 was only meant as a rule of interpretation. The specific terms used suggest that in addition, s.25 is intended to emphasize the special constitutional status of aboriginal rights, that they have a distinct quality and are therefore beyond the reach of Parliament as far as its authority to curtail these rights is concerned. The fact that the same language was not used in s.35 (1) can be explained by the position of s.35(1) outside the Charter, which is in itself a sufficient recognition of the special status of aboriginal rights.

It is here submitted, then, that if the rights of aboriginal peoples are beyond the application of the Charter they should be unaffected by the exercise of the same rights pursuant to a statute.

In the context of self-government, this would mean that a right to self-government under the Indian Act, e.g. the right of a band council to make by-laws under s. 81 of the act, could not be construed as a limitation on an inherent right to self-government, assuming this right falls under the scope of s.25.

3. Relation between s.25 and s.35

Another consideration supporting the submission that s.25 confers constitutional

protection - albeit more limited than a positive guarantee of rights - on the rights of aboriginal peoples is the comparison with s.35. It can be noted that the scope of s.35(1) is narrower than that of s.25, since s.35(1) protects "existing aboriginal and treaty rights", whereas s.25 refers to "any aboriginal, treaty or other rights or freedoms ...". If the view is taken that s.25 is only an interpretative provision with no substantive protective effect, with s.35(1) fulfilling that function, then s.25 would serve no useful purpose, since s.35(1) would also protect aboriginal and treaty rights from the impact of Charter rights. It was indeed noted that "Section 35 probably leaves s.25 with no work to do"[24]. The contention may be made that s.25 serves the purpose of protecting rights other than aboriginal or treaty rights from the impact of the Charter. However, there does not seem to be any reasonable explanation why certain rights of aboriginal peoples should only be protected against the effect of the Charter, but not receive positive constitutional protection through s.35(1). A better view, it is submitted, would be to consider s.25 as an interpretative provision also in respect of s.35[25].

There is an interpretative presumption that constitutional provisions, in particular those protecting rights, should be interpreted so as to give them full effect and in a manner beneficial to the subject of the rights in case of ambiguity[26]. The ambiguity created by the difference in wording between s.25 and s.35(1) could be resolved, it is submitted, if s.25 is to be used to interpret s.35(1).

If s.25 is to be used to define and interpret the scope of the rights protected in s.35(1), then s.25 would have the effect of providing for an indirect constitutional protection of the rights it refers to. Although s.25 only makes reference to rights guaranteed in the Charter, there is no reason why it could not also serve to interpret s.35, since the latter deals with the same subject matter.

In the case A.G. Ont. v. Bear Island Foundation et al, the Ontario High Court

held with respect to s.25 that it could not be interpreted as a limitation upon what was dealt with in s.35 and that s.25 had nothing to do with the definition and content of the aboriginal rights to be protected, which question was dealt with exclusively by s.35 [27]. The court however did not give any justification for its reasoning and did not address the relation between s.25 and s.35 in more detail. The mere affirmation that s.35 has to be interpreted independently does not appear to be conclusive.

It would seem artificial to interpret s.35 and s.25 independently from each other. The legislative history of the two provisions indicates that they have been drafted in the same political context. It can be noted that s.35(3) contains the same clause in respect of land claims agreements as s.25(b). Subs. 35(3) was added to s.35(1) by the 1983 Constitution Amendment Proclamation, at the same time as the new s.25 (b). This subsequent amendment can be taken to mean that s.35 is not to be interpreted in a manner conflicting with s.25 and that the latter has a bearing on the interpretation of s.35.

II. S.35 of the Constitution Act, 1982

S. 35, situated outside the Charter in Part II of the Constitution Act, 1982, provides in sub-section (1) that

> "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed".

Sub-section (2) defines the term "aboriginal peoples", sub-section (3) clarifies the term "treaty rights" and sub-section (4) contains a sexual equality clause.

1. Recognition and affirmation of rights

The wording of s.35(1) indicates that it is a positive protection and guarantee of

aboriginal rights. It has been demonstrated that upon a grammatical interpretation, the words "recognized and affirmed" mean that the rights are "formally acknowledged as valid in law and rendered sure and unavoidable"[28]. This conclusion does not seem to provide much clarification to the scope of s.35(1), although it certainly is not incorrect. There appear to be concurring opinions that s.35(1) has the effect of entrenching aboriginal rights against infringement by any statute[29]. The wording of s.35(4), which says that the "...rights referred to in sub-section (1) are guaranteed equally to male and female persons", would appear to confirm the contention that s.35(1) is a guarantee of rights. This however depends on the meaning conferred on the term "guaranteed". It may also be interpreted as not having a substantive effect on its own. This issue need however not be resolved here, since the controversial question would still remain as to the scope of the entrenched rights, i.e. as to the effect of the word "existing" and as to whether the protection of s.35(1) may be subject to limitations.

2. Effect of the term "existing"

It has been contended that the term "existing" itself did not add anything to the provision, since it seems self-evident that only existing rights can be protected[30]. The legislative history of the provision seems to confirm this view. As the then Minister of Justice, Jean Chrétien, said in the Parliamentary debate on the constitutional draft, the addition of the word was only made under the assumption that it did not alter the legal substance of the original provision (which did not have the word in it)[31]. It must however be presumed that the wording of a provision has a specific meaning and that no superfluous words have been inserted. The term "existing" thus has to be presumed to modify the meaning of s.35(1). It must then be interpreted so as to confer on that section a meaning compatible with

the words "recognized and affirmed". As noted above[32], s.25 will also have to be taken into account for the interpretation of s.35(1). A number of different interpretations have been given to the term "existing". Sanders[33], McNeil[34], and Hogg[35] argue that the term has the effect of excluding rights that had been extinguished with the consent of aboriginal peoples or by legislation before April 17, 1982. Slattery, with regard to the then proposed s.35(3), suggested that "existing" meant "existing from time to time", so as to encompass future treaty rights[36]. In a more recent article, the same author examines the contention that "existing" was meant as a reference to a legal framework, i.e. that the right in question had to be recognized in Canadian law to qualify as an "existing right" in the meaning of s.35(1). However, he now comes to the conclusion that "existing" only amounts to "unextinguished", whether the right was previously fully recognized in Canadian law or not[37]. As McNeil correctly points out - albeit referring to judicial recognition -the existence of a right before April 17, 1982, can only depend on the circumstances and time of its creation and not on judicial recognition[38]. The same can be said of legislative recognition of a right.

The courts have so far adopted a restrictive approach with regard to s.35. In the case R. v Eninew, the Saskatchewan Court of Queen's Bench held that "existing" meant that only the rights that existed on April 17, 1982, were protected by s.35(1). The court was of the opinion the term limited the rights of aboriginal peoples to "those rights which were in being or which were in actuality at the time when the Constitution Act, 1982 came into effect. ... Were it to be otherwise, Parliament would have used the word original or some like word ..."[39]. The decision of the court was rendered on July 22, 1983. The 1983 FMC was held in March 1983. The constitutional amendment adding subs. (3) to s.35 and altering s.25(b) must therefore have been known to the court. In the light of s.35(3), the

finding of the court appears to be unreconcilable with s.35 (1). In respect of the word "existing", the court correctly held that it related to the entire phrase "aboriginal and treaty rights" and not only to "aboriginal ... rights", as was submitted to the court[40]. S.35(3), however, expressly provides that treaty rights include rights "that now exist by way of land claims agreements or may be so acquired" (emphasis added). "Future" rights are thus also contemplated by s.35(1). The term "future" is used here in the sense "recognized in the future", since an inherent aboriginal right is by definition already in existence. The word "existing" as applied to treaty rights cannot therefore be interpreted as limiting the constitutional protection to rights existing before April 17, 1982. If "existing" also applies to "aboriginal rights", it must have the same effect in relation to the latter. It is therefore submitted that "aboriginal and treaty rights" also encompass future rights, i.e. rights coming into existence or recognized after April 17, 1982. The court in R. v Eninew further concluded from its interpretation of "existing" that the content of the right as protected by s.35(1) was determined by the regulations limiting its exercise and that the Constitution Act, 1982 only secured the status quo, thus allowing for future "reasonable" limitations of the right in question[41]. The court however did not justify this finding. The judgment was upheld by the Saskatchewan Court of Appeal[42].

A similar restrictive view was taken by the British Columbia Court of Appeal (hereinafter: B.C.C.A.) in a recent decision concerning an aboriginal right to fish[43]. In that case, an appeal court for the first time attempted to determine in more detail the effect of s.35(1) and in particular of the term "existing". The B.C.C.A. held that the right in question had been subject to regulation before April 17, 1982, and that only the content of the right as defined and limited by the regulation was protected by s.35(1), the term "existing" having in other words the

effect of preserving the "liability" attached to the right[44]. The B.C.C.A. in effect ruled that s.35(1) did not preclude a limitation of the entrenched rights, but that the limitation itself would be subject to a standard of reasonableness similar to the one contained in s.1 of the Charter[45]. The interpretation of the term "existing" given by the court is open to challenge.

The proposition that the rights protected by s.35 were defined by the regulations in force at the time of entrenchment amounts to a "frozen concepts" theory. This theory has been developed in connection with the Canadian Bill of Rights, which contains a similarly worded provision. In the case Robertson and Rosetanni v. The Queen, concerning religious freedom, the S.C.C. held that the Bill of Rights was concerned "with such rights and freedoms as they existed in Canada immediately before the statute was enacted ... It is accordingly of first importance to understand the concept of religious freedom which was recognized in this country before the enactment of the Bill of Rights ..."[46]. The S.C.C. has implicitly rejected that theory in the decision R. v Drybones[47] since it ruled that a certain discriminatory provision of the Indian Act was inconsistent with the Bill of Rights, although the provision - defining and limiting the scope of the right in question - already existed before the Bill of Rights came into force. The theory re-emerged in subsequent decisions[48]. However, even if it were to be upheld in relation to the Bill of Rights, it could not be applied to s.35. The Bill of Rights is a federal statute, whereas s.35 is part of the constitution. A constitutional provision is essentially dynamic in character. As Dickson C.J.C. has stated in Hunter et al v Southam Inc., "A constitution, by contrast, is drafted with an eye to the future ... It must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers"[49] and thereby justified the necessity of a flexible interpretation[50]. The interpretation given to

s.35(1) therefore cannot be dependent on a specific date but should be flexible so as to encompass future changes. A "frozen concepts" theory applied to s.35 would run counter to the very nature of a constitutional provision. The argument advanced by the B.C.C.A. more specifically raises the question whether the rights protected un s.25 and s.35 may be subject to limitations.

III. The limitation of the rights of aboriginal peoples.

1. The rights protected under s.25

The position of s.25 in the Charter raises the question of whether it is subject to s.1, which provides criteria for the limitation of the rights guaranteed by the Charter. The character of s.25 as a protection from the exercise of Charter rights and as a rule of interpretation suggests that s.1 cannot be applied to s.25. Although s.25 can be considered to provide for a limited entrenchment of rights, its major effect and purpose is to limit the scope of Charter rights so that aboriginal rights remain unaffected. If s.1 was applied to s.25, the limiting clause would itself be limited so that its purpose could not be fulfilled[51].

2. The rights protected under s. 35

a) Position of s.35

S.35 (1), contrary to s.25, is a positive guarantee of rights. The position of s.35(1) outside the Charter however indicates that s.1 is not applicable either. The question remains whether an implicit limitation should be read into s.35(1). The view that s.35(1) does not prevent a limitation of the rights protected therein does not seem to be consistent with the concept and effect of entrenchment. The B.C.C.A. did acknowledge that s.35(1) protects aboriginal rights against extinguishment[52], but made a distinction between extinguishment and regulation of the right[53]. In so doing, the court applied a standard of reasonable limitation to

s.35(1). Slattery argues that s.35(1) does not allow an abridgement of rights and that legislation which renders the rights "ineffective" without purporting to abolish them is inconsistent with s.35(1) and thereby void[54]. It is however apparent from his analysis that he considers only a substantive alteration or a legislative override of the rights to be inconsistent with s.35(1)[55]. In a more recent article, the same author states that "entrenchment does not completely preclude limitation of those rights" and suggests that an "implicit standard of reasonableness" governs s.35(1)[56]. This postulate, along with the reasoning of the B.C.C.A. in the Sparrow case, is open to criticism.

The Attorney-General for British Columbia in the Sparrow case took the view that contrary to the Charter, s.35(1) did not protect specific rights but was only a recognition of unspecified rights. The position of s.35(1) outside the Charter therefore indicated that there had been no intention to restrict the federal or provincial legislative power, since s.35(1) would otherwise have been included in the Charter, where the legislative power to limit rights was subjected to s.1[57]. This position does not seem to be conclusive. The fact that the aboriginal rights protected by s.35(1) have not been specified does not per se diminish the protective character of the provision. It can be explained by the ongoing political negotiation process which was contemplated by Part IV.1. of the Constitution Act, 1982. The inclusion of certain specific rights in the constitution at a later stage does not render s.35(1) inoperative. The argument that s.35(1) was merely an "empty box" to be filled through the constitutional negotiation process could be supported by the wording of Part IV of the the Constitution Act, 1982 (which was repealed on April 17, 1983 pursuant to s.54). S.37 said that the agenda for the first constitutional conference on aboriginal constitutional matters had to include "the identification and definition of the rights of those (aboriginal) peoples to be included in the

Constitution of Canada". Part IV.1, which replaced Part IV, only provided that the agenda should include "constitutional matters that directly affect the aboriginal peoples of Canada", and thus no longer lended support to the above argument. Even less support can be found for it after the repeal of Part IV.1.

The argument of the Attorney-General was not followed by the B.C.C.A., which held that s.35(1) did confer constitutional protection on aboriginal rights.

The position of s.35(1) in a separate part of the Constitution Act, 1982 can be explained by the special character of aboriginal rights and confirms the special status of aboriginal peoples. As Sanders observes, s.35 "reflects a broad consensus in Canadian thinking that the aboriginal people have been denied their rights and have legitimate claims against the Canadian state. It confirms that the aboriginal peoples are not viewed simply as economically deprived or as victims of discrimination"[58].

b. Specific character of aboriginal rights

The special character of aboriginal rights is related to the values underlying these rights, which stand in contrast to those expressed in the Charter.

The Charter of Rights and Freedoms can be considered as the expression of liberal-democratic values which place emphasis on individual liberty[59]. The liberal tradition is deeply rooted in European political philosophy. The freedom of the individual was and is still considered as being the fundamental element of democratic societies[60]. The "fundamental freedoms" guaranteed in s.2 of the Charter are an expression of this ideology. The characteristic feature and "raison d'être" of the Charter of Rights and Freedoms and of similar instruments is that it seeks to protect the individual person's freedom against infringement by the state. Although the most fundamental rights and freedoms may be presumed to exist independently, without being recognized in a constitutional document following a

political tradition inherited from the United Kingdom (the Preamble of the Constitution Act, 1867 states that Canada shall have a "Constitution similar in principle to that of the United Kingdom"), they were nonetheless subject to infringement by Parliament. The legal status of civil liberties prior to the Charter is aptly illustrated by the judgment delivered by Beetz J. in Dupond v. City of Montreal (S.C.C.), who stated that "none of the fundamental freedoms that were inherited from the United Kingdom is so enshrined in the Constitution as to be beyond the reach of competent legislation"[61].

The Charter of Rights and Freedoms represents a departure from this conception, since the rights and freedoms guaranteed therein can only be amended through the procedures laid down in Part V of the Constitution Act, 1982.

A corollary of the guarantee of rights in the Charter is the limitation clause in s.1. It is a trite observation that the rights and freedoms guaranteed in the Charter are not guaranteed absolutely[62], but may be subject to limitations, a feature which is found in most constitutional instruments protecting rights and freedoms[63]. The limitation clause contained in s.1 is an expression of the dichotomy between the individual person and the state, which through legislation may limit the exercise of rights - subject to certain conditions - but at the same time protects those very rights through the judicial institutions. This concept implies that the rights and freedoms are granted by Parliament and may ultimately be taken away by Parliament. Although the fundamental freedoms do not derive from an act of Parliament, that legislative body has the authority to curtail these freedoms. The guarantee of fundamental freedoms forms an integral part of a democratic system, in which the government has the legitimate competence to regulate their exercise by the individual. With respect to the constitutional recognition of aboriginal rights and in particular of an aboriginal right to self-

government, the situation is different. The democratic system described above reflects a concept of a state authority opposed to individual freedom. This concept stands in sharp contrast with the values underlying aboriginal societies, which are ultimately reflected in the notion of aboriginal rights. Aboriginal societies do not generally adhere to the idea of the individual as the central element of society but focus on the collectivity, the interests of which supersede the individual interest. Collective and individual interest in fact appear to merge into one[64]. A consequence of the primacy of the collective interest is that the individual-state dichotomy does not exist in aboriginal conceptions. Thus, concepts of authority and of (parliamentary) sovereignty are not present in aboriginal societies[65]. Although certain forms of authority do exist, they are not perceived in a hierarchical manner. The relation between village chiefs and the tribe members is not one of subordination, but of co-ordination[66]. The authority vested in chiefs derives from their individual wisdom and knowledge and is not exercised coercively, but rather in an advisory manner[67]. Leaders or chiefs of Indian tribes are described as being on the same level as any other individual tribe member. Correspondingly, decision-making in traditional Indian society was and is carried out by direct participatory majority and by a consensus procedure[68].

The recognition of aboriginal rights in the constitution therefore cannot be placed on the same level as the guarantee of individual rights. The specific character of aboriginal society is reflected in the special position of s.35(1). The distinct character of aboriginal rights as collective rights[69] reflects the collectivist values underlying those rights. The different character of aboriginal rights is also reflected in the fact that the Charter "guarantees" the rights and freedoms contained in it, whereas s.35(1) "recognizes and affirms" the rights of aboriginal peoples. This difference in wording confirms their special character. In

view of the fundamentally different conceptions Euro-Canadian and aboriginal societies are based on, a notion of limitation of rights as the one expressed in s.1 of the Charter does not appear to be applicable to the constitutional recognition of aboriginal rights. The recognition of aboriginal rights in s.35(1) does not take place within the state-individual framework. It implies the recognition of the distinct status of aboriginal peoples. If s.35(1) was subjected to an implicit standard of reasonableness, the implication would be that Parliament has the authority to curtail the rights protected by s.35(1). Such a result would place aboriginal rights in the context of the liberal-democratic model based on the concepts of individual liberty and state authority. This would in turn be inconsistent with the special character of these rights and would in effect deny aboriginal peoples a recognition of their special status and distinctness.

It is apparent from the decision of the B.C.C.A. in the Sparrow case that the court did not properly take into consideration the specific character of aboriginal society underlying the concept of aboriginal rights. The court based its reasoning on the assumption that - in matters of conservation policy - "only Parliament could legislate with due regard to the interests of all"[70]. This argument is based on the premise that the federal government legitimately represents Indian interests and implies that Indian tribes are integrated in the model of the state limiting and regulating individual interests, these in turn being protected by a constitutional instrument. The argument of the court related to an aboriginal right to fish. If this right is placed in the wider context of an aboriginal right to self-government, then the federal government would no longer be competent to regulate conservation "for the interests of all", since the interests of aboriginal peoples would be in their own hands. It may be noted in this respect that the recently adopted Sechelt Indian Band Self-Government Act[71] provides in s.14(1)(k) that the

band council has the power to regulate in respect of the protection of fish, fur-bearing animals and game. This indicates that conservation matters may indeed fall under the competence of an Indian "government". However, it must be kept in mind that the Sechelt Act was passed subsequently to an agreement between the federal government and the band. It may not therefore be inferred from that legislation that the government recognizes a right to self-government including a right to an autonomous conservation policy. It remains to be demonstrated that the right to self-government is an inherent aboriginal right and that conservation policy is one of the matters falling thereunder. This will be examined further below. In this context, it is sufficient to note that the B.C.C.A. did not address the context of self-government or take into consideration the specific nature of aboriginal rights finding expression in s.35(1). Other than the assumption that Parliament only was competent to regulate for the common interest, the court did not give any justification for the application of an implicit standard of reasonableness.

3. Absolute protection of aboriginal rights

The B.C.C.A. in rejecting the submission of the Attorney-General for B.C. (that s.35(1) was only a "political program" with no substantive effect) based its conclusion - that the aboriginal right to fish was one entitled to constitutional protection - on the argument that the constitution was to be interpreted in a "liberal and remedial way"[72]. It is submitted here that a liberal interpretation of s.35(1) would come to the conclusion that there is no implicit standard of reasonableness contained therein. To hold that s.35(1) affords constitutional protection for aboriginal rights subject to reasonable limitation appears to be the narrowest possible interpretation. Regarding that s.35(1) as anything less than a

constitutional protection of aboriginal rights would indeed deny any meaning to the provision and "ignore its language", as the court has said itself[73]. If this interpretation is clearly unacceptable to the court, then the next admissible interpretation (on a "spectrum" of interpretations ranging from narrow to broad or liberal) can hardly be termed liberal, since it does no more in effect than to state the obvious, namely that a constitutional recognition and affirmation of aboriginal rights offers constitutional protection to those rights.

The conclusion following from a liberal and broad interpretation therefore should therefore be that neither s.25 nor s.35(1) are subjected to an implicit standard of reasonable limitation.

4. The interpretation of s.35 with regard to s.25

It was noted above[74] that s.25 should serve as an interpretative guideline for s.35. It was also noted that the wording of s.25 was wider. S.25 refers to "any" aboriginal or treaty rights, to "other" rights and to "freedoms" whereas s.35(1) only mentions "existing aboriginal or treaty rights".

A broad and liberal interpretation, it is submitted, has to take into account this discrepancy and attempt to read the two provisions together to make them compatible with each other. There are no apparent reasons why only "existing aboriginal or treaty rights" should receive constitutional protection in s.35 (1) but not the rights or freedoms not falling into these categories.

It is submitted here that the term "aboriginal rights" in s.35(1) may also encompass "other rights" and "freedoms". Neither the wording of s.25 nor of s.35 (1) allows the inference that the categories of rights referred to therein are absolutely "watertight" and do not overlap. The provisions do not contain any legal definition of the terms used. So far, specific aboriginal rights have been identified

by Canadian courts (such as the right to fish and to hunt), but other rights remain to be defined. In Guérin et al v. The Queen, the S.C.C., dealing with the nature of Indian title, noted that the courts have been applying an "inappropriate terminology" in relation to Indian title and described Indian title as a "sui generis" interest[75]. In Simon v. The Queen, the S.C.C. said - with respect to treaties - "An Indian treaty is unique; it is an agreement "sui generis" which is neither created nor terminated according to the rules of international law"[76]. These statements confirm that it is not possible to draw strict lines between the different categories of rights. In respect of treaty rights, the S.C.C. noted in Simon that although the treaty in question was a positive source of protection against the infringement of hunting rights, these rights existed before and were merely recognized by the treaty[77]. This finding indicates that "treaty rights" and "aboriginal rights" may in substance be the same, although deriving protection from different sources. The wording of the respective sub-sections may also provide some guidance. S.35(3) clarifies the meaning of "treaty rights" and states that they include rights arising out of land claims agreements. S.25(b) contains the same formulation, but does not specify to which of the categories mentioned in the general part it refers to.In the absence of a specific reference, it may be taken that rights and freedoms arising out of land claims agreements may be part of any of the categories of the general part. If s.35(3) and s.25 (b) are read together, it may be inferred that the terms "treaty rights" in s.35(1) also include "any rights or freedoms" arising out of land claims agreements. As noted above, it would seem arbitrary or artificial to strictly categorize rights and freedoms arising out of land claims agreements and to confer a different degree of protection on each category. The James Bay and Northern Québec Agreement[78] can be taken as an example. S.24.3.1 of the agreement provides for the right to hunt, fish and trap.

The philosophy of the agreement was explained in an introductory statement which preceded the examination of the agreement by a special committee of the Québec legislature. It said with reference to the role of trapping for the natives that "It is ..., part of the basis of their livelihood ... This is an integral part of their life, not an isolated activity"[79]. The right to trap may be qualified as a "right existing by way of a land claims agreement". However, in view of its fundamental importance in the life of aboriginal people, it could also be qualified as a "freedom" (existing by way of a land claim agreement). If a strict classification is to be maintained, the freedom to trap would not be protected under s.35(1) (read with s.35 (3)), but only under s.25(b). The right to trap would however be protected under both provisions. To avoid such artificially differing results, considering that the legal substance of the right or freedom remains the same, it is submitted that "treaty rights" in s.35(1) has to be read as including rights and freedoms.

If the term "treaty rights" is read as including "rights and freedoms", then the same must be said of the term "aboriginal rights". In view of the fact that a rigid classification of the rights of aboriginal peoples does not seem possible, the term "aboriginal rights" in s.35(1) can also be taken to include "any rights" or "other rights" referred to in s.25.

This interpretation, it is submitted, is in accord with the principle of liberal and remedial interpretation and would avoid the discrepancies which would arise if the two provisions are interpreted narrowly.

IV. The rights protected under s. 25 and s. 35

The wording of s.25 indicates that the rights protected therein fall into four broad categories, namely "aboriginal rights", "treaty rights", "other rights" and "freedoms". S. 35 (1) protects "aboriginal and treaty rights".

"Aboriginal rights" include rights such as hunting and fishing rights, and possibly

a right to self-government.

"Treaty rights" are those rights arising out of the treaties concluded between aboriginal peoples and the colonizing powers. S. 25 (b) indicates that rights deriving from modern land claims agreements would also fall under their scope. This is confirmed by S.35 (3), which defines "treaty rights" as including rights out of existing and future land claims agreements.

It is unclear which rights would fall under the category "other rights". Upon a grammatical interpretation, these rights would encompass all those rights not falling under the other categories. The term could be interpreted as also including rights of aboriginal peoples under international law. Similarly, the meaning of "freedoms" is not defined in the Constitution Act, 1982. It has been contended that the term did not add to the substance of the provision and was synonymous with rights[80]. It is submitted here that the term has a distinct meaning. It may be presumed that each term in a legal provision has a specific meaning and that no superfluous words have been added. The term "freedoms", though it may encompass the term rights, nonetheless provides for a separate category of rights, the scope of which remains to be determined. Some indication as to the meaning of "freedom" may be found in the Charter itself. The Charter also uses the terminology of "rights" and "freedoms". S.2 lists a number of "fundamental freedoms", the other sections contain specific rights. The use of the term "freedom" as opposed to the term "right" (in respect, for example, of thought, opinion and expression) has a stronger connotation, indicating that a "freedom" is broader than a "right". The term "fundamental" in conjunction with "freedom" denotes that the rights listed in s.2 are deeply rooted in the democratic traditions and values underlying the Charter and that they are more than rights merely granted by Parliament. The freedoms guaranteed in s.2 have been aptly described

as being "little less vital to man's mind than breathing is to his physical existence"[81]. If this characterization is applied to the terminology of s.25, then a "freedom" pertaining to aboriginal peoples may be defined as a fundamental element of aboriginal society, based on aboriginal traditions and values. If it can be shown that a certain form of self-government was such a fundamental element, then the term "freedom" might encompass an inherent right to self-government or to self-determination.

S. 25 in subsections (a) and (b) makes reference to two specific categories of rights included in one of the above-mentioned four categories. Subsection (a) may be relevant for an aboriginal right to self-government if it can be established that the 1763 Royal Proclamation contemplated self-governing aboriginal societies. In the above-mentioned decision of the English Court of Appeal, Lord Denning referred to the Royal Proclamation and qualified it as a "fundamental document upon which any just determination of fundamental rights rests"[82]. Rights recognized by the Royal Proclamation however do not form a separate category of rights under s.25 but fall under the rights and freedoms referred to in the general part, as indicated by the word "including".

It was noted earlier[83] that these categories of rights are not strictly demarcated and that they may overlap. The Constitution Act, 1982 does not provide a definition of these rights. The jurisprudence has identified the concept of original occupancy as a source of aboriginal rights.

The term "aboriginal rights" can be considered to encompass both aboriginal title and rights deriving from the aboriginal people's original occupancy of the lands[84]. The notion of aboriginal title is however itself not clearly defined and to a certain extent overlaps with the concept of aboriginal rights[85]. The common and essential element of the concepts of aboriginal title and aboriginal rights is however the fact

of original occupancy as a source of the rights or interests deriving therefrom. The French wording or s.25 and s.35 ("droits ancestraux") is an adequate reflection thereof. The qualification of these rights as "interest", "title" or "aboriginal rights" does not affect the character of their source. It is therefore not necessary to draw a sharp line between "aboriginal right" and "aboriginal title".

V. The Subjects of the rights protected under s.25 and .35

S. 25 and S. 35 protect the rights of the "aboriginal peoples" of Canada. The term "aboriginal peoples" is defined in s.35(2) as including the Indian, Inuit and Métis peoples of Canada. The term "peoples" itself is, however not defined. The question then arises whether "peoples" refers to the collectivity only or also to its individual members. The Oxford English Dictionary[86] defines "people" in its first meaning as "a body of persons composing a community, tribe, race or nation", the second meaning being "the persons belonging to place, or constituting a particular concourse, congregation, company, or class". The "rights of the aboriginal peoples" could therefore refer to the rights of the people as a collectivity as well as to the rights of the members of that collectivity.

The wording of s.35(4) appears to support this view. S. 35 (4) provides that the aboriginal rights referred to in subsection (1) are "guaranteed equally to male and female persons". This indicates that s.35(1) contemplates rights belonging to the collectivity as well as rights belonging to the individual. With regard to a right to self-government, the question arises as to what the relevant "units" of self-government would be. There is in Canada no uniform Indian people, to take one of the groups mentioned in s.35(2), but one finds a large number of tribes speaking different languages and having different traditions and cultures[87]. Their membership ranges from 12000 (Six Nation Band) to very small numbers. This fact

is reflected in the wording of s.35(2), which speaks of Indian, Inuit and Métis "peoples" and not of "people", which allows the inference that each of the three groups are not considered as being one people but as encompassing several peoples. With regard to rights such as hunting and fishing rights, these may be exercised by the individual tribe member as well as by the collectivity. The BCCA in the above-mentioned Sparrow case identified the issue as arising "out of the bands' right to fish"[88]; however, the fishing licenses were issued either to an Indian or to the band under the pertinent regulations, as noted by the court[89]. Aboriginal hunting or fishing rights thus may be individual or collective rights. A right to self-government, however, appears to be a right which can only be exercised by the collectivity. The determination of the relevant "units" of self-government may however be difficult in view of the diversity of languages, traditions and culture among the Indian peoples as one of the aboriginal peoples in Canada. The definition of the self-governing units and of corresponding criteria would have to take into account demographic, sociological, anthropological and other factors. It is beyond the scope of a legal analysis to elaborate these criteria. From the point of view of constitutional law, the term "peoples" appears to be adequate. The important feature is that this term includes the collectivity as well as its individual members.

The right to self-government has been characterized as a collective right. The next chapter will elaborate on the distinction between collective and individual rights and also on the distinction between minority rights and aboriginal rights.

CHAPTER 5

The distinction between collective and individual rights in the domestic context

The provisions of the Charter indicate that it is not solely concerned with the protection of individuals, but also with the protection of groups. The provisions relating to aboriginal peoples are one example thereof. It is submitted, however, that a distinction between the protection of aboriginal peoples and the protection of other groups or minorities has to be made, in order to place the analysis of a right to self-government in a proper perspective.

I. Collective rights, group rights, minority rights

It is apparent from legal writings relating to the protection of groups that the terminology and the characterization of the rights in question are sometimes unclear and ambiguous or even , it is submitted, incorrect. The protection of the rights of aboriginal peoples is sometimes placed on the same level as the protection of the rights of ethnic, linguistic or religious minorities. For example, it was stated that "Almost one third of the Charter's provisions deal with the collective rights of autonomous Canadian communities", with reference to ss. 16-23, 25, 27 and 29 of the Charter[1]. Another recent study on the rights of native populations is clearly based on the premise that Canada's aboriginal peoples are minorities and that norms protecting minority rights are applicable to them[2]. Similarly, the demands of aboriginal peoples for self-government are mentioned in the context of the protection of ethnic minorities[3]. Although some authors distinguish between ethnic or linguistic minorities and aboriginal peoples, they use the term "collective rights" with regard to language and cultural rights[4].

It is submitted here that the character of a right has to be determined according to its subject and that accordingly, a more appropriate terminology would be to qualify as collective those rights belonging to a collectivity.

If a distinction between collective and individual rights is made according to the subjects of the right, it is equally submitted that minority rights have to be distinguished from aboriginal rights, this distinction in turn being an adequate reflection of the fundamental differences between an ethnic minority and aboriginal peoples.

An examination of the constitutional provisions relating to linguistic, cultural or ethnic minorities shows that the proper subjects of the protected rights are individual persons, although their protection arises from belonging to a certain group.

The provision of the Charter specifically dealing with linguistic minorities is s.23. S.23 provides for the rights of certain "citizens of Canada" - as qualified by the subsections - to have their children receive their education in English or French respectively. It is apparent from that provision that the subjects of the rights are individuals, although the whole provision could be qualified as a "minority rights" provisions, since it deals with the rights of persons belonging to a linguistic minority.

Sections 16 to 18, 19 and 20, providing for the right to use any of the two official languages in governmental insitutions and courts, are addressed to individual persons. This is confirmed by the existence of s.133 of the Constitution Act, 1867, which can be considered as the "predecessor" - although still being in force - of sections 16 to 20 of the Charter and which clearly states that "any person" has the right to use any official language in governmental institutions.

S. 29 of the Charter makes reference to rights in respect of certain

denominational schools. It is thus aimed at the protection of religious minorities and their educational rights in respect of education. The provision does not clearly specify who the subjects of the rights are. S.29 itself however is not intended to be a positive guarantee of rights, but is an interpretative provision with regard to the rights guaranteed in the Charter. It refers to rights guaranteed by or under the Constitution of Canada.

S. 93 (1) of the Constitution Act, 1867 protects the rights "which any class of Persons have" with respect to denominational schools. As the verb "have" indicates, the rights in question pertain to the persons belonging to a particular class. The subjects of the rights are therefore individual persons, though defined through their appurtenance to a specific group.

By contrast, sections 25 and 35 of the Constitution Act, 1982 protect the rights of the "aboriginal peoples" of Canada. The subjects of the rights are "peoples", which term prima facie refers to a collectivity. However, aboriginal rights may also be exercised by the individual member of the collectivity (right to hunt or to fish, for example)[5]. Nonetheless, the individual aboriginal right also has a collective component, in that its exercise takes place in the specific context of the tribe or band in question. This collective character of the right is a reflection of the collectivist values underlying aboriginal society[6].

It is apparent from the provisions referred to above that the so-called "minority rights" provisions protect the individual rights of persons who belong to a certain group or minority, whereas the aboriginal rights provisions protect the rights of a collectivity.

It is thus submitted that the term "collective rights" should not be used in relation to "minorities", since the subject of the rights in question is not the minority or collectivity, but the individual member. "Aboriginal rights" should be

qualified as collective rights which may be exercised individually, whereas minority rights should be qualified as individual rights which may be exercised collectively.

The distinction between collective and individual rights is thus based on the criterion of the proper subject of the right.

It may be contended that this distinction does not allow for the distinction between individual rights guaranteed to any person and minority rights, i.e. rights guaranteed to persons belonging to a specific group.

It is submitted that it is possible to adequately define minority rights by reference to the purpose of the protective provision and the beneficiaries of that protection. Minority rights may be defined as (individual) rights the beneficiary of which is a specific ethnic, linguistic or cultural group. Some of the authors qualifying minority rights as collective rights seem to base this classification on the fact that collective rights protect and benefit groups rather than individuals[7]. While the purpose and effect of minority rights provisions may be the protection of a certain group, it nonetheless remains that the subjects of the right in question are individual persons, who in the collective exercise of their right will secure a benefit for the minority of which they are a member.

In summary, the following definitions are suggested:

"collective rights" are rights of a collectivity such as the aboriginal peoples; they may be exercised in some cases by individual persons.

"minority rights" are the rights of the individual members of a minority, which is the beneficiary of the rights; the rights may be exercised collectively, i.e. together with other members of the minority.

"Group" or "community rights" are synonymous with "minority rights".

This qualification can be supported by reference to international law. The relevant norms of international law will be discussed further below[8].

In Québec Protestant School Boards v. A.-G. Québec (No. 2), Mr. Justice Deschênes attempted to define the notion of collective rights. The Attorney-General of Québec argued that s.23 of the Charter was a guarantee of collective rights. Looking at the language of s.23, Deschênes came to the conclusion that the section recognized the rights of the members of a (linguistic) minority, the members and not the collectivity having the capacity to enforce the rights before a court[9]. By contrast, s.25 was characterized as "a clear case of collective rights"[10]. The individual exercise of the right - to be determined according to the text and context of the law granting the right[11] was taken to be a strong indication that the right in question was not a collective one[12]. The view taken by Mr. Justice Deschênes thus appears to confirm the above submission.

Further justification for the necessity to distinguish between the protection of minorities and the protection of aboriginal peoples, i.e. for the distinction between "minority rights" and "collective rights" (e.g. rights of aboriginal peoples) is the different character of aboriginal peoples and ethnic, linguistic or religious minorities. Despite the fact that aboriginal peoples are numerically a minority within the Canadian state, it is nevertheless submitted that a "minority" is different from a "people" for the purpose of a legal analysis. Whereas the aboriginal peoples claim recognition of a separate status within Canada[13], minorities do not as a general rule object to being considered part of the Canadian society but merely claim the right to the exercise of their own culture, religion or language. Attempts to define the concept of a "minority" have come to the conclusion that aboriginal peoples, albeit having some common elements with minorities, should not be included in the definition of minorities in view of their specific character [14]. The aboriginal peoples of Canada are at least distinct from any ethnic, linguistic or religious minority in that they have pre-colonial, ancestral

roots to the territory and subsequently were never integrated in the Canadian society[15]. Aboriginal peoples themselves reject any qualification as a "minority"[16]. Such a qualification would place them on the same level as linguistic, religious or ethnic minorities and thus implicitly reject their special character. It would imply that aboriginal peoples could merely assert rights relating to the preservation of their specific language, culture and traditions. The protection of these specific rights would fall short of any recognition of a right to self-government. The equation of "aboriginal peoples" with "minorities" would also be inconsistent with the language of the Constitution Act, 1982. Aboriginal peoples and minorities are dealt with in separate provisions. S. 15(2) of the Charter allows for special measures to be taken in favour of "disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin ...".

S. 23 bears the heading "Minority Language Educational Rights". S. 27 - albeit not itself creative of rights - is aimed at the protection of the "multicultural heritage" of Canadians and thus contemplates the rights of ethnic, cultural and linguistic minorities[17].

The specific reference to the rights of aboriginal peoples in s.25 of the Charter and s.35 of the Constitution Act indicates that they belong to a different category and that "aboriginal peoples" therefore are not "minorities" from the point of view of constitutional law.

II. The right to self-government as a collective right

The constitutional provisions refer only to "peoples" as the subjects of the rights. Whether an individual exercise of the right in question is conceivable consequently depends on the nature of the rights. The nature of a right to self-government appears prima facie to be collective. The concept of self-government implies the existence of a basic system of decision-making and presupposes the existence of a collectivity.

If the right to self-government was qualified as an individual right, the implication would be that an individual member of the collectivity could enforce this right before a court. However, it is not conceivable that an individual person could subsequently exercise a right to self-government as a subjective right, because self-government presupposes some form of collective process in which more than one person has to be involved. The fact of the necessary participation of several persons or of a collectivity in the exercise of a right justifies its qualification as a collective right[18].

A right to self-government should therefore be properly characterized as a collective right, which only the collectivity, i.e. the aboriginal people in question can exercise and enforce. Although individual members of the collectivity would assert the right to self-government before a court, they would not do so on their own behalf but acting as its representatives on behalf of the collectivity.

CHAPTER 6

The right to self-government as an inherent right

Introduction

This chapter shall examine the sources of an aboriginal right to self-government. A right to self-government may derive from the historic fact of original occupancy. An analysis of the jurisprudence relating to aboriginal rights shows that the concept of original occupancy is recognized as a valid source of rights. It will be submitted that the reasoning adopted by courts in respect of specific aboriginal rights can be applied to a right to self-government. It will then have to be demonstrated that aboriginal societies were historically self-governing, and that the right deriving therefrom has not subsequently been extinguished. International law concepts will be relevant to discuss the issue of extinguishment. If an original right to self-government has not been extinguished, it will be submitted that the Constitution Act, 1982 recognizes a right to self-government as an "aboriginal right" in the meaning of s. 35(1)..

I. The concept of original occupancy as a source of the rights of aboriginal peoples

It is a contention of aboriginal peoples that the historic fact of original occupancy is the source of their rights[1]

1. Canadian jurisprudence

Early Canadian judicial decisions did not recognize this concept. In St. Catharines Milling and Lumber Co. v. The Queen, the Judicial Committee of the Privy Council (hereinafter: P.C.) held that an aboriginal title was based on the 1763 Royal Proclamation only. The aboriginal title in question related to hunting and

fishing rights. Referring to the occupation by the Indians of the territory in question, the P.C. held that "Their possession, such as it was, can only be ascribed to the general provisions made by the Royal Proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown"[2].

Subsequent decisions of Canadian courts did acknowledge that aboriginal rights existed prior to the Royal Proclamation. In R. v White and Bob, a decision of the British Columbia Court of Appeal concerning the right to hunt, the court held with regard to the Royal Proclamation that it had the purpose of defining and clarifying aboriginal rights and the related policy and that it was "declaratory and confirmatory of the aboriginal rights"[3]. The court in its judgment however did not address the question of the source of the rights but merely acknowledged their existence.

A clearer recognition of the historic roots of aboriginal rights can be found in the 1973 Calder decision[4], in which the issue of aboriginal title came before the S.C.C. for the first time. At issue was whether aboriginal title to the lands in question (a territory in north-west British Columbia) existed or had been extinguished, and whether the Royal Proclamation was applicable to them. The court held that the latter did not contemplate lands in British Columbia. The appeal, brought by several Indian bands and individual band members claiming recognition of a title to the lands, was dismissed. However, the judges sitting on the court were split three to three; the casting vote was rendered by Pigeon J., who based his decision solely on a procedural point and held that the court had no jurisdiction to hear the case[5]. Judson J., speaking for the majority of the court, came to the conclusion that the title to the land claimed by the Indians had been extinguished. However, with regard to the nature of the Indian title, he said "Although I think it is clear that Indian title in British Columbia cannot owe its

origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the lands as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished"[6] and thus found himself in agreement with Hall J., who wrote the dissenting opinion as to the question of extinguishment. In Hamlet of Baker Lake et al v. Minister of Indian Affairs and Northern Development (Fed. Court, Trial Division)[7], the court found that the Inuit people had an occupancy-based title to the lands in question. It also elaborated criteria for determining the existence of such a title, namely:

"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 societies.

4. That the occupation was an established fact at the time sovereignty was asserted by England"[8].

The court acknowledged the fact that the Inuit had an organized society and held that this fact was the source of their right to hunt and fish[9]. The court resorted to historical and anthropological evidence to determine to what extent the area at issue had been occupied by the Inuit.

In Guérin et al. v. The Queen[10], the S.C.C. referred with approval to the Calder decision and found that it implicitly recognized "... that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it".[11].

In Simon v. The Queen[12], the S.C.C. had to determine the effect of a treaty conferring hunting rights on Indians on the application of provincial laws prohibiting the use of rifles outside the hunting season. The court did not specifically address the question of the source of the aboriginal hunting rights. However, it found that although the treaty in question was a positive protection of hunting rights[13], these rights existed before and independently and were recognized by the treaty[14].

It is apparent from the language of these two decisions of the S.C.C. that the existence of independent aboriginal rights to hunt is recognized. Implicit in the acknowledgment of an independent aboriginal right is the recognition of its historic roots. The fact that the S.C.C. in Guérin relied on Calder is an indication that the concept of original occupancy-based rights is no longer in dispute. This proposition can be supported by a passage of general significance in the Simon decision, in which the S.C.C. confirmed that an evolution had taken place in Canadian law with regard to aboriginal rights[15]. The the notion of an aboriginal right deriving from the pre-colonial existence of organized aboriginal societies is thus accepted in the Canadian jurisprudence. More recent decisions such as Sparrow v. The Queen[16] are consistent with that jurisprudence. The court - with regard to a right to fish - said, after consideration of the anthropological evidence "It is clear that the Musqueam have a history as an organized society going back long before the coming of the white man; and that the taking of salmon from the Fraser River was an integral part of their life and has continued to be so to this day"[17]. The B.C.C.A. made extensive reference to the Calder decision of the S.C.C. and in particular - with approval - to the passages relating to the nature of the aboriginal right[18].

Although not being a Canadian decision, the judgment of the English Court of Appeal quoted earlier[19] can be mentioned in this respect, since the action was

brought by Canadian Indian groups during the constitutional process in 1980-81. The court had to determine whether the British Crown still had obligations towards the Indian peoples in Canada or whether these obligations now had to be assumed by the government of Canada. Lord Denning in his judgment elaborated on the legal aspects relating to aboriginal societies. He stated, under the heading "aboriginal rights and freedoms", "The Indian peoples of Canada have been there from the beginning of time. So they are called 'aboriginal peoples', ... They had their chiefs and headmen to regulate their simple society and to enforce their customs. I say 'to enforce their customs', because in early societies custom is the basis of law ... These customary laws are not written down ... Yet beyond doubt they are well established and have the force of law within the community. In England we still have laws which are derived from customs from time immemorial"[20]. Lord Denning then referred to the Royal Proclamation as a fundamental instrument guaranteeing the original rights of Indian peoples in Canada[21]. He thus acknowledged the existence of rights based on the original, pre-colonial organization of Indian societies.

2. U.S. jurisprudence

The early decisions of the U.S. Supreme Court (hereinafter: U.S.S.C.)relating to the status of Indian nations also support the concept of an occupancy-based right. These cases are noteworthy in that they make reference not only to aboriginal hunting and fishing rights, but also to a right to self-government.

In Johnson and Graham's Less v. McIntosh[22], the U.S. S.C. had to determine whether a title to land granted by Indian tribes to private individuals could be recognized by U.S. courts. Chief Justice Marshall described the effect of the discovery of North-America by the European colonizers and held that discovery

conferred a title to the government by which it was made valid, against all other European governments. With regard to the relations between Indians and Europeans, he said "In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished ..."[23] and, with regard to the U.S. government "The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown or its grantees ... All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right"[24].

In Cherokee Nation v. State of Georgia[25], the U.S.S.C. had to determine the nature of the relation between the United States and the Indians. Chief Justice Marshall, speaking for the court, described the relationship as a special and unique one. "... But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else"[26]. Marshall characterized the Indians as "domestic dependent nations"[27] and found that the Cherokee Nation had been recognized by the U.S. government as a state[28]. In the course of his judgment, Marshall also referred to the "... unquestionable, and heretofore, unquestioned rights to the lands they (the Indians) occupy"[29]. The concept of a historic right linked to the original sovereignty of Indian Nations is thus apparent in the judgment.

In Worcester v. State of Georgia[30], the U.S.S.C. had to determine the effect of treaties concluded between the United States and the Cherokee Indians. Marshall

C.J. again assessed the legal consequences of the colonization of North-America by the Europeans. He stated:

"America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and the rest of the world, having institutions of their own, and government themselves by their own laws. It is difficult to comprehend the proposition, ... that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors"[31]. Referring to the principle of discovery, already enounced in Johnson v. McIntosh[32], he reaffirmed that it "...could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man".[33] He further stated that "The Indian nations had always been considered as distinct, independent political communities, retaining their original rights, as the undisputed possessors of the soil, from time immemorial ... The very term 'nation', so generally applied to them, means 'a people distinct from others' ... The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth"[34]. Interpreting the clauses relating to trade of the treaty between the Cherokees and the U.S. government, Marshall said "It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade ... This treaty, thus explicitly recognizing the national character of the Cherokees, and their right to self-government ... is now in full force"[35]. Marshall characterized the relation between the U.S. government and Indians as one of

protection and placed it in the context of international law: "... the settled doctrine of the law of nations is, that a weaker power does not surrender its independence - its right to self-government, by associating with a stronger, and taking its protection"[36].

In Mitchell v. United States[37], the U.S.S.C. had to rule upon the effect of a treaty of cession between Spain and the United States on the title to lands ceded to individuals by Indians. In the course of the judgment, Baldwin J. said of the Indian title to the lands: "... that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them, by a perpetual right of possession ... Indian possession or occupation was considered with reference to their habits and modes of life ... It is enough to consider it as a settled principle, that their right to occupancy is considered as sacred as the fee-simple of the whites"[38]. He then referred to the Royal Proclamation as the instrument embodying these principles[39].

A comparison between the Canadian and early American jurisprudence shows that the early American cases add an additional dimension to the concept of aboriginal rights based on original occupancy, in that they link it to the concept of aboriginal sovereignty.

The Canadian cases do not explicitly address the question of the inherent sovereignty of Indian (or aboriginal) nations, but merely acknowledge the existence of rights deriving from the fact of original occupancy. Whereas the concept of occupancy-based aboriginal rights was only acknowledged by the S.C.C. in 1973 in the Calder decision[40], the U.S.S.C. already in its early decisions appeared to assume the existence of such rights, since the arguments of the latter were focussed on the extent of aboriginal sovereignty, a concept which can be considered as implicitly encompassing the land rights of Indian nations. The

original occupancy as a source of aboriginal rights did not appear to be subject to controversy to the U.S.S.C.

As noted above[41], concepts of "inherent sovereignty" or "nationhood" are closely linked to aboriginal demands for self-government. The overview of the American and Canadian jurisprudence indicates that the concepts have a role to play in the analysis of aboriginal rights.

The relevant Canadian jurisprudence has so far only dealt with specific aboriginal rights such as hunting or fishing rights, or rights to the use of land.

It is submitted here that the concept of original occupancy as a source of aboriginal rights can also be applied to determine the existence of a right to self-government.

To this end, it has to be determined whether one feature of the original occupancy of the colonized lands by aboriginal peoples was the existence of governmental elements. If these were an integral part of aboriginal societies to the same extent as fishing or hunting activities were, then a right to self-government would derive from that historic fact to the same extent as fishing or hunting rights derive therefrom.

II. Aboriginal self-government as a historic fact

At the risk of stating the obvious, it must be borne in mind that the assessment of aboriginal "governments" cannot use the same standards as modern political science would in relation to modern systems of government. The term "government" will be used here to describe any form of organized decision-making within aboriginal societies. Due to the relatively small size of aboriginal communities, the models of organization will necessarily be simpler than corresponding models of industrialized societies. It was already noted that

aboriginal peoples have a different perception of authority and decision-making processes[42]. This factor also has to be kept in mind when describing aboriginal "governments".

Although not making any reference to political organization, the judicial decisions referred to earlier do acknowledge the fact that aboriginal societies were "there" and "organized"[43]. This finding is confirmed by anthropological evidence. The studies referred to earlier describe a system of decision-making and structures of authority, albeit fundamentally different from the models of industrialized societies[44]. One of the largest Indian communities, the Six-Nation Iroquois Confederacy, is described as having a constitution and a government based threon dating back far beyond the arrival of the first European colonizers[45]. The constitution itself is described as providing for the setting-up of decision-making institutions and corresponding procedures[46]. It was noted in this respect that the model of the Iroquois constitution inspired the drafters of theAmerican Declaration of Independence and the Bill of Rights[47].

Aboriginal people generally point our that their current decision-making procedures stem from traditional forms of government which are diametrically opposed to forms of government which the Canadian government attempted to impose on aboriginal peoples[48].

One of the earliest scholars who attempted to determine the legal relationship between the Spanish conquerors and the Indians of South-America, rejected the proposition that they were of unsound mind - and therefore not capable of exercising any rights over their territory - on the ground that they had an organized society: "The Indian aborigines are not barred on this ground from the exercise of true dominion. This is proved from the fact that the true state of the case is that they are not of unsound mind, but have, according to their kind, the use

of reason. This is clear, beacause there is a certain method in their affairs, for they have politics which are orderly arranged and they have definite marriage and magistrates, overlords, laws and workshops, and a system of exchange, all of which call for the use of reason; they also have a kind of religion"[49].

In Worcester v. Georgia, Marshall C.J. found that the Indians inhabiting North-America had "institutions of their own" and were "governing themselves by their own laws"[50]. The S.C.C. found in Calder that the Indians were "organized in societies"[51]. The same fact was acknowledged in Hamlet of Baker Lake[52] and in Sparrow[53]. The courts relied on anthropological evidence to support this finding. The terms "organized in societies", it is submitted, implies that aboriginal societies had some form of political decision-making process by which they were "governing themselves".

It may therefore be taken that aboriginal societies were organized and thus self-governing. If one applies the reasoning of courts relating to occupancy-based aboriginal rights, then a right to self-government derives from this historic fact.

If a right to self-government thereby came into existence, it may in the course of time have been extinguished. It therefore has to be shown that this right has not subsequently been extinguished.

III. Extinguishment of a right to self-government in the Canadian context

It was noted that the concept of self-government is linked to the concept of sovereignty. The early U.S.S.C. decisions acknowledged that Indian peoples were "nations"[54]. A right to self-government appears to be a corollary of nationhood or sovereignty. The concept of sovereignty is a fundamental concept of international law. The principle of state sovereignty is one of the basic principles contained in the Charter of the United Nations.

If the right to self-government is seen in the context of sovereignty, principles of international law may be helpful to determine whether this right has been extinguished. To determine whether a right to self-government is still in existence, two approaches thus seem possible: in the Canadian context, the question is whether a right to self-government has been lawfully (according to Canadian law) extinguished, i.e. ceded or surrendered by aboriginal peoples. If self-government is seen as an element of sovereignty, the question is whether the original sovereignty of aboriginal peoples or nations has been terminated according to principles of international law.

In Canadian law, there appear to be two principal modes of extinguishment of aboriginal title, namely extinguishment by treaty and by legislation. The exact conditions of extinguishment however do not seem to be well defined[55].

1. Extinguishment by legislative enactment

In the Calder decision, the judges of the S.C.C. had opposing views as to the requirement for the extinguishment of aboriginal title. The issue in the Calder case was whether the aboriginal title in question had been extinguished by legislative enactments of the lands without regard to the claims asserted by the Indians. After reviewing relevant U.S. cases, Judson J., speaking for three judges (out of seven), said "In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga tribe might have had, when, by legislation, it opened up such lands for settlements, subject to the reserves of land set aside for Indian occupation"[56] and dismissed the appeal on these grounds. Since one of the judges (Pigeon J.) dismissed the appeal solely on a procedural point, the opinion of Judson J. stands on equal footing with the dissenting opinion written by Hall J.

The latter said with regard to the position held by the Nishga Indians: "The Nishga tribe has persevered for almost a century in asserting an interest in the lands which their ancestors occupied since time immemorial. The Nishgas were never conquered nor did they at any time enter into a treaty or deed or surrender as many other Indian tribes did throughout Canada and in southern British Columbia. The Crown has never granted the lands in issue in this action other than a few small parcels later referred to prior to the commencement of the action"[57]. He further held with regard to aboriginal title: "Once aboriginal title is established, it is presumed to continue until the contrary is proven. ... It being a legal right, it could not ... be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation"[58]. Examining the specific enactments which allegedly extinguished the Indian title, Hall J. found that no enactment contained any language to the effect that Indian title was extinguished[59].

Hall J. thus considered that absent a cession or surrender of title by the Indians, any legislation purporting to abolish Indian title had to indicate a clear intention to extinguish an aboriginal title, whereas Judson held that any legislative act affecting Indian lands automatically extinguished Indian title.

In Hamlet of Baker Lake[60], Mahoney J. also held that the legislation did not have to express a clear intention to extinguish aboriginal title[61], and placed the aboriginal title on the same level as other common law rights, thus implicitly subjecting aboriginal title to the principle of parliamentary supremacy.

If a conservative approach invoking this principle is taken, the requirement of a specific language of extinguishment indeed appears to run counter to the supremacy doctrine.

The conservative approach, it is submitted, would however not be consistent

with the specific character of aboriginal rights. The S.C.C. in recent decisions relating to aboriginal rights has held that they constitute "sui generis" rights of a unique nature and that the terminology used to characterize them was often inappropriate[62]. Aboriginal rights should therefore not be placed on the same level as common law rights. Consequently, the doctrine of parliamentary supremacy should be limited by a presumption that an aboriginal title is not extinguished unless the statute in question has an unequivocal and specific wording to the effect of extinguishment.

With regard to a right to self-government, it appears that there are no legislative enactments specifically purporting to abolish that right. This may be due to the fact that the concept of aboriginal title has generally been considered as encompassing rights to land only. The only legislative enactment of general application relating to aboriginal "governments" is the Indian Act. The Indian Act has been described as an instrument of the federal government assimilation policy[63]. Although it does provide for a system of government - or rather a system of administration - which has little in common with traditional forms of Indian government, there is nothing in its wording indicating a clear intention to extinguish a right to self government. On the contrary, the Indian Act does even make one reference to Indian customs with regard to choosing band council members, thus allowing for traditional systems to be continued[64]. It must also be noted that the federal government appears to be willing to replace the Indian Act in its application to specific bands, as illustrated by the Cree-Naskapi and Sechelt Acts[65] and to grant Indians more autonomy under the act, as illustrated by the recent amendments concerning membership[66] and the purported changes in respect of band taxation powers[67]. These developments indicate that the Indian Act is not considered as an instrument extinguishing a right to self-government.

The Indian Act can therefore not be considered as extinguishing a right to self-government. However, the act may be considered as an instrument for the limitation or the regulation of a right to self-government. To what extent the Indian Act is compatible with an inherent right to self-government will be examined further below[68].

2. Extinguishment by treaty

The wording of the treaties and agreements concluded between aboriginal peoples and the European colonizers and subsequently the Canadian federal government is likely to provide a clearer indication as to the extinguishment of a right to self-government. Most of the treaties concluded between the British Crown and aboriginal peoples before confederation (1867) provided for peaceful relations between the parties and contained corresponding mutual assurances. The aboriginal tribes in question agreed in most cases to subject themselves to the Crown and to its laws. Some of the treaties guaranteed the exercise of specific rights[69].

The pre-confederation treaties did not make any specific reference to aboriginal governments. Thus, it can be presumed that they did not abolish or extinguish any right to self-government.

After confederation, eleven treaties were negotiated and concluded between the Canadian government as a Crown representative and aboriginal peoples. Essentially, these treaties provided for the cession or surrender of the aboriginal peoples' rights to land, in exchange for a guarantee of specific rights such as hunting and fishing rights and the allocation of reserves for the use of aboriginals[70]. These treaties did not make any specific reference to self-government or to aboriginal political institutions either. More recent agreements

concluded subsequently, such as the James Bay and Northern Québec Agreement[71] contain similar clauses providing for the explicit cession and surrended of all rights to the land[72]. Self-government is not explicitly referred to in the more recent agreements.

The common feature of both pre- and post-confederation treaties appears to be that they do not contain any clause explicitly of implicitly denying a right to self-government.

The S.C.C. has recently affirmed the principle that Indian treaties should receive a large and liberal interpretation favourable to the Indians[73]. Thus, in view of the absence of a specific reference to self-government in these treaties, it may be presumed that they did not affect the existence of a right to self-government.

Although the practice of the Canadian government since confederation has in effect limited any exercise of aboriginal self-government, the fact that aboriginal peoples could not - or in some instances could have but did not -exercise their right to self-government does not imply that this right has been extinguished. As Sanders notes, "... the English legal system treated Canada as a settled colony. This seemed a denial of the existence of organized native political communities in Canada. But the denial was never explicit"[74]. A distinction is to be made, it is submitted, between the existence and the exercise of a right. It was established that a right to self-government could be derived from the historic circumstances of aboriginal occupancy[75]. To what extent this right has subsequently been exercised does not affect the existence of the right.

PART 3: THE INTERNATIONAL LEGAL CONTEXT

Chapter 7:

Extinguishment of a right to self-government from the international law perspective

Introduction

The early U.S. decisions characterized Indian peoples as "domestic dependent nations"[1]. Several of the pre-confederation proclamations and treaties between the Crown and Indians referred to the latter as allies[2].

These qualifications suggest an element of sovereignty and the applicability of principles of international law. To determine whether aboriginal peoples can support their claim to an inherent right to self-government with a claim to a sovereign status, it has to be shown that aboriginal peoples were sovereign entities and that this original sovereignty has not been extinguished.

I. The concept of sovereignty

The concept of sovereignty is fundamental in international law. The principle of the sovereign equality of the U.N. member states is the basic principle on which the organization is based[3].

The notion of sovereignty has emerged in conjunction with the formation of the feudal and monarchical states in Europe. It became firmly embedded in international law with the development of independent states[4].

A definition of the concept of sovereignty was given in the Island of Palmas arbitration by arbitrator Max Huber, who stated "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the

globe is the right to exercise therein, to the exclusion of any other State, the functions of a State"[5]. The notion of sovereignty is closely linked to the concept of self-government and self-determination and of title to territory. The "right to exercise the functions of a State" presupposes the existence of a specific territory on which the State will exercise its sovereignty[6]. The concept of title to territory is correspondingly linked to sovereignty[7]. The functions of a State are exercised through a government, and independence in relation to other States presupposes the right of a particular State to determine its own form of government. The term "internal sovereignty" has been suggested to qualify this element of sovereignty[8]. In the same context, sovereignty was defined as "internal self-determination"[9] and as the "power of each state to freely and autonomously determine its tasks, to organize itself and to exercise within its territory a 'monopoly of legitimate physical coercion'"[10].

A right to self-government can therefore be derived from the sovereign status - in international law - of the entity in question. The traditional conception of sovereignty appears to be an absolute one in that it is linked to the concept of an independent state exercising its functions to the exclusion of any other. With regard to aboriginal peoples, the question arises as to what extent the concept may be applicable to them and of whether sovereignty may be seen as relative instead of absolute. In Johnson v. McIntosh[11], Marshall C.J. held that the Indians were entitled to exercise a certain "degree of sovereignty" limited by the sovereign power of the U.S. government[12]. The notion of a "degree" of sovereignty suggests that the concept is relative and not absolute. It is here submitted that under modern international law, sovereignty is a relative concept and not restricted to the concept of an independent state. The sovereignty of aboriginal peoples may be derived from the fact that they occupied a specific territory on which they

exercised sovereign rights. The question of sovereignty thus can be examined in conjunction with the question of title to territory.

To determine whether a title to a certain territory existed and is still valid under international law, reference has to be made to the doctrine of intertemporal law.

II. The doctrine of intertemporal law

The doctrine of intertemporal law has been invoked in relation to territorial claims. The principle was described by arbitrator Huber in the Island of Palmas case as follows:

> "as regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called inter-temporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law"[13].

The doctrine as expressed by Huber thus contains two elements, namely, that the title to territory has to be proven with reference to the law in force at the time, and that the continued existence of the title must be established according to the law as it develops subsequently. While the first element appears to be generally accepted[14], the second element has been criticized on the ground that each title to territory could be challenged whenever an evolution in the law would take place and would thus have to be constantly maintained and established, which would render the whole principle of intertemporal law ineffective[15].

This hypothetical interpretation of the principle does, however, not appear to render its practical application overly difficult. The factual circumstances of each

case, e.g. the absence or presence of competing claims, will be determinative for the requirements of proof of title[16].

The question of the original sovereignty and title to territory of the aboriginal peoples thus has to be determined by the international law in force at the time of the first contact between the aboriginal peoples and the European settlers.

III. Aboriginal peoples as sovereign nations

It appears that the early international law doctrine recognized indigenous peoples as sovereign nations.

The analysis and conclusions of Victoria; namely, that Indians "had true dominion in both public and private matters"[17], implies a recognition of their sovereignty. The same conclusion has been reached by other international scholars of that time.

Samuel Pufendorf in his treatise De Jure Naturae et Gentium Libri Octo (1688)[18] referred to the writings of Victoria, criticized the latter for his contention that the native people of South America could not legally prevent the Spaniards from sharing their territory, and found that the natives had no such obligation but possessed the same rights as any other state, namely, that

"Every state may reach a decision, according to its own usage, on the admission of foreigners who come to it for other reasons that are necessary and deserving of sympathy"[19].

Hugo Grotius, one of the most eminent early scholars of international law, relied on Victoria in his treatise De Jure Praedae Commentarius (1604) and commented on the effect of the discovery of the East Indies by the Portuguese: "... it should be noted that even discovery imparts no legal right save in the case of those things which were ownerless prior to the act of discovery. But at the time when the

Portuguese first came to the East Indies, the natives of that region ... enjoyed public and private ownership of their own property and possessions, an attribute which could not be taken from them without just cause. This is the conclusion expounded by the Spaniard Victoria with irrefutable logic and in agreement with other authorities of the greatest renown .... Thus Victoria correctly maintains that the Spaniards acquired no greater right over the American Indians in consequence of that defect of faith, than the Indians would have possessed over the Spaniards if any of the former had been the first foreigners to come to Spain ... Therefore, since the Portuguese lack both possession and title to possession, since the property and sovereign powers of the East Indians ought not to be regarded as things that had no owner prior to the advent of the Portuguese ... it follows that the said peoples are ... free men possessed of full social and civil rights (sui iuris)[20]".

These excerpts from the early international law doctrine indicate that aboriginal peoples were at that time considered to be sovereign nations.

The original occupancy and sovereignty of the aboriginal peoples may subsequently have been limited or extinguished, through the discovery and occupation of the territory by the European settlers.

IV. The effect of the discovery and occupation of North America by the Europeans under international law.

The U.S.S.C., in its early decisions referred to above, discussed the legal effect of conquest and discovery and found that it was creative of rights as between the colonizing powers[21] and that it gave them the right to extinguish the Indian title of occupancy[22]. The U.S.S.C. however failed to give a legal justification for the contention that discovery conferred the right to limit or extinguish aboriginal sovereignty. As to international law, it has been contended that discovery only

confers an "inchoate title" as against other states, which has to be consolidated by acts of effective occupation.

Max Huber in the Island of Palmas case held that "The title of discovery, ... would under the most favourable and extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation"[23].

The concept of discovery and the notion of "inchoate title" has been criticized as being inadequate and incorrect, the essential criterion being the effective occupation of the territory in question[24].

According to the doctrine of intertemporal law, however, the notion of discovery prevailing at that time must be considered to determine its legal effect. In the present case, though, it is not necessary to determine the legal effect of discovery at the time of first contact, since the discovery was followed by an effective occupation. Thus, even if the discovery itself was not sufficient to limit or extinguish the sovereignty of aboriginal peoples, the subsequent occupation and display of authority by the Europeans remains as a determining factor to be taken into consideration. With regard to the "discovery" of North America, it may be contended that regardless of the legal consequences attached to it, the term itself is not appropriate. "Discovery" presupposes that the discovered territory is uninhabited. Since North America was clearly occupied or inhabited by the aboriginal peoples, the term "discovery" should not be used to qualify the arrival of the first European settlers on the North American continent. Similarly, one can say that "effective occupation" as a legal concept and a root of territorial title can logically only be applied to uninhabited territories. Brownlie writes that "Effective occupation is commonly related to extension of territory to terra nullius, i.e. new land, ... territory abandoned by the former sovereign, or territory not possessed by a community having a social and political organization"[25]. The

International Court of Justice (hereinafter: I.C.J.) in the Western Sahara case confirmed the view that territories occupied by socially and politically organized tribes could not be regarded as terra nullius and that therefore effective occupation could not constitute root of title[26].

The presence of the European settlers can thus not be subsumed under the principle of effective occupation. The remaining options as to the lawful limitation or extinguishment of aboriginal sovereignty are conquest, cession or acquiescence (or consent).

The history of the early relations between the Europeans in Canada and the aboriginal peoples indicates that a conquest did not take place. The pre-confederation treaties referred to the Indians as allies of the Crown or were treaties of peace and friendship[27]. The Indian and Inuit peoples often provided valuable assistance and help to the Europeans[28]. Economic relations between them and the aboriginal peoples developed rapidly[29]. Despite a number of armed confrontations, aboriginal peoples were not conquered and subdued by military force. On the contrary, the Indians fought as allies of the British Crown against the French[30]. The fact of treaty-making itself could be taken as an indication that a conquest did not take place.

Aboriginal peoples may have given up their sovereignty by cession. The concept of cession means the transfer of territorial sovereignty from one sovereign to another, in the form of a treaty[31]. The question thus is whether the treaties concluded between aboriginal peoples and the Europeans did transfer, in part or totally, any territorial sovereignty to the latter. The pre-confederation treaties were for the most treaties of peace and friendship. The post-confederation treaties in Canada did however provide for a surrender of lands[32]. It may therefore be contended that these treaties terminated aboriginal sovereignty on

the lands they dealt with. Most of the treaties, however, provided that Indians would retain their hunting, fishing and trapping rights over the ceded territories[33]. These rights can be considered as rights deriving from their original sovereignty over the lands they formerly occupied. These treaties can therefore be considered as limiting the sovereignty of the aboriginal peoples over the ceded lands. A major difficulty surrounding the interpretation of the treaties lies in the fact that the Indians appear to have a fundamentally different understanding of the treaties and did not view them as a surrender of sovereignty[34]. The S.C.C. has recently reaffirmed that Indian treaties should be interpreted liberally in favour of the Indians and in the sense the latter would have understood them[35].

Another difficulty arises as to the proper nature of these treaties. It may be contended that these treaties are not international treaties and that therefore international law cannot be resorted to to determine whether a transfer of sovereignty has been effected through the treaties. While the early U.S. jurisprudence placed the treaties on the same level as treaties with foreign nations[36], the Canadian jurisprudence rejected a qualification of the treaties as international treaties[37]. The S.C.C. in Simon v. The Queen recently held that Indian treaties were agreements sui generis, which were not created nor terminated according to international law. However, the S.C.C. acknowledged the possibility of an analogous application of international law[38]. The question of the nature of the treaties can therefore be left open.

Without engaging in a detailed analysis of the circumstances surrounding the conclusion of the treaties, their wording and interpretation - which would go beyond the scope of the present discussion - it is submitted that the common features of the treaties identified above, which do not appear to be disputed, are such as to warrant a presumption that aboriginal sovereignty has not been

extinguished, but only limited. To interpret the treaties as a total extinction of aboriginal sovereignty cannot be supported by the language of pre- or post-Confederation treaties. The same considerations as those made in relation to the extinguishment by legislative enactment apply here[39]. If the treaties did not expressly extinguish a right to self government, then this finding supports the presumption that the treaties did not contemplate a transfer of sovereignty under international law.

The result would then appear to be that under international law, aboriginal sovereignty has not been terminated, but only limited. Aboriginal sovereighty thus co-exists with the sovereignty exercised by the Canadian government. The legal justification for the exercise of European, i.e. British and French, and subsequently Canadian and U.S. sovereignty can be seen in the acquiescence of the original sovereign.

The treaties concluded between the colonizers and the aboriginal peoples, if not having the effect of a cession of territorial sovereignty, may be interpreted as expressing the acquiescence of the aboriginal peoples to the exercise of sovereignty by the colonizing powers. Under international law, territory may be acquired by prescription, which Brownlie describes as "the removal of defects in a putative title arising from usurpation of another's sovereignty by the consent and acquiescence of the former sovereign"[40].

The conduct of the French and British colonizers after the first contact with the aboriginal peoples would fulfil the generally accepted criteria for the acquisitive prescription, namely a continuous and peaceful display of state authority. This display of authority will however only create sovereign rights if the competing sovereign indicates its acquiescence. In other words, a lack of acquiescence would prevent the title of coming into existence[41]. The treaties between aboriginal

peoples and colonizers, and also the conduct of the aboriginal peoples, appear to fit these criteria. Aboriginal peoples were willing to share their sovereignty with the European colonizers[42], and this willingness was expressed in the treaties. Their acceptance of the European presence is also indicated by the fact that on the whole, aboriginal peoples did not make attempts to forcefully remove the settlers from their lands[43].

To test the validity of the presumption that the treaties did not extinguish aboriginal sovereignty and of the conclusion that aboriginal and Canadian sovereignty co-exist, it has to be examined whether international law recognizes situations of shared sovereignty.

V. Shared sovereignty under international law

The contention that aboriginal and Canadian sovereignty co-exist does not necessarily imply that aboriginal peoples form a sovereign state. Although sovereignty is generally linked to the notion of a state[44], it is conceivable that there exist entities retaining some degree of sovereignty under the protection of and dependent on a sovereign state[45].

The U.S.S.C. has characterized the Indians as "domestic dependent nations"[46]. Although the U.S. government has subsequently denied any such qualification of Indians and the Canadian government has equally refused to recognize aboriginal peoples as sovereign entities, it is submitted that this non-recognition did not affect the original sovereignty of the aboriginal peoples. The original sovereignty has not been terminated under principles of international law. Although the aboriginal sovereignty was to a large extent limited by the rapidly expanding display of sovereignty by the colonizers itself based on the acquiescence of the aboriginal peoples - and may therefore not have been fully exercised, the non-

exercise or non-display of sovereignty does not affect its existence.

It appears to be accepted in international law that a change in sovereignty over a particular territory does not automatically extinguish the sovereign rights of the original occupants[47]. An illustration of the principle may be found in the situation of states which have been subdued by military force after a war and the government of which was temporarily not capable of exercising the functions of a state. After the second world war, for example, the allied powers assumed control and authority over Germany. Despite the display of sovereign authority by the allied powers, the sovereign authority of the German government was not terminated but only suspended. This is confirmed by the treaty concluded between the allied powers and the West-German government, which granted the full powers of a sovereign state to the West-German government as a consequence of the termination of the occupation régime[48].

If a military occupation of a state does not extinguish its sovereignty, then a fortiori a gradual and peaceful occupation of a state cannot have the effect of extinguishing its sovereignty either.

An analogy may then be drawn with the situation of the occupation of North America by the European settlers. Even if the latter assumed and exercised sovereign authority over the territory and over the aboriginal peoples, the original sovereignty of the latter was not necessarily extinguished.

A display of sovereignty by aboriginal peoples would not be incompatible with Canadian sovereignty under international law. Under modern international law, the principle of state sovereignty is subject to limitations, one of them being the principle of self-determination of peoples. Recent developments in international law suggest that aboriginal peoples may qualify as subjects of the right to self-determination of peoples[49]. The exercise of the right to self-determination would

be a reflection and corollary of the retained sovereignty of aboriginal peoples and would consequently limit Canadian sovereignty.

With regard to the situation of shared sovereignty which would follow from the exercise of sovereignty by aboriginal peoples, it can be argued that it would not be incompatible with the structure of the Canadian federation. A federal state could be considered as an example of shared sovereignty. Earlier doctrines appeared to recognize federal states as examples of divided sovereignty[50]. However, under modern international law the provinces within a federal state would not be considered as sovereign entities, even though they may internally have some competences in the field of external affairs[51].

International law recognizes situations of joint exercise of sovereignty. Brownlie in this context mentions situations of shared sovereignty whereby one dominant power may assume essential functions of an entity under its protection: "It may be that the protected community or state is part of state A and, as a colonial protectorate, has no international legal personality, although for purposes of internal law it will have a special status. However, the protected state may retain a measure of externally effective legal personality, although the exercise of its legal capacities be delegated to state A"[52]. The situation of the aboriginal peoples of Canada would appear to fit this situation.

VI. The status of aboriginal peoples under modern international law

Under the doctrine of intertemporal law, the creation of a right has to be determined according to the law in force at that time. It was noted that under the early international law doctrine, aboriginal peoples constituted sovereign nations. This original sovereignty would be the root of the right to self-determination and self-government. It was then examined whether the occupation of North America

by European settlers had the effect of extinguishing the aboriginal peoples' original sovereignty. The result that the aboriginal sovereignty has been retained was confirmed by principles of modern international law. However, the analogous application of international law has to fulfil certain criteria which have not yet been discussed. The finding was that aboriginal sovereignty would not necessarily be incompatible with Canadian sovereignty and that under international law, situations of shared sovereignty were possible. The analogous application of international law, and in particular of principles relating to state sovereignty, however rests on the hypothesis that aboriginal peoples are recognized as having some legal status under international law. To verify the validity of this hypothesis and for the purposes of the doctrine of intertemporal law, the status of aboriginal peoples under modern international law has to be determined.

1. Aboriginal peoples as states

It has been suggested that aboriginal peoples would fulfil the criteria of statehood enounced for example in the 1933 Montevideo Convention, which contains a definition of the constituent elements of a state[53], namely a permanent population, a defined territory, a government, and a capacity to enter into relations with other States[54]. In support of the contention that many aboriginal peoples would be eligible for statehood in international law, it was pointed out that several independent states are smaller in territorial size and population than a number of Indian tribes[55]. While specific tribes may fulfil the criteria of territory and population, the criteria of a government and a capacity to enter into relations with other states seem difficult to fulfil in most cases. In Canada, the band councils under the Indian Act or the few examples of local aboriginal governments with a larger degree of autonomy do factually not appear to have a capacity to

enter into foreign relation. Although the Indian tribes in the U.S. enjoy a substantially larger degree of autonomy than their Canadian counterparts, the same consideration applies to them[56]. The fact that domestic aboriginal groups are increasingly active on the international scene and are represented at international organizations[57] is not in itself a sufficient indicator of their capacity to enter into relations with other states on an equal level. However, even if aboriginal peoples had the factual capacity to enter into such relations, the legal capacity to do so would not automatically follow. The fact that aboriginal peoples had the legal capacity to enter into relations - e.g. in the form of treaties - with other nations was based on the recognition of aboriginal peoples as nations in the early international law doctrine.

It seems to be beyond dispute that in the current practice of states and in the international legal doctrine there is as yet no recognition of aboriginal peoples as independent states[58]. Under the doctrine of intertemporal law, a claim to statehood must be examined according to the international law in force at the present period of time[59]. Although the recognition of states does not have a constitutive effect[60], the non-recognition by a vast majority of states of an entity normally precludes it from acquiring international legal statehood[61].

The non-recognition of aboriginal peoples as states under the present international law therefore does not allow to qualify them as states; the fact of their earlier recognition as nations cannot influence this result in view of the doctrine of intertemporal law[62]. It must also be noted in this context that the aboriginal peoples of Canada do generally not claim recognition as an independent state, but only the recognition of a separate status within the Canadian confederation[63].

2. Recent developments

In 1926, Great Britain brought a claim on behalf of the Cayuga Indians before an arbitral tribunal. The tribunal found that the Cayugas did not constitute legal units under international law[64]. Since 1926 and in particular since 1945, an evolution has taken place. Recent developments in international law suggest that aboriginal peoples may have some degree of international legal subjectivity. It has been proposed that the provisions of the U.N. Charter relating to trust and to non-self-governing territories could be applied to North American Indians[65]. There is however as yet no indication of corresponding developments in the U.N. Nonetheless, there is evidence of a growing recognition of aboriginal peoples as actors on the international scene.

In 1977, the International Indian Treaty Council was granted category II observer status[66] within the U.N., as the first Indian organization to be granted such a status[67]. Subsequently, the World Council of Indigenous Peoples, the Indian Law Resource Center, the Inuit Circumpolar Conference, the Four Directions Council and several other aboriginal organizations received that status[68]. Most recently, the Grand Council of the Crees (of Québec) was granted the observer status, being the first domestic Indian representative body to receive it[69].

The question of indigenous populations is also on the agenda of various U.N. bodies. The U.N. Commission on Human Rights, itself established as a subsidiary organ of the Economic and Social Council[70], set up a Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Sub-Commission inter alia dealt with the specific subject of indigenous populations and appointed a special rapporteur who submitted an extensive report on discrimination against indigenous populations[71], in which the rapporteur also submitted a definition of the

terms "indigenous peoples"[72]. In 1981, the Sub-Commission proposed the creation of a Working Group on Indigenous Populations, which was set up in 1982[73], with a mandate to "a) Review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations ... b) Give special attention to the evolution of standards concerning the rights of indigenous populations ..."[74].

Another recent development in the U.N. relating to aboriginal peoples is the setting up of a voluntary fund for indigenous groups and communities, in order to facilitate their participation in the sessions of the working group. The voluntary fund is to be administered by a board of five trustees, who were scheduled to convene for their first session in the summer of 1987[75].

Most recently, the Commission on Human Rights, by consensus, adopted resolution 1987/34, in which the working group was urged "to intensify its efforts, in carrying out its plan of action, to continue the elaboration of international standards ..."[76]. The working group has so far elaborated fourteen draft-principles on indigenous rights, which constitute the first step towards the elaboration of a declaration on indigenous rights to be adopted by the General Assembly. The principles affirm inter alia the right to enjoy fundamental rights and freedoms, the right to be free from discrimination, the collective right to exist, religious, cultural and educational rights. The right to self-determination and to self-government has so far not been included in the principles[77]. During the 1985 session of the working group, it was pointed out by a governmental observer that the inclusion of these rights in a declaration would not be accepted by governments and also that any reference to indigenous populations as subjects of international law would be incorrect, since international law did so far not recognize them as such[78]. That indigenous nations are subjects of international law and have the

right to self-determination has been asserted in declarations of principles submitted to the working group by various aboriginal non-governmental organizations[79]. At the 1987 session of the working group, governmental observers informed the group about the measures adopted with regard to self-goverment and autonomy and affirmed their willingness to pursue efforts in that direction[80]. One governmental observer said that his government remained committed to realize the objective of self-government, but that the principle of self-determination of peoples was not applicable to indigenous populations[81]. Indigenous observers however reaffirmed the right of indigenous peoples to self-determination[82]. A member of the working group stated that self-determination or self-government should be reflected in national constitutions[83].

These two antagonistic positions illustrate the two extremes of a politico-legal spectrum on which indigenous populations are situated. The problem remains to determine their exact position of this spectrum. The difficulty in assessing that position lies in the fact that the activities of member states in the U.N. are in essence political but at the same time are elements contributing to the formation of international law, in that they are evidence of state practice necessary for the formation of customary international law[84].

Yet another example of a recent development in the international field in relation to indigenous peoples is provided by the revision process of Convention 107 of the International Labour Organization (ILO)[85]. The convention is to date the only binding international treaty concerning indigenous populations. As indicated by the title and by its substantive provisions, the convention is aimed at the integration and progressive assimilation of indigenous populations, while protecting them against discrimination in their respective states. In view of this character, the convention does not reflect the aspirations of indigenous peoples. The

recognition of this fact has initiated a revision process in the ILO, with the goal to amend the convention and to eliminate its assimilationist character[86]. One of the issues debated at a meeting of experts (which convened in September 1986 to draft recommendations concerning the revision) was whether the right to self-determination should be included in the convention[87]. This revision process was also discussed at the last session of the working group; critical observations were made on the part of indigenous representatives, in particular concerning the lack of effective participation in the process[88].

The recent developments described above indicate that indigenous populations are receiving increasing attention as actors on the international political scene[89]. To what extent they are considered as legal actors, i.e. as subjects of international law, cannot be determined on the basis of the activities of the working group alone. These activities are evidence of the member states' practice insofar as they endorse the working group's work by adopting corresponding resolutions[90]. However, the draft principles adopted by the working group cannot be considered as having a legal value. The first step towards the formation of a corresponding rule of customary international law would be their adoption by the General Assembly.

The activities of the working group, in particular the elaboration of a declaration of the rights of indigenous peoples nonetheless do indicate that they are at least in the process of attaining international legal subjectivity in respect of the rights laid down in the draft principles.

However, even if the draft principles would be considered as having legal value, they do not contain a reference to self-government or self-determination and would therefore not provide direct guidance for the present analysis.

It was noted that the aboriginal peoples of Canada make frequent reference to

the right to self-determination of peoples under international law[91]. The declarations of principles submitted by international indigenous organizations also refer to the right. The right to self-determination of peoples thus appears to be relevant to determine the international legal subjectivity of indigenous populations and whether they have a right to self-government under international law.

Before discussing the right to self-determination of peoples, a few preliminary remarks shall be made to identify some of the related problems. The previous description of the recent development in the U.N. focussed on the Working Group on Indigenous Populations. It can be noted that the group is officially concerned with "indigenous populations". The present discussion focusses on the right to self-government of the "aboriginal peoples" of Canada. While "indigenous" may be considered as synonymous with "aboriginal", "population" may not have the same legal meaning under international law as "people". The working group was established by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The reports of the working group quoted earlier[92] also bear the title "Study of the Problem of Discrimination Against Indigenous Populations". These denominations appear to indicate that the protection of indigenous populations is seen in the context of discrimination against minorities. The right to self-determination of peoples, as will be seen, has been developed in a different context, although its historical sources (prior to the U.N. period) are also related to the protection of minorities. The discussion of the right to self-determination of peoples will therefore necessitate a definition of the terms "people" and "population" and address the distinction between rights of peoples and rights of (indigenous) minorities under international law.

The fact that aboriginal peoples of Canada invoke their right to self-determination under international law , attend the sessions of and make

submissions to the Working Group on Indigenous Populations[93] indicates prima facie that they fall under the scope of the group's mandate and that "indigenous populations" may thus encompass "aboriginal peoples". Canadian aboriginal groups however also made applications invoking their right to self-determination before the U.N. Human Rights Committee established under the International Covenant on Civil and Political Rights (hereinafter I.C.C.P.R.)[94], which makes a clear distinction between the protection of minorities (Art. 27) and the protection of the right to self-determination of peoples (Art. 1). It is thus apparent that the distinction between minorities and peoples under international law is an important issue in the discussion of a right to self-determination of aboriginal peoples.

Chapter 8

The Right to Self-Determination of Peoples under International Law

Introduction

This chapter will examine whether a right to self-government can be derived from the right to self-determination of peoples as expressed in various international documents. With regard to the aboriginal peoples of Canada, two different approaches may be taken. It may be argued that the right to self-determination forms part of customary international law, which is part of the law of the land. It may also be argued that the implementation of the right is one of Canada's international treaty obligations. International treaties and international customary law are two distinct sources of international law, according to Art. 38(1) of the Statute of the I.C.J.[1].

I. Relevant provisions of international law

The principle of and the right to self-determination of peoples has been expressed in various international documents.

The Charter of the United Nations (hereinafter U.N. Charter) mentions the principle of self-determination of peoples as a basis for the development of friendly relations among nations in the list of its purposes in Art. 1. The principle is reiterated in Art. 55, which sets up purposes regarding international and economic cooperation among member states, which under Art. 56 pledge to take action for the achievement of these purposes. Two important resolutions of the U.N.General Assembly mention the right to self-determination of peoples. The Declaration on the Granting of Independence to Colonial Countries and Peoples[2] affirms the right to self-determination of peoples subject to colonial domination in para. 2. The Declaration on Principles of International Law Concerning Friendly

Relations and Cooperation Among States in Accordance with the Charter of the United Nations[3] says in para. 5 that by virtue of the principle of self-determination, all peoples have the right freely to determine their political status and to pursue their economic, social and cultural developments, and that every State has the duty to respect this right. Reference to the right to self-determination is also made in several earlier resolutions of the General Assembly[4].

Art. 1(1) both of the I.C.C.P.R. and the International Covenant on Economic, Social and Cultural Rights (hereinafter I.C.E.S.C.R.) stipulates that all peoples have the right to self-determination and adopts the same wording as the above-mentioned declaration (res. 2625) concerning the meaning of the right[5].

Although not being an international treaty like the two covenants, the 1975 Final Act of the Helsinki Conference[6] can be mentioned in this context. Principle VII of the declaration embodies the commitment of the participating states to respect the right to self-determination of all peoples. The African Charter of Rights and Freedoms affirms the right to self-determination of all peoples in Art. 20 para 1[7].

The expression of the principle of or right to self-determination in these various international documents raises the question as to their value in determining the legal status of the right to self-determination of all peoples.

II. Legal status of the right

1. International treaty law

"International conventions" are enumerated first in Art. 38(1) of the Statute of the I.C.J. It was noted that the I.C.C.P.R. and the I.E.S.C.R. both protect the right to self-determination of all peoples. Both covenants are international conventions in the meaning of Art. 38(1)(a) of the I.C.J. Statute. Canada has signed and ratified both covenants[7a].

The right to self-determination of peoples is thus part of the international treaty

law. The nature of the obligation on the part of Canada and the field of application of the right will be discussed further below.

2. International customary law

According to Art. 38(1)(b) of the I.C.J. Statute, international customary law is created by state practice accompanied by the recognition of the binding character of the norm (the so-called "opinio juris"). Evidence of state practice can be found inter alia in resolutions of international organizations and in international treaties. Evidence of "opinio juris" can be sought in statements of state representatives made in various contexts[8]. Resolutions of the U.N. General Assembly, although not formally binding on the member states (Art. 10 of the Charter provides that the General Assembly may only make recommendations), may nonetheless have a legal value insofar as they provide evidence of the consensus of member states on the legal status of a given principle. The authoritative wording of certain resolutions, their denomination as "Declarations", the circumstances of their adoption are among the factors which confer greater or lesser weight and legal value on them[9]. Resolution 2625 was adopted by consensus and is generally considered as an authoritative interpretation of the principles contained in the U.N. Charter[10].

The adoption of resolution 2625 is thus evidence of the consensus among U.N. member states on the meaning of the principle of self-determination contained in the Charter. Similarly, resolution 1514 (adopted by 89 votes against 0, with 9 abstentions), which was also named "Declaration", can be seen as evidencing the legal status of self-determination insofar as it affirms a right to self-determination in authoritative terms[11]. The reaffirmation of the right in 1970 indicates that its acceptance by the international community remained unchanged since its

expression in resolution 1514 in 1960. It may be contended that the evidentiary value of these resolutions - as far as the legal status of the right to self-determination is concerned - is limited in view of the non-binding character of U.N. resolutions. It may also be said that U.N. member states are inclined to vote in favour of resolutions precisely because they consider them as being non-binding. This view however appears to be somewhat formalistic. U.N. member states often issue reservations as to the interpretation or content of certain resolutions, a fact which indicates that they are not considered as being legally irrelevant. States also show great reluctance to openly disregard resolutions of the General Assembly, which confirms that they are considered as having legal effect[12]. While the view that General Assembly resolutions sometimes create "instant" customary law[13] may seem to be too far-reaching, the argument underlying that proposition is to some extent plausible, namely that in a legal field where the practice of states outside the U.N. is very limited due to external circumstances, it may be necessary to rely exclusively on U.N. resolutions to assess the state practice and the necessary opinio juris.

The practice of the United Nations and of the member states in respect of the right to self-determination of peoples has in fact almost entirely occurred in the process of decolonization[14]. The fact that the principle of self-determination has mainly been applied to colonial situations makes it difficult to assess the state practice and in particular the corresponding opinio juris from a broader perspective. Even if the focus is on the process of decolonization, the factors which have led to the independence of peoples under colonial domination are so diversified that it is hardly possible to detect any definite evidence for the contention that the acts of the colonial powers have been conducted in recognition of the binding legal force of the principle of self-determination[15]. The

difficulty of evaluating the practice of colonial states does however in itself not refute the proposition that the right to self-determination forms part of customary international law. For this reason, it seems justifiable to resort to U.N. resolutions and other international documents to assess the relevant state practice.

The above-mentioned resolutions indicate that the principle of self-determination as contained in the Charter has evolved into a right to self-determination recognized by the international community. This proposition can be supported by the fact that the right has been expressed in other instruments such as the I.C.C.P.R. and the I.C.E.S.C.R. and the Helsinki Declaration. The inclusion of the right in the two covenants can however only be taken as evidence of state practice, not of opinio juris, since the recognition of a binding obligation is the essence of an international treaty. The covenants could however be considered as declaratory of customary international law in respect of the right to self-determination. Having been drafted over many years[16] in the forum of the United Nations, the inclusion of the right in the draft covenants is evidence for the corresponding recognition by the participating states of the right to self-determination[17]. The reference to the right to self-determination in the Helsinki Declaration is also confirmatory of the support given to the rule. In spite of the non-binding character of the agreement, it has a legal value to the same extent as U.N. resolutions.

Besides the practice of states reflected in these international documents and in the activities of the U.N. in the decolonisation process, some other examples may be cited as further evidence of the recognition of the right to self-determination as a legal rule. The 1972 treaty between East and West Germany makes reference to the right to self-determination as one of the guiding principles for the conduct of their mutual relations[18]. Among the statements made by official

representatives of governments in the domestic forum and the U.N., those made by British officials may serve as an example. The United Kingdom (U.K.) representative at the U.N., in a statement before the Third Committee of the General Assembly, made extensive reference to the right to self-determination of peoples and said that "it applies to all people, without discrimination". Another U.K. representative, referring to the Falkland Islands dispute, stated in the Security Council "We are all familiar with the Charter doctrine about self-determination; indeed by our count, no fewer than 101 of the 145 speeches in the general debate this year referred directly to self-determination. It is a principle which the great majority of Governments regularly invoke"[19].

State practice has to be uniform, of a certain duration and generality for a rule of customary law to develop[20]. The requirements vary according to the circumstances. The previous account of state practice shows that the principle of and the right to self-determination has been continuously referred to and affirmed in U.N. resolutions, international instruments and in official statements of member states from the early U.N. period onwards and received support from a majority of states.

The above criteria thus appear to be fulfilled. The proposition that the right to self-determination of peoples forms part of customary international law can be supported by the opinions of international scholars and by international judicial decisions, which according to Art. 38(1)(d) of the I.C.J. Statute may serve as subsidiary means for the determination of rules of law.

While the view is sometimes taken that the right to self-determination has even attained the status of an objective standard or a norm of jus cogens[21], i.e. a peremptory norm of general international law[22], it is in most cases held that the right forms part of customary international law[23].

It thus seems possible to conclude from the foregoing observations that the right to self-determination of peoples forms part of customary international law.

III. Character and scope of the right to self-determination

Even though the right to self-determination as such may be recognized as part of international law, its field of application, in particular in the post-decolonization period, remains controversial.

1. The right to self-determination as a human right

From the coming into existence of the United Nations onwards, international law has witnessed a considerable evolution with the development of the international law of human rights. The individual has emerged as a new subject of international law, a status characterized inter alia by the possibility for individual persons to seek remedies for violations of human rights before international judicial bodies[24].

The right to self-determination of peoples can be seen as part of this new law of human rights. The U.N. General Assembly has characterized the right to self-determination as a pre-requisite for the enjoyment of all fundamental human rights, a view which is supported by the opinions of legal scholars[25]. This does not necessarily place the right to self-determination on a superior plane. It can be considered as a necessary complement of individual rights in a comprehensive human rights system[26].

The relation between the right to self-determination and human rights is evidenced by the wording of resolution 2625, which affirms the right to self-determination in para 5(1) and the duty of states to promote the respect for and the observance of human rights and fundamental freedoms in para.5(3). Similarly, para.5(2) declares that the subjection of peoples to alien domination constituted a

violation of the principle (of self-determination) and a denial of fundamental rights, which indicates that the right to self-determination is ranked among the latter[27].

The inclusion of the right to self-determination in the I.C.C.P.R., which has emerged as one of the most important international instruments for the protection of fundamental rights and freedoms[28] also shows that the right to self-determination belongs to the law of human rights. The Committee on Human Rights set up pursuant to Art. 28(1) of the I.C.C.P.R. noted the particular importance of the realization of the right to self-determination as a condition for the guarantee of individual human rights and the interrelation between the right and the other provisions of the covenant[29].

It has been stated that the position of the right to self-government in the context of human rights provides a better perspective for the assessment of its scope of application[30]. To regard the right to self-determination as an integral part of the law of human rights may indeed, as will be seen, provide guidance for the determination of its scope.

The right to self-determination is a right of "peoples". The scope of the right will partly depend on the definition given to this term in international law.

2. The definition of "peoples"

Neither the U.N. Charter nor any of the resolutions or international instruments referred to earlier contain any definition of the term. An application was brought before the U.N. Human Rights Committee[31] in 1980 by the Micmaq Indians of New Brunswick, alleging a violation of their rights under Art. 1 of the covenant. The Committee unfortunately rejected the application as inadmissible because the applicant was not capable of proving that he was legitimately entitled to act on

behalf of his community, without examining whether the Micmaq constituted a "people"[32]. According to the separate opinion of Committee member Errera, this should have been determined by the Committee before rejecting the application[33]. The Micmaq Indians have recently brought another, similar, application before the Committee, which has not yet reached a decision.

Several definitions of the term have been suggested, there exist other definitions of related terms which may provide guidance.

An earlier definition which could serve for the definition of "people" was given by the Permanent Court of International Justice (hereinafter: P.C.I.J.) in the Greco-Bulgarian "Communities" case, an advisory opinion on the situation of minorities in neighbouring Balkan states after World War I. The court defined a "community" as being a group of persons having a race, religion, language and traditions of their own and united by this identity in a sentiment of solidarity, with a view to preserving their traditions[34].

Similarly, it has been suggested that a people should be defined by reference to an objective and a subjective element, namely as an ethnic group linked by a common history and having a common ethos or state of mind[35]. In a study made under the auspices of the U.N., the term "peoples" was defined as a specific type of community sharing a common desire to establish an entity capable of functioning to ensure a common future[36].

In another U.N. study, prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, (hereinafter: Sub-Commission) the special rapporteur Martinez Cobo elaborated a working definition of "indigenous communities, peoples and nations", which were characterized as having "a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories" and being "determined to preserve, develop and

transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence of peoples, in accordance with their own cultural patterns, social institutions and legal systems"[37].

These definitions all contain a number of common elements, which can be divided into the objective elements of race, religion, language, history, culture and the subjective elements of a commonly perceived identity and desire to perpetuate it. The Cobo definition adds the element of the ancestral, pre-colonial roots to a territory and the distinctness from the dominant society. These definitions, and in particular the working definition elaborated in the U.N., appear to provide useful criteria for the definition of a people. Of course, it may be argued that these definitions do not have any legal value. The denomination of the Cobo definition as a "working definition" indicates its provisional character. It was noted that the activities of the Working Group on Indigenous Populations, which take place in the same context, only represent the first step in the formation of legal standards relating to indigenous populations[38]. The Cobo report however received the approval of the Sub-Commission and of the Commission on Human Rights, which recommended that it should be widely publicized[39]. To that extent, the same considerations as those relating to the legal value of U.N. resolutions[40] can be applied here. Although not yet having received formal approval by the General Assembly, the definition does reflect the consensus of the member states represented in the Sub-Commission and the Commission on Human Rights, since no substantial objections have been raised. The working definition is also consistent with the other definitions articulated previously.

It was contended that a definition of the term "people" which intended to cover situations in all parts of the world posed a number of problems, such as permitting

interpretations of such a (necessarily wide) definition which could encourage secessionist movements within an independent state[41]. It is submitted that any given definition is likely to be interpreted broadly by groups having secessionist ambitions, and that the problem cannot be solved by extremely narrow definitions, since norms of international law, in particular in the field of human rights, should be applicable universally. The problem appears to rest more with the validity of the right to secession, i.e. with the limitation imposed by international law on the exercise of the right to self-determination rather than with the definition of the term "peoples".

It may further be argued that the Cobo definition, even assuming that it is generally accepted, is specifically concerned with "indigenous" peoples, whereas the I.C.C.P.R. only refers to "peoples", which may not necessarily be "indigenous". Support for this argument may be found in the fact that the Cobo definition was drafted in a different context than the I.C.C.P.R., as noted earlier[42]. It is submitted again that this problem is not linked to the definition of "people" but to the question whether the right to self-determination is also applicable outside the colonial context, namely to peoples within independent states.

There is prima facie no apparent reason why "indigenous peoples" should not fall under the term "peoples" as used in Art. 1 of the I.C.C.P.R.

It was also noted above[43] that yet another term, namely indigenous "populations" is used in this context, which raises the question to what extent that term overlaps, if at all, with the term "peoples". This difference in terminology, it is submitted, is related to the distinction between the protection of "minorities" and the protection of "peoples", which will be discussed in the following sub-chapter.

It is therefore submitted that the Cobo definition of "indigenous peoples" is adequate and provides sufficiently precise criteria for the determination of the

relevant "units" of self-determination.

3. The distinction between indigenous peoples and minorities in international law

The Cobo report, entitled "Study of the Problem of Discrimination Against Indigenous Populations", was commissioned by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities. The terms "minorities", "populations" and "Prevention of Discrimination" place the question of indigenous groups in a specific legal context, which, it is submitted, is different from the legal context of the right to self-determination and inappropriate with regard to aboriginal peoples.

"Population" is defined in the Oxford English Dictionary[44] as "The state of a country with respect to numbers of people; ... the total number of persons inhabiting a country ... or other area; the body of inhabitants".

"People" is defined as a "body of persons composing a community, tribe, race or nation"[45].

The term "population" thus has a numerical or statistical connotation which the term "people" does not have. The term "Indian population of Canada" would refer to the total of the Indian persons in Canada, to the same extent as the term "Italian population of Canada" for example would refer to the total number of persons of Italian nationality or descent in Canada. The term "Indian people" does on the contrary refers to the collectivity as a whole in the first place, and also carries with it the connotation of the link to a specific territory. From a legal point of view, the use of the two terms suggests that there is a corresponding difference. The right to self-determination is a right of "peoples", therefore a right of a collectivity. The U.N. Human Rights Committee, in its general comment on Art. 1, noted that the right to self-detemination was a prerequisite for the

enjoyment of individual human rights, which indicates that it is considered as a collective right[46]. The rights belonging to a certain population would however not belong to the population as such but to its individual members. The term "collective rights" (i.e. the rights of a collectivity) cannot be used if the collectivity in question is only a numerical or logical universe of individual persons (which a "population" is) and not an entity identifiable by a number of criteria as a natural compact or whole. The use of the terms "prevention of discrimination" and "protection of minorities" supports this view. It is difficult to speak of the right of a collectivity or group as such not to be discriminated against; the actual discrimination would be directed at the individual because of that person's appurtenance to a specific group. Consequently, it is the individual and not the group which would assert the right not to be discriminated against before a court. The same considerations as those made in the domestic context can be applied here[46a]. The right of peoples to self-determination as a collective right can thus not be qualified as being part of the protection of minorities under international law. The protection of minorities, of which the norms relating to non-discrimination on particular grounds form a part, is effected through provisions protecting individual rights. This can be illustrated by the wording of international provisions. The I.C.C.P.R. protects the right of peoples to self-determination in Art. 1. Art. 27 of the covenant protects the right of persons belonging to ethnic, religious or linguistic minorities to exercise corresponding rights "in community with other members of that group". Although the rights may be exercised collectively, they are nonetheless rights of individuals, whereas the right to self-determination is exercised by a collectivity, namely a people, and can thus be termed collective right[47].

The European Convention on Human Rights[48] provides in Art. 14 that the rights

and freedoms protected in it "shall be secured without discrimination on any ground such as ... national or social origin, association with a national minority ...".

The Helsinki Declaration[49] refers to the right to self-determination of peoples in principle VII, whereas principle VII affirms the commitment of the participating states to respect "... human rights and fundamental freedoms ... without distinction as to race, sex, language or religion" and "... the freedom of the individual to profess and practice, alone or in community with others, religion or belief ..."

The African Charter[50] makes a similar distinction between the right to self-determination of peoples (Art.20, para. 1) and the prevention of discrimination against minorities in Art. 2, which states that "Every individual shall be entitled to the enjoyment of the rights and freedoms ... without distinction of any kind such as race, ethnic group, ... national and social origin ...".

These provisions illustrate the distinction between a people's right to self-determination and minority rights, i.e. rights of the individual members of minorities.[51]

It is hereby submitted in the present discussion that in view of this distinction between minority rights and peoples' rights, minorities should correspondingly be distinguished from indigenous peoples under international law.

It has been contended in this respect that minorities could come close to fulfilling the criteria of peoplehood if the definition of minorities as "separate or distinct groups, well-defined and long-established on the territory of a State" is accepted, and that indigenous communities would certainly fall into the category of a minority so as to benefit from the protection of Art. 27 of the I.C.C.P.R.[52]. The activities of U.N. member states and of independent U.N. bodies, such as the Human Rights Committee, indeed show that the question of indigenous communities is almost exclusively dealt with in the context of the prevention of

discrimination and the protection of minorities. Under the International Convention on the Elimination of All Forms or Racial Discrimination[53] States Parties are required to submit reports on its implementation to the Committee on the Elimination of Racial Discrimination[54]. The two last reports of Canada made detailed references to the situation of the aboriginal peoples, inter alia to the changes in the Constitution Act, 1982, to the report of the Special Committee (the Penner-Report)[55] and to the special measures taken in favour of aboriginal peoples[56]. The representatives of Canada also described the situation of aboriginal peoples before the Committee, at the request of several Committee members, but were careful to point out that the use of the term "Indian First Nations" had no direct legal consequences in Canada[57]. Representatives of Canada also held on other occasions that indigenous communities were minorities and therefore not entitled to exercise the right to self-determination[58].

The U.N. Human Rights Committee has so far decided on one individual application from a member of an indigenous group in the Lovelace case. At issue was a provision of the Indian Act of Canada, which was allegedly discriminatory on the ground of sex. The Committee found that Canada was in breach of its obligation under Art. 27 of the covenant, since the provision in question had the effect of preventing the applicant of living on her reserve in community with the other members of the band[59]. It is apparent from the Committee's decision that the applicant was considered to be a member of a minority and thus coming under the scope and protection of Art. 27.

In its latest report submitted to the Human Rights Committee[60], Canada made no reference to aboriginal peoples. With regard to Art. 1 of the covenant, Canada simply stated that it "subscribes to the principles set forth in this Article"[61], a remarkably short statement in view of the total length of the report (479 pages)[62].

The Canadian ambassador to the U.N. mentioned the situation of aboriginal peoples in Canada in his opening statement to the 1984 Additional Report to the Committee in 1984, referring to the recent constitutional developments affecting aboriginal peoples and to recent political moves towards aboriginal self-government[63]. No reference was made, however, to the right to self-detemination under Art. 1. It has already been noted that self-determination in relation to aboriginal peoples is not an acceptable terminology for the Canadian government[64]. Committee members questioned the Canadian representatives on the status of Indians and Eskimos in Canada in relation to the implementation of Art. 27, but not in relation to Art. 1[65].

These examples of positions taken by U.N. member states and those of U.N. bodies indicate that indigenous communities are considered as "minorities".

It is submitted here that this qualification is inappropriate insofar as it does not take into consideration the collective rights of indigenous communities. To consider them as minorities confers protection only on the individual members of indigenous communities, but not on the community as such. Consequently, the classification of indigenous peoples as minorities would prevent them from asserting the collective right to self-detemination. The fear of such claims by most governments appears to be their prime motivation in placing indigenous peoples in the category of minorities. It is submitted here that the potential assertion of a right to self-determination cannot be determinative of their classification into minorities or indigenous peoples. This classification must be based on objective criteria. The problem relating to a claim to self-determination is whether it entails a right to secession, which will be examined further below. The definition of "indigenous peoples" and "minorities" has to be made independently.

In spite of the apparent tendency to consider indigenous peoples as minorities, some developments within the U.N. point towards a separation of the question of minorities from the question of indigenous peoples. The creation of the Working Group on Indigenous Populations with a mandate to draft international standards on the rights of indigenous peoples was already noted[66]. In 1978, the U.N. Commission on Human Rights established an open-ended working group with a mandate "to consider the drafting of a declaration of the rights of persons belonging to national ethnic, religious and linguistic minorities". The working group was set up pursuant to a recommendation by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and established by the Commission at each subsequent session. The declaration is to be drafted "within the framework of the principles set forth in Art. 27 of the International Covenant on Civil and Political Rights"[67]. The two most recent reports of the working group[68] do not make any reference to the question of indigenous peoples.

The problem of distinguishing indigenous peoples from minorities lies partly in the lack of precise and generally accepted definitions.

Several proposals concerning a definition of the term "minority" were submitted to the working group. One of the definitions, proposed by Mr. Jules Deschênes, reads as follows:

> "A group of citizens of a state, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law"[69].

The working group was not able to agree on this definition. However, it noted "that the proposal of Mr. Deschênes and the debate of the Sub-Commission thereon constituted important material on the subject-matter which might serve as a

valuable basis for the future of the working group"[70]. Thus, it may be used as a "working definition" for the purposes of the present discussion.

The comparison with the Cobo definition shows that an indigenous people is characterized by additional elements which are not contained in the definition of a minority, namely the ancestral roots to the territory, the historic continuity between pre-colonial or pre-invasion and present aboriginal societies and the existence of social institutions and legal systems.

It is interesting to note that while the working group is concerned with indigenous "populations", the Cobo definition speaks of "communities, peoples and nations". This terminology confirms the distinction between "indigenous peoples" and "minorities".

The additional features which characterize indigenous peoples support the contention that they should not be considered as minorities. Such a qualification would not properly reflect the obvious factual differences that exist between indigenous peoples and ethnic, linguistic or religious minorities[71]. This has been correctly acknowledged by Mr. Deschênes in his proposal for a definition of "minority", in which he qualified the question of indigenous peoples as a "non-problem" in the context of the definition of a minority.[72].

It may be contended that to exclude indigenous peoples from the concept of "minority" would deprive them of the benefit of the protection of Art. 27 of the I.C.C.P.R. or of similar provisions. The answer to this contention lies in the drafting of specific standards for indigenous peoples, such as those elaborated by the Working Group on Indigenous Populations. The draft principles refer to the enjoyment of fundamental rights and freedoms, to non-discrimination, to collective and individual rights[73]. Another example of a possible specific catalogue of the rights of peoples - as opposed to the rights of members of minorities - is provided

by the 1976 Algiers Universal Declaration of the Rights of Peoples[74], which provides for the collective rights of peoples and the individual rights of persons belonging to a people. The declaration has only political value, but it may nonetheless serve as an illustration in the present context. Such a catalogue of people's rights would appear to be a more appropriate instrument for the international protection of indigenous peoples. It would avoid the inadequacies of subsuming indigenous peoples under the term minorities and correctly reflect the factual differences between the two. Most importantly, it would be consistent with the aspirations of indigenous peoples themselves, who object to being qualified as minorities, partly on the ground that the concept of minority is not compatible with that of self-determination[75].

The qualification of indigenous peoples as "peoples" and not as "minorities" under international law implies that the right to self-determination of peoples under Art. 1 of the I.C.C.P.R. is also applicable to indigenous peoples.
However, it remains to be determined whether the right to self-determination is applicable to such peoples living in independent states.

4. Field of application of the right to self-determination

The fact that the U.N. has mainly been concerned with the right to self-determination in the context of decolonisation has led to the contention that the right was as a general rule only applicable to peoples under colonial domination and not to peoples existing within an independent state[76]. It is argued that in the latter case, the right to self-determination has already been exercised[77]. However, it has been acknowledged that when colonial domination still existed "beneath the guise of ostensible unity", the right of peoples to self-determination could still be validly exercised[78]. The limitation of the application of the right to

colonial peoples can be supported by the wording of U.N. resolution 2625[79], para 5(7) of which says that the right to self-determination as laid down in the declaration should not be construed "... as authorizing or encouraging any action which would dismember ... the territorial integrity or political unity of sovereign and independent State conducting themselves in compliance with the principle of ... self-determination ... and thus possessed of a government representing the whole people belonging to the territory ..." Para. 5 (2) makes express reference to the duty of states to promote the realization of the principle of self-determination "... in order ... to bring a speedy end to colonialism ...".

Further support for the above contention can be found in U.N. resolution 1514[80], which expressly affirms the right to self-determination with regard to peoples under colonial domination. Several U.N. member states, in particular the western democracies have further taken the position that only "geographically separate" people under colonial domination could be subjects of the right to self-determination (the so-called " blue water thesis")[81], and consequently that after the achievement of independence from a colonial power or in non-colonial states with democratically elected governments, they could no longer resort to the right to self-determination [82]. The U.N. General Assembly resolution 1541 (XV), which lays down criteria for the implementation of resolution 1514, mentions "geographically separate" territories in relation to the right to self-determination[83].

The legislative history of the instruments not directly related to decolonization, namely, resolution 2625 and the two covenants, in particular the time of their drafting, appears <u>prima facie</u> to confirm the contention that the right to self-determination was meant to be an instrument of decolonization only.

The drafting of the two covenants started as early as 1948, they were both

adopted for signature and ratification in 1966[84]. The drafting of resolution 2625 started in 1964 with the creation of a special committee to prepare the draft[85]. In the period from 1948 to 1970, decolonization was one of the major issues on which activities in the U.N. were focussed. 1960 marked a decisive step in the anticolonial movement which had been building up to that date, with the adoption of resolution 1514[86]. By 1970, most of the former colonies had achieved political independence or were in the imminent process of doing so[87]. The drafting of the international provisions on self-determination thus coincided with the era of decolonization, which explains the close connection between the two.

In the post-colonial era, the question remains as to the field of application of the right.

It is submitted here that it can no longer validly be maintained that the right to self-determination cannot be applied to peoples existing in independent states.

The fact that the political motivation of the U.N. has mainly been concerned with decolonization does not in itself permit the inference that the right to self-determination is legally only applicable to colonial peoples before independence[88]. The history and wording of the relevant instruments, although suggesting the relation of the right to decolonization, does not upon a closer examination support that proposition. Of the three instruments mentioned here, only resolution 1514 is expressly aimed at colonial peoples. The I.C.C.P.R. does not refer to the colonial situation at all, but to the right of all peoples to self-determination. Resolution 2625 does refer to colonialism, but in a separate sub-paragraph; Para. 5(1) states generally that the right applies to all peoples. This separation suggests that the right to self-determination as applied to colonial peoples has the character of a lex specialis. If the three instruments are considered together, it appears plausible to qualify resolution 1514 as lex specialis, by contrast to the general rule

expressed in Art. 1 of the I.C.C.P.R. and para. 5(1) of resolution 2625[89].

Support for this view can be found in the characterization of the right to self-determination as part of the universal law of human rights, as illustrated by the I.C.C.P.R. It was noted earlier that the human rights perspective could provide a better context for the proper determination of the scope of the right[90]. If the right to self-determination is placed among the fundamental and universal human rights, then its objective must be the universal protection of the right regardless of whether its subject is situated within an independent sovereign state or not. There can on this ground be no justification for granting a preferential treatment to peoples under colonial domination . If the right to self-determination is a human right, then it must apply to all peoples fulfilling the criteria of peoplehood.

It can further be noted that the right to self-determination has been embodied in instruments manifestly drafted in a non-colonial context, such as the Helsinki Declaration and the treaty between East and West Germany[91].

The "blue water thesis" advocated by a number of states equally has no legal foundation and does not appear to be workable. If geographic separation was a valid criterion, then the Inuit people of northern Canada could be considered as geographically separate from the rest of Canada. If separation by water is a criterion, then it would appear impossible to define with precision when the stretch of water is of sufficient importance to qualify a people as "colonial".

The I.C.J. has rejected the concept of the "blue water thesis" in the Western Sahara case[92]. The separate opinion of judge Dillard implicitly points out the incompatibility of the "blue water thesis" with the very concept of self-determination: "It seemed hardly necessary to make more explicit the cardinal restraint which the legal right of self-determination imposes. That restraint may be captured in a single sentence. It is for the people to determine the destiny of

the territory and not the territory the destiny of the people"[93].

As far as the legislative history of the I.C.C.P.R. or of resolution 2625 is concerned, it can be argued that the original focus of the drafters on the situation of colonial peoples is not a guideline for the present interpretation of the provisions in the post-colonial era. Under Art. 32 of the Vienna Convention on the Law of Treaties[94], the preparatory work of a treaty and the circumstances of its conclusion are only supplementary means of interpretation to be used only if the interpretation according to the ordinary meaning of the terms of the treaty and its object and purpose leave the meaning ambiguous or obscure or leads to an absurd or unreasonable result.

The interpretation of Art. 1 of the I.C.C.P.R. according to its object and purpose and its ordinary meaning does not leave any ambiguity in defining to which peoples the right of self-determination shall apply. The wording unequivocally says all peoples, and this meaning can be confirmed by the purpose of a universal protection of human rights. Therefore, recourse to the preparatory work is not necessary.

The same consideration could be applied analogously to resolution 2625. The latter however elaborates on the principle of self-determination in greater detail than Art. 1 of the I.C.C.P.R. and thus deserves more attention, in particular para. 5(7) which protects the "territorial integrity or political unity of sovereign and independent states" and thereby places a limit on the exercise of the right to self-determination. Thus, even if the right to self-determination applies to all peoples, it may not in principle be exercised by a people in a sovereign and independent state. Para. 5(7) however does not completely rule out the assertion of a right to self-determination in a non-colonial context, but subjects it to the condition that the state in question acts in compliance with the principle of self-determination.

It was argued that this qualification offered little guidance as to when an exercise of self-determination is justified[95]. It may be contended that the criterion of a "... government representing the whole people ... without distinction as to race, creed or colour" does give some indication as to when the right to self-determination may be exercised. However, as noted above[96], situations may arise where the factual domination of a people within an independent state is cloaked by a legal fiction of territorial integrity and political unity. Resolution 2625 does not appear to take into account situations "where major ethnic cleavages divide the people of a state", in which cases a conflict may arise between state sovereignty and the principle of self-determination, in particular if the above-mentioned human rights perspective is taken[97].

If indigenous peoples are distinct from minorities, then the mere absence of discrimination ("without distinction as to race, creed or colour") cannot be considered as sufficient evidence of "compliance with the principle of self-determination". The indigenous population may formally be allowed to participate in the political process in the state in which they live, while the same indigenous people as a whole, although being distinct from the rest of the population, may simultaneously be denied the possibility of establishing its own form of government. Even if certain forms of autonomous government are made possible, their existence alone does not prove that they have been established freely by the people concerned.

Para.5(7) of resolution 2625 thus does not appear to provide guidelines to determine the compliance or non-compliance with the principle of self-determination in these hypothetical situations. This determination therefore has to be worked out on a case by case basis.

At this stage of the present discussion, then, it can be concluded that resolution

2625 does not prohibit the exercise of the right to self-determination by a people within an independent and sovereign state. To what extent the aboriginal peoples of Canada may assert the right remains to be determined.

Before discussing the application of the right in the Canadian context, the question of the right to secession has to be addressed. If indigenous peoples within an independent and sovereign state qualify as subjects of the right to self-determination, then the question arises whether they would be entitled to secede from that state.

5. The right to secession

The right to secession can be considered as a corollary of the right to self-determination. Para.5(4) mentions "The establishment of a sovereign and independent State" as one of the modes of implementation of the right to self-determination. It can also be inferred from the wording of para. 5(7) that if a state does not act in compliance with the principle of self-determination, then a people would be allowed to exercise its right to self-determination at the cost of dismembering the territorial integrity or political unity of a state. In fact, in situations of overwhelming oppression or of colonial domination, there would probably be a political consensus as to the validy of a claim to secede. In the practice of states, the claim to secession of a people from an existing state has only been recognized in a few instances. It has been denied recognition in most other cases[98]. The evidence of state practice is therefore insufficient to establish a right to secession. Consequently, even if an accomplished secession does not contradict the provisions of resolution 2625, it does not follow that there would exist a right to secession flowing from the right to self-determination.

It has been contended, however, that although the practice of states did not prove

the existence of a right to secession, customary international law contained no prohibition to that effect[99]. Similarly, it was held that international treaty law, namely Art. 1 of the I.C.C.P.R. and the U.N. Charter, contained a right to secession[100]. It was thus argued that Art. 1 of the I.C.C.P.R. embodies a right to secession in view of its unrestrictive wording[101]. This proposition appears to rest on the argument that since the wording of Art. 1 of the I.C.C.P.R. does not expressly prohibit the right to secession and does not contain any limitations such as the one expressed in para. 5(7) of resolution 2625 or in the U.N. Charter, a right of secession can be derived therefrom[102]. This line of reasoning does not seem to be conclusive. It can indeed be inferred from Art. 1 of the I.C.C.P.R. that a right to secession is not prohibited. This however does not permit the conclusion that the same provision confers the right in question. If the drafters of the covenant did not expressly mention a right to secession, the plausible reason is that they did not consider it as necessarily flowing from the right to self-determination. The limitations on the exercise of the right to self-determination contained in the U.N. Charter and in resolution 2625 are a strong indication that there is a presumption against the existence of a right to secession. The fact that no express prohibition of secession is contained in these provisions establishes only that secession may be allowed in certain instances as one of the modes of implementing the right to self-determination. It was noted above that para. 5(7) of resolution 2625 does not give sufficiently precise guidelines as to when a secession may be legally justified. For this reason alone, it is not possible to derive a right to secession from that provision. To do so would be to broaden the scope of these provisions beyond their actual wording. Similarly, it cannot simply be deduced from the absence of any limitation clause in Art. 1 of the I.C.C.P.R. that it positively grants a right to secession. The limitation contained in para. 5(7) of

resolution 2625, since it refers to the exercise of the same right as protected by the covenant, should be used to interpret Art. 1 of the latter accordingly.

From these considerations can be concluded that there exists no right of secession under international law. This result would be consistent with the wording of Art. 1 of the I.C.C.P.R. and with that of resolution 2625 (para.5(7)), without stretching the scope of any of the two provisions. This interpretation thus appears also to be the most appropriate, since it attempts to define the scope of the right to self-determination with equal regard to both provisions read in conjunction with each other. The argument referred to above would on the contrary achieve different results as to the scope of the right to self-determination, being more restrictive with regard to resolution 2625 but wider with regard to the I.C.C.P.R. Nothing in the I.C.C.P.R. or in its legislative history suggests that it was meant to express a different right to self-determination than under customary international law. It is submitted, then, that there can only be one right to self-determination, the scope of which has to be determined by attempting to harmonize the possible interpretations of distinct provisions relating to the same right.

The conclusion as to the scope of the right to self-determination is therefore that while it applies indigenous peoples within an independent and sovereign state, it does not confer a right to secede from that state.

CHAPTER 9

The Application of the Right to Self-Determination to the Aboriginal Peoples in Canada

Introduction

The application of the right to self-determination of peoples in the Canadian context has to overcome several difficulties. Since the right is part of international law, its application in Canada will have to follow the domestic rules concerning the reception of international law. A problem may arise in that while the aboriginal peoples qualify as subjects of the right to self-determination under international law, e.g. under the I.C.C.P.R., they may not be able to exercise this right in the Canadian context unless the provisions of the I.C.C.P.R. are transformed into domestic law.

Another problem lies in the fact, noted earlier[1], that the "aboriginal peoples" of Canada do not constitute uniform peoples, rendering the task of determining the "units of self-determination"[2] a difficult one. It may also be noted that the conclusion reached in the previous chapter, namely that the right to self-determination is applicable to indigenous peoples within an independent state, should not be understood in absolute terms. It does not imply that only one option, namely independence short of secession, is left open to the aboriginal peoples in Canada. Just as the concept of sovereignty, self-determination should be understood, it is submitted, as a relative concept, leaving a wide range of options open for its implementation. As Brownlie notes, self-determination "... is the principle that a community has a right to choose a system of government which

sufficiently reflects the nature and needs of that community. This choice is wide open and thus ranges from a modest regime of local autonomy, through forms of federal association, to full-blooded separate international personality..."[3]

In applying the right to self-determination in the Canadian context, two approaches seem possible. Although the right to self-determination may be a right of the aboriginal peoples of Canada, the obligation under international law to promote and respect this right is incumbent upon the Canadian government. Canada has signed and ratified the I.C.C.P.R. Under Art. 1, para. 3 of the covenant, Canada has an obligation to "promote the realization of the right to self-determination" and to respect that right. Under customary international law, Canada has a similar obligation. Para. 5(1) of resolution 2625, which may be taken as an expression of customary international law, states that "every State has the duty to respect this right in accordance with the provisions of the Charter". The right to self-determination may in this way be incorporated into domestic law as international treaty law and as international customary law. Before discussing the modes of incorporation, however, it has to be determined whether the aboriginal peoples qualify as subjects of the right to self-determination, i.e. whether they constitute "indigenous peoples".

I. The aboriginal peoples of Canada as "indigenous peoples"

It was determined above that "indigenous peoples" qualify as subjects of the right to self-determination. The aboriginal peoples of Canada would therefore qualify as subjects of the right to self-determination if they satisfy the criteria contained in the definition of "indigenous peoples" referred to earlier[4].

It seems appropriate to recall the different elements contained in the definition:

1. the historical continuity between the present people and pre-colonial societies;

2. the collective consciousness of being distinct from the society now prevailing on the territory;
3. the determination to preserve and transmit to future generations their ancestral territories and their ethnic identities;
4. the existence of cultural patterns, social institutions and legal systems.

From the observations made in the present discussion concerning the historic roots of aboriginal title[5], the aboriginal demands for recognition as a distinct society within Canada[6], their corresponding desire to maintain this distinctness in the future[7] and the social, political and legal organization of aboriginal societies[8], it is apparent that the aboriginal peoples of Canada fulfil the criteria enounced in the Cobo definition and thus qualify as "indigenous peoples" under international law. They therefore fall under the concept of "peoples" and are thereby subjects of the right to self-determination of peoples.

The "aboriginal peoples of Canada" however do not constitute one uniform people, which raises the issue as to the definition of the entities or "units" to which the right to self-determination would apply.

The Indian population is composed of several peoples distinct from each other through language and culture[9]. The Métis population, for example, which may be considered as one uniform people, is however faced with the difficulty that it has no defined land-base. The specific problems of the application of the right to self-determination in this particular situation will not be addressed in the present discussion[10]. The Inuit population may be considered as one people. In view of their geographical separation from the more densely populated areas in Canada, the definition of a land-base for the application of the right to self-determination does not appear to pose a major problem. The territorial delimitation of Indian territories is in many instances rendered difficult by their presence in densely

populated and industrialized areas of Canada.

It is beyond the scope of the present discussion to define the "units of self-determination" which will exercise the right. It is submitted, that this definition is to be effected by the peoples concerned as part of the exercise of the right to self-determination. Whether the aboriginal peoples will decide to act as one people or as several peoples for the purpose of exercising their right to self-determination will have to be decided by them according to their own decision-making procedures. This uncertainty as to the specific implementation of the right does however not alter the validity of the general proposition that the right to self-determination is applicable to the aboriginal peoples of Canada. (The last part of the present discussion will discuss possible modes of implementation of the right). The right to self-government, it is submitted, can be derived from the right to self-determination.

II. The right to self-government as a corollary of the right to self-determination

Under para.5(1) of resolution 2625, all peoples, by virtue of the principle of self-determination have the right "freely to determine, without external interference, their political status and to pursue their economic, social and cultural development ...".Art. 1, para. 1 of the I.C.C.P.R.adopts the same wording. Para. 2 makes reference to the free disposition over natural wealth and resources and to the right of a people not to be deprived of its means of subsistence. The right of a people to determine its political status is thus only one element of the right to self-determination.

The "determination of the political status" can be understood to mean the possibility of establishing political institutions and decision-making procedures through which the political status will be defined. The existence of political organs

through which the will of the individual members of a community can be implemented is a precondition for the exercise of the other elements of the right to self-determination such as the social and economic development of the community and the management of its resources. The right of a people to determine its political status therefore means the right to choose its own form of government. Self-government can thus be considered as a corollary of self-determination. The term "government", it should be noted, is used here in a neutral sense. In view of the relativity of the principle of self-determination, "government" may in practice refer to many different forms of organization, as determined by the communities concerned. "Aboriginal self-government" may represent an elaborate political process of decision-making, but may also essentially refer to the self-management of natural resources, to the extent that the traditional activities of aboriginal peoples - such as hunting, trapping and fishing are a central element of their societies. Seen from that perspective, it is the "self", i.e. the autonomous character of the government that appears to be of primary importance rather than the actual form of government. Nonetheless, "self-determination" implies that the form of government be chosen freely.

For the aboriginal peoples of Canada to assert the right to self-determination within the Canadian legal system, it has to form part of Canadian law.

III. Incorporation of the right to self-determination in domestic law

The right to self-determination of peoples may be incorporated as customary international law or as international treaty law.

1. International customary law

The generally accepted rule concerning the incorporation of customary

international law in Canadian law appears to be that it is "part of the law of the land"[11] and that no specific act of incorporation on the part of the Canadian Parliament or of the provincial legislatures is necessary, unless a conflict arises between the rule of the customary international law and internal law, in which cases enforcing legislation would be necessary[12].

It also seems to be generally accepted that in the absence of such enforcing legislation, customary international law would be subordinated to conflicting domestic statutes[13]. It has been argued that the provinces are restricted from legislating in violation of international law[14], which would imply that customary international law could prevail over provincial statutes. This view has been rejected on the ground that the provincial legislatures and Parliament have equal authority within their respective spheres of competence, including the power to legislate in violation of international law[15]. This argument, supported also by the doctrine of parliamentary supremacy, appears to have more weight. In the context of the international law of human rights, of which the right to self determination forms part, this position would imply that the provinces could prevent its domestic implementation to the extent to which matters of provincial competence would be affected[16].In the context of a right to self-determination of aboriginal peoples, the problem of whether provinces may violate customary international law can however be left open. Under s.91(24) of the Constitution Act, 1867, Parliament has the legislative competence in respect of "Indians, and lands reserved for the Indians". The S.C.C. held in the Reference Re Eskimos[17] that for the purpose of s.91(24) Eskimos were included in the term "Indians". The court looked at the official French translation of one of the resolutions forming the confederation proposal and found that "Indians" was translated as "Sauvages", from which fact the court concluded that the term had to be construed broadly: "The Upper and Lower

Houses of Upper and Lower Canada petitioners to the Queen, understood that the English word "Indians" was equivalent to or equated the French word "Sauvages" and included all the present and future aborigines native subjects of the proposed Confederation of British North America ..."[18]. Parliament thus has legislative competence in respect of the aboriginal peoples of Canada. Their right to self-determination under customary international could therefore be overridden by federal statute. In respect of the Indian peoples, it could be argued that the Indian Act implicitly overrides a right to self-determination under customary international law, since it prescribes the basic structures of decision-making procedures and thereby does not leave room for an autonomous and free determination of political status "without external interference". It must be noted however, that the federal government appears to be willing to replace the Indian Act with regard to individual bands by specific enactments passed pursuant to negotiated agreements. The Cree-Naskapi Act[19] and the Sechelt Indian Band Self-Government Act[20] are two examples thereof. Both acts were passed pursuant to agreements concluded with the concerned bands and replace the Indian Act in its application to these bands. They thus differ from the Indian Act in that the latter was not a negotiated instrument. To what extent the Cree-Naskapi and the Sechelt acts may be considered as an implementation of the right to self-determination will be examined in Part 4.

The Indian Act however remains applicable to most of the Indian bands in Canada. From a strictly legal point of view, it remains that a federal statute could override a right to self-determination incorporated as customary international law.

For this reason, the domestic incorporation of the right to self-determination as customary international law does not provide a solid legal foundation for a right to self-government.

2. International treaty law

The right to self-determination of peoples is also contained in Art. 1 of the I.C.C.P.R. and is thus part of international treaty law. The generally accepted view on the domestic incorporation of international treaty law is that international treaties have to be transformed into domestic law by an act of Parliament[21].

It must be noted in this context that there remains a controversy in Canadian constitutional law as to whether Parliament has the exclusive power to implement international treaties or whether the provinces have this power for international treaties dealing with subject-matters within their sphere of competence under ss. 92 to 93 of the Constitution Act, 1867[22]. In the context of the present discussion, a problem may arise as to the implementation of the I.C.C.P.R., since some of its provisions can be considered as affecting matters of provincial competence, such as the right of parents with respect to the religious education of their children under Art. 18 para. 4 of the I.C.C.P.R. (which would probably fall under s.93 of the Constitution Act, 1867), whereas other provisions, such as the right of men and women to marry under Art. 23 para. 2 of the I.C.C.P.R. would probably fall under federal competence, e.g. under s.91(26) of the Constitution Act, 1867. This observation raises the general issue of whether an international instrument such as the I.C.C.P.R. has to be implemented as a whole or whether its provisions may be implemented individually, in which case the implementation could be effected according to the respective federal and provincial legislative competences. This potential conflict and the underlying constitutional issue need not be resolved here, however, since to date no legislation implementing the I.C.C.P.R. has been passed by either Parliament or provincial legislatures.

Another issue arising in this context is whether the provisions of the I.C.C.P.R. may be considered as "self-executing", i.e. whether they may be directly applied without any implementing legislation. This may be the case if the provisions of a particular treaty are of sufficient precision or confer rights on individual persons[23]. However, it appears that the terminology used in this context and the concept of a self-executing treaty is subject to variation according to the different domestic legal systems[24]. The concept of a self-executing treaty as defined above would appear to run counter to principles of British and thereby Canadian constitutional law, which requires that any governmental act affecting the rights of individual citizens necessitates an act of Parliament[25]. The I.C.C.P.R. can on this ground alone not be considered to be a self-executing treaty. The controversy concerning the concept of self-executing treaties can therefore be left open here.

Art. 1 of the I.C.C.P.R. is therefore not part of Canadian domestic law. It is submitted that the right to self-determination may nonetheless find an indirect application in the Canadian domestic context.

The relevant constitutional provisions may be interpreted in the light of international law and the right to self-determination of peoples, expressed in Art. 1 of the I.C.C.P.R. would in that way provide a framework of reference for that purpose.

IV. Interpretation of the Constitution Act, 1982, in the light of international law

There is a presumption in Canadian constitutional law that Parliament - or the provincial legislatures - do not intend to legislate in contradiction with Canada's international obligations[26]. This means that Canadian law, including constitutional law, has to be interpreted with regard to international law. The sections of the Constitution Act, 1982, relating to the rights of aboriginal peoples should therefore

be read with regard to the right to self-determination under the I.C.C.P.R., and under customary international law and to Canada's corresponding obligation to respect and promote the realization of the right to self-determination of the aboriginal peoples.

With regard to s.25 of the Charter, this view can be supported by its specific character as a human rights instrument.

1. Specific character of the Charter as an instrument for the protection of rights and freedoms.

The Charter was drafted to ensure the protection of fundamental rights and freedoms. The comparison of its provisions with those of international human rights instruments reveals that many of them have been inspired by those of international treaties and related instruments[27].

This fact has been used as a justification for interpreting of the Charter with reference to international law. In the decision R. v. Big M Drug Mart Ltd.(Alberta C.A.)[28], Belzil J. said that "... the Canadian Charter was not conceived and born in isolation. It is part of the universal human rights movement..." and that it could not be doubted that "these fundamental freedoms were entrenched in the Charter with Canada's commitment in the International Covenant"[29] and thereby justified his opinion that the provisions of the Charter should be interpreted in this universal human rights context[30]. This view was most recently reaffirmed by Dickson, C.J.C. in Reference Re Public Service Employee Relations Act (Alta.)[31], who referred to the international law of human rights to determine the scope of the freedom of association guaranteed by the Charter and stated in this respect: " The Charter conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various

international documents pertaining to human rights. The various sources of international human rights law ... must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions"[32].

These considerations lend support to the view that the provisions of the Charter must be interpreted with regard to international law.

2. The Charter as an implementation of the I.C.C.P.R.?

It was noted that no legislation implementing the I.C.C.P.R.had to date been passed. This proposition is correct in that no legislation expressly implementing the I.C.C.P.R.has been passed. In the specific context of the Charter and in view of the fact that several of its provisions bear resemblance to those of the I.C.C.P.R., it may be argued that the Charter represents an implicit implementation of the I.C.C.P.R. It must be noted that the Charter makes no reference to international law except in section 11(g). It does not indicate the status international human rights instruments are to receive in Canadian domestic law[33]. The fact that Canada has signed and ratified the I.C.C.P.R. is an indication of the public policy the government has chosen to follow in that field. It seems surprising that the Charter, which can also be considered as an expression of public policy, does not attempt to address the relation between the international and the domestic law of human rights.

The legislative history of the Charter does however not give any indication as to an intention to implement international law, in particular as far as the I.C.C.P.R. is concerned. The wording of the Charter does not contain any such indication either. It is then difficult to assume under ordinary rules of interpretation that the Charter was intended as an implementation of the I.C.C.P.R. The latter contains certain provisions which are not found in the

Charter, such as Art. 20 and 23. Other provisions relating to the same subject-matter have a different wording or a different scope. The freedom of expression protected in the I.C.C.P.R. is for example subjected to a different limitation clause than the one contained in s.1 of the Charter. The I.C.C.P.R. would in certain instances offer more protection than the Charter, but widen its scope in others. To consider the Charter as an implicit implementation of the I.C.C.P.R. is thus fraught with a number of difficulties. For this reason, the Charter cannot be considered as a general implementation of the I.C.C.P.R., though some of its provisions are very similar.

It must be noted in this context, that the term "implementation" is used here in the sense of "incorporation into domestic law". This has to be distinguished from the question of the extent Canada to which is acting in compliance with its obligations under the covenant. The Charter may thus be considered as a fulfilment of Canada's obligations to the extent to which it complies with the standards set by the covenant. The question may however be asked whether specific provisions of the covenant may have been implicitly implemented by specific provisions of the Charter[34]. With regard to the right to self-determination of peoples under Art. 1 of the I.C.C.P.R., it could be argued that s.25 of the Charter - and possibly also s.35 of the Constitution Act, 1982 - implements Art. 1 of the I.C.C.P.R., since the two provisions refer to the rights of "peoples". However, in the absence of any reference to the covenant and in the light of the above considerations, to consider the aboriginal rights provisions as an implementation of Art. 1 of the covenant would go beyond their ordinary meaning and does not find support in the legislative history of the provisions. It was noted earlier that "self-determination" was an unacceptable terminology for the Canadian government[35]. Consequently, it seems very questionable to read any

intention to implement Art. 1 of the I.C.C.P.R. through s.25 or s.35 of the Constitution Act, 1982. The proposition nonetheless remains that the Charter and by the same token s. 35(1) of the Constitution Act, 1982, should be interpreted in the light of international law, in order to achieve compliance with Canada's international obligations.

It is submitted that the wording of s.25 and s.35 leaves room for an interpretation which takes into account the right to self-determination, such right being applicable to the aboriginal peoples of Canada under international law.

V. Interpretation of s.25 and s.35 of the Constitution Act, 1982 with reference to international law

It was noted earlier that s.25 of the Charter protected "aboriginal rights and freedoms" and that s.35(1) of the Constitution Act, 1982, protected "aboriginal rights". It was then submitted that s.25 should serve to interpret s.35(1), and that "aboriginal rights" should be read as encompassing "aboriginal rights and freedoms"[36].

1. Self-determination as a "freedom"

"Aboriginal freedom" was characterized as being a fundamental element of an integral part of aboriginal societies[37]. The right to self-determination was characterized as a fundamental human right[38]. The right to self-determination may be considered as the collective equivalent of individual human rights of a fundamental character, such as the right to life and liberty or the freedom of opinion or expression.

If the Universal Declaration of Human Rights[39] is taken as an example, these individual fundamental rights and freedoms are derived from the postulate of the

equality and inherent dignity of all human beings, as expressed in Art. 1 of the Declaration. The Helsinki Declaration[40] affirms in principle VII that the participating states "will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development". Similarly, it may be argued that the same human dignity has a collective component and forms the root of the collective right of self-determination. Principle VIII of the Helsinki Declaration, which refers to the right to self-determination of all peoples, cites the "political, economic, social and cultural development" as corollaries of the right to self-determination, which denotes a certain similarity with the essential individual rights mentioned in Principle VII.

As Schachter notes, the statement that human dignity underlies all fundamental rights and freedoms "clearly implies that rights are not derived from the state or any external authority"[41]. The same consideration, it is submitted, applies to the collective right to self-determination. It would support the submission that the right to self-determination is an inherent right of aboriginal peoples. In view of its fundamental character, it may appropriately be termed "freedom" in the domestic context, namely the freedom of the aboriginal peoples to determine their political status without external interference. This qualification does not alter the legal content of the self-determination and is not meant to draw a rigid division between self-determination and self-government, freedom and right. The two concepts may overlap to a large extent. With regard to the terminology of s.25 of the Charter, it seems appropriate to interpret the term "aboriginal freedom" as encompassing the right to self-determination under international law. Under the interpretation submitted above[42], namely that an "aboriginal freedom" is also protected under

s.35(1), the right to self-determination would also serve as a guideline for the interpretation of s.35(1).

2. Self-government as a "right"

It was noted that the right to self-government could be derived from the right to self-determination. The term "aboriginal rights" in s.35(1) may therefore be interpreted in such a manner as to encompass a right to self-government. The interpretation of s.35(1) with regard to international law would be consistent with the finding that there exists an inherent right to self-government in the domestic context.

The interpretation of the Constitution Act, 1982 with regard to international law may thus provide additional clarification for the definition of "aboriginal rights and freedoms". If the right to self-government is a right of aboriginal peoples deriving from the right to self-determination under international law, then the relevant provisions in the Constitution Act, 1982 can be interpreted accordingly.

Their wording does not preclude such an interpretation; the scope of the term "aboriginal rights or freedoms" is not restrictive. Nor does any other provision of the Constitution Act, 1982, preclude an interpretation which resorts to international law. The legislative history of s.25 and s.35 does not indicate that international law was to be excluded as a framework of reference.

The proposed interpretation would on the contrary be in conformity with Canada's obligations under international law. The question arises in this respect whether there is a corresponding obligation on Canadian courts to interpret the Charter and the Constitution Act, 1982 with regard to international law. Dickson, C.J.C., noted in the reference relating to the freedom of association[43] "In short, though I do not believe the judiciary is bound by the norms of international law in

interpreting the Charter, these norms provide a relevant and persuasive source for interpretation..."[44], but did not justify his belief. He also noted that, "Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the Charter"[45]. This statement appears to be inconsistent with the one quoted above. If Canada is under the international obligation to ensure respect for the right to self-determination, then it is submitted that compliance with international obligations has to be effected through all organs forming part of the state; thus, it is also incumbent upon judicial organs to ensure compliance with international law. This compliance has to be achieved through the interpretation of domestic law with regard to international law.

The foregoing analysis, then, allows the conclusion that the right to self-government of aboriginal peoples is an inherent right deriving from the fact of original occupancy and the retained original sovereignty of aboriginal peoples on the one hand and from international law on the other hand.

The last part of this analysis will describe the various models of self-government existing in Canada and those which have been proposed, and discuss the legal issues connected therewith.

PART 4

ABORIGINAL SELF-GOVERNMENT IN THE CANADIAN CONTEXT

Introduction

The proposition that the right to self-government is one of the aboriginal rights protected under s.35(1) of the Constitution Act, 1982 raises the question of the implementation of that right within the Canadian political and legal system. It was noted that the relevant "units of self-determination" could be subject to variations. An examination of all possible models of self-government would go beyond the scope of this analysis. Nonetheless, certain general features and legal characteristics which would apply to most aboriginal governments can be identified.

Several models of aboriginal government exist in the Canadian context. The discussion of the existing forms of government will attempt to determine whether these models can be considered as implementing the right to self-government or whether they only represent forms of self-administration. The analysis of proposed models and the comparison with U.S. forms of Indian self-government will provide some indication as to the legal position of aboriginal self-government within the Canadian constitutional framework, with regard for example to the degree of jurisdiction aboriginal governments would have. As an example of a pertinent issue in the context of aboriginal jurisdiction, the relation between individual and collective rights will be discussed.

Chapter 10:

Existing forms of "self-government"

I. Self-Government under the Indian Act

The Indian Act[1] was passed in 1876 under s.91(24) of the Constitution Act, 1867, which confers upon Parliament the competence to make laws relating to "Indians, and lands reserved for the Indians". The Indian Act is to date the main piece of legislation of general application relating to Indians. It confers upon Indians limited powers of self-government, to be exercised on the reserve lands through an elected band council as the political organ of each band. The by-law making powers of the band council are enumerated in s.81 of the Indian Act. The range of powers conferred on the bands is limited to matters of a local nature and subject to the control of the Minister for Indian Affairs (hereinafter: Minister). The authority exercised by the band council is a delegated authority. S.74 of the act determines the criteria and the voting procedures for the band elections, which are implemented by regulations issued by the Minister. The Minister has the power to determine the size of bands and to create new bands. The Indian Act also lays down criteria to determine the membership of the bands. Recent amendments to the Indian Act however conferred a larger degree of autonomy on the bands in this regard[2]. Without describing in detail the provisions of the act, it is apparent from these elements that Indian bands do not have an effective power of self-government, i.e. of deciding without outside interference on crucial matters such as the setting- up of political institutions. The Department of Indian Affairs has itself acknowledged that band governments under the Indian Act are more like administrative arms of the Department than they are governments accountable to

band members[3]. The Special Committee on Indian Self-Government stated in its 1983 report that the Indian Act was the main obstacle to Indian self-development and self-sufficiency, which are aspects of self-determination[4]. The committee also drew attention to the fact that the Indian peoples played no part in negotiating confederation or in drafting the British North America Act, 1867[5]. Similarly, the Indian Act can be considered as lacking legitimacy in respect of Indians, since they were only allowed to vote in federal elections in 1960[5a] and the basic structure of the act was established before that date.

For these reasons, it can be said that band governments established under the Indian Act do not constitute an implementation of the right to self-government.

More recent examples of self-government illustrate a different approach in relation to aboriginal self-government.

II. The Cree-Naskapi Act

The Cree-Naskapi Act[6] was passed in 1984, pursuant to s.9 of the James Bay and Northern Quebec Agreement[7]. The Cree-Naskapi Act was one of the two federal statutes passed to implement the agreement and to protect the rights contained therein[8]. S.5 of the act states that it derogates from the application of the Indian Act. S.21 of the act provides that the objects and powers of the band shall be inter alia to act as local governments, to use, manage, administer and regulate land and its natural resources, to regulate the use of buildings, to promote the general welfare and to promote and preserve its culture and traditions. Under s.45, the band has the power to make by-laws of a local nature for the good government of its lands and its inhabitants, inter alia for the administration of band affairs, health, public order and safety, protection of the environment and of natural resources, the prevention of pollution, the maintenance and operation of local

services and taxation for local purposes. S. 63 provides for the election of the band councils. The band is allowed to make by-laws concerning procedural matters, subject however to the approval of the Minister . S.65 indicates what criteria electoral by-laws shall contain. Under s.67, the Governor in Council may make regulations concerning the election of council members and for the prohibition of actions detrimental to the conduct of fair and free elections. The bands are furthermore established as corporations and thus allowed to function as legal entities. They have jurisdiction for the enforcement of by-laws on their territories and for the administration of justice, the latter competence however being limited to minor offences.

The Cree-Naskapi Act confers upon the bands a range of powers far more extensive than under the Indian Act. In the first report of the Cree-Naskapi Commission, a body established under Part XII of the act with a mandate to prepare biannual reports on the implementation of the act, the commission found that the statute provided the basis for the Crees and Naskapis to assume authority and responsibility for their own forms of self-government[9]. It also pointed out the fact that the act has been developed through close consultation with Native representatives[10]. In its conclusion, the commission indicated that the Cree Indians had a positive feeling for their new autonomy[11]. The commission only has the capacity, however, to submit reports concerning the implementation of the act. One of its recommendations was therefore the creation of a new and more effective machinery in the form of a special representative to the Prime Minister, entrusted with a special responsibility to implement the act[12]. In respect of certain matters such as taxation, the powers of the band are subject to regulations issued by the Governor in Council. The Minister may disallow specific by-laws relating to hunting and fishing. In this respect, the act does not provide for a full

measure of autonomy for the Cree Indians. The question thus arises to what extent the James Bay Agreement and the Cree-Naskapi Act can be considered as implementing a right to self-determination. It may be noted that neither the agreement nor the act expressly recognize a right of aboriginal peoples to self-government based on original occupancy. Although the latter confers upon the Cree and Inuit communities certain autonomous powers, there is no indication that this was done as a recognition of an inherent right of aboriginal peoples to self-government. The two instruments, however, make reference to specific rights. One of the purposes of the act, as stated in the preamble, is to protect certain individual and collective rights. Rights to hunt, fish and trap and the right to harvest are mentioned in s.24 of the James Bay Agreement. The agreement can be considered as a treaty within the meaning of s.35 of the Constitution Act, 1982, and consequently, these rights have received constitutional protection as treaty rights with its coming into force. It must also be noted that the agreement received support from the populations concerned. The James Bay and Northern Québec Agreement was the result of negotiations between the government and aboriginal communities. It may be argued that their participation as equal negotiators and their corresponding influence on the outcome of the negotiations demonstrate an element of self-determination, albeit limited, in the process. The Grand Council of the Crees (of Québec), which acted as a representative of the Cree Indians in the course of the negotiations, was the result of an initiative of the Cree community to form an entity for negotiations and for the subsequent exercise of self-government. The recognition and protection of specific rights, although expressed in a formal instrument emanating from Parliament, was thus the result of a negotiation process. The fact of the negotiation process itself may be taken as an implicit recognition of self-government. To the extent that the result of this process

adequately reflected the aspirations of the Cree Indians, it may be considered as a limited exercise of self-government. It was observed earlier that "self-government" can include a wide range of options and may be essentially related to specific matters such as trapping and hunting and the management thereof. According to s.48(1) of the Cree-Naskapi Act, the band is empowered to make by-laws in relation to hunting, fishing and trapping and the protection of wildlife. In relation to these specific activities, the band appears to be "self-governing", however limited by the power of the Minister to disallow certain by-laws pursuant to s.48(5). The power of the Minister extends to matters described in s.48(1)(b) of the Cree-Naskapi Act, which refers to sections 85 and 86 of the Act respecting hunting and fishing rights in the James Bay and New Québec territories (Québec)[13]. These sections provide for the power of Indian local government bodies to make by-laws "which are more restrictive than those made by the Government", the latter having the power to make regulations concerning wildlife protection for example through the establishment of hunting and fishing quotas and the determination of endangered species, pursuant to s.84 of the act. These provisions in effect mean that the Indians do not have an exclusive power in relation to conservation matters, but that their by-laws can be overridden by the regulations of the Québec government if the Minister chooses to disallow "more restrictive" Indian by-laws.

The self-governing power of the aboriginal people in question is thus subject to limitation, even though the exercise of the rights is protected by s.35(1) of the Constitution Act, 1982. The conception of aboriginal self-government reflected in these particular provisions of the Cree-Naskapi Act appears to be similar to the one expressed by the B.C.C.A. in the Sparrow case, namely, that it is the competence of Parliament (or the provincial legislature) to regulate in matters of conservation[14]. As was submitted above, this approach does not seem to reflect

adequately the specific character of aboriginal rights[15]. For this reason, it is difficult to consider the Cree-Naskapi Act as a adequate implementation of self-government, despite the fact that it was the result of a negotiation process and thereby received the informed consent of the Indian communities in question. However, it must be noted that the Cree-Naskapi Act was only meant to be the first step of a negotiation process, as indicated by its preamble, which states that "... this Act is not intended to preclude the James Bay Crees and the Naskapis of Québec from benefitting from future legislative or other measures respecting Indian government in Canada ...".

III. The Sechelt Indian Band Self-Government Act

The Sechelt Act[16] was passed in June 1986 pursuant to an informal agreement between the federal government and the Sechelt band of British Columbia. In its preamble, the act states that it was enacted for the purpose of enabling the band to exercise self-government over its lands. The preamble further indicates that the legislation was approved by the members of the band in a referendum. S.35 provides that the application of the Indian Act is subject to the act itself and to the constitution and laws made by the band. The act establishes the band as a legal entity. It provides that certain elements shall be contained in the constitution of the band, which can be declared in force by the Governor in Council.

The legislative powers granted to the band council are similar to those enumerated in the Cree-Naskapi Act. The act does not make express reference to any competence of the band in relation to the enforcement of its by-laws and to the administration of justice. These powers may fall under the general competence of the band council "to make laws for the good government of the band". The

Sechelt Act represents a departure from the system established under the Indian Act in that it confers on the band a greater capacity to control and administer its own affairs. In a statement to the House of Commons when the Sechelt Act was tabled, the then Minister for Indian Affairs, David Crombie, said that the legislation "will restore self-governing rights to the Sechelt Indian community"[17]. However, the act itself does not expressly recognize an inherent aboriginal right to self-government, although it confers on the bands some degree of autonomy and the capacity to exercise a form of self-government. The act in s.3 makes reference to s.35 of the Constitution Act, 1982, and provides that it shall not derogate from any existing aboriginal right. The type of self-government can be compared to that of a municipality. In this respect, the authority conferred upon the band is more a delegated authority than an original and independent one. S.15 of the act expressly contemplates the possibility of a delegation of legislative powers by the legislature of British Columbia to the band council. The act provides in s.23 that the title to all lands is transferred to the band in fee simple. Since the band is a legal entity with the capacity to enter into contracts and agreements, its position is analogous to that of a private owner of land. This would suggest that provincial laws relating to property and civil rights under s.92(13) of the Constitution Act, 1867, are applicable to the Sechelt lands. Under s.88 of the Indian Act, all provincial laws of general application apply on reserve lands, except when otherwise provided by a treaty. The Indian Act was passed by Parliament pursuant to s.91(24) of the Constitution Act, 1867. The application of provincial laws on reserve lands is thus determined by the exercise of federal competence. The Sechelt Act, also passed under s.91(24), transferred the title to the lands to the band. The question then arising is to what extent this transfer of title has affected the federal government's jurisdictional competence under s.91(24), since the lands

of the Sechelt band are no longer "reserve lands" in the meaning of the latter section. This could mean that the province may forthwith assume legislative competence in respect thereof. The paradox effect may also be that the Sechelt Act itself will no longer be applicable to the lands in question. The exact scope of the band's jurisdiction thus appears to be unclear and possibly subject to infringement by the province with regard to the lands. Without examining this issue in more detail, it appears that the effect of the Sechelt Act is not to "vacate ... areas of jurisdiction to recognized Indian governments", as recommended by the Special Committee[18]. Rather, it seems that the province could "occupy the field of legislation"[19] in the place of the band. With regard to the application of provincial laws of general application, the Sechelt Act appears to be more restrictive than the Cree-Naskapi Act. The latter in s.4 contains a presumption against the application of provincial laws ("Provincial laws of general application do not apply to the extent ..."), whereas the Sechelt Act provides in s.38 that "Laws of general application of British Columbia apply ... except to the extent ...". In that respect, the Sechelt Act does not significantly depart from the equivalent provision of the Indian Act (s.88).

These last two examples of existing models of self-government do provide some indication of what is meant by self-government in the Canadian context. It is difficult, however, to draw general conclusions from them. In both cases, the legislation was passed subsequently to individual agreements (formal or informal), not as a result of a right to self-government entrenched in the constitution and legally defined. A legal definition of the right to self-government is still awaited. Although individual arrangements such as the Sechelt and the Cree-Naskapi Acts may be satisfactory to the particular Indian nations concerned, it is submitted that the right to self-government must be defined and entrenched in the constitution,

in order to provide a solid legal basis for further self-government arrangements in response to the aspirations of all aboriginal peoples in Canada. A constitutional definition of the right to self-government could take the form of a Charter of Aboriginal Rights, laying down the essential criteria and elements of aboriginal self-government, for example with regard to their jurisdiction and their constitutional position within the Canadian confederation. Recent proposals made in this regard may provide further guidance as to the content of the right.

CHAPTER 11

Proposed Models of Self-Government

I. The recommendations of the Special Parliamentary Committee on Indian Self-Government

The Special Committee on Indian Self-Government was established in 1982, with a mandate to "review all legal and related institutional factors affecting the status, development and responsibilities of Band Governments on Indian Reserves" and to make recommendations to that effect. In particular, the committee was asked to take into account constitutional aspects such as the competence of the federal government under s.91(24) of the Constitution Act, 1867 and the impact of s.35 of the Constitution Act, 1982[1]. The committee made, inter alia, the following specific recommendations and observations:

- that the right to self-government be expressly stated and entrenched in the Constitution of Canada[2].
- that the Indian Act was completely unacceptable as an instrument for implementing self-government for Indian peoples,[3],
- that three distinct legislative measures should be taken, namely the enactment of an Indian First Nations Recognition Act committing the government to recognize Indian governments pending their constitutional recognition; legislation authorizing the federal government to enter into agreements with recognized Indian governments as to their jurisdiction; legislation under s.91(24) of the Constitution Act, 1867, to occupy all areas of competence necessary for Indian Nations to govern themselves effectively and to ensure that the

application of provincial laws on Indian lands would be subject to Indian consent[4].

- that Indian Nations should have full legislative and policy-making powers on matters affecting Indian peoples, and in particular,
- that Indian Nations must have the full right to control their own lands and that they should therefore have exclusive jurisdiction over activities on reserves,[5]
- that special representation of Indians in Parliament was not the best way to promote Indian rights[6]
- that the implementation of its recommendations was also a means to satisfy international standards relating to Indian Nations[7].

The model advocated in these recommendations amounts to a third order of government for aboriginal peoples within the Canadian federation. This seems to be in accord with the claims made by aboriginal peoples.

The federal government submitted a response to the report of the committee in 1984[8], in which it agreed with the proposition that Indian communities were historically self-governing[9] and stated that it intended to introduce in Parliament legislation to establish a framework for Indian self-government[10]. Under that legislation, "an Indian First Nation Government would be recognized as having certain powers defined in the Act"[11]. Aboriginal and treaty rights protected under s.35(1) would remain unaffected[12]. In the view of the government, the legislation was to be flexible so as to encompass several options according to the aspirations of Indian nations, so that the relevant "unit of self-government"[13] could be determined by the Indian peoples. The application of the new legislation would be dependent on the choice of Indian Nations, to be articulated in a "democratic process"[14]. With regard to the jurisdiction of Indian governments, the legislation would, according to the government, constitute a basis for corresponding

agreements, which would allow Indian governments to exercise "a wide area of jurisdiction"[15] in respect of matters falling under federal or provincial competence. The response of the government thus appeared to pave the way for more effective aboriginal self-government. However, it still reflected a somewhat paternalistic approach to Indian self-government, in that it referred in the first place to the government's "special responsibilities for Indian people"[16] and its "commitment to the preservation and enhancement of Indian culture and heritage".

Legislation of the kind proposed by the government was subsequently introduced in the House of Commons after hurried consultations with the Indian leadership. The proposed statute provides an example of the legal character an aboriginal self-governing entity may assume in the future.

II. Bill C-52

Bill C-52[17] was tabled in the House of Commons in June 1984. The bill never became law. Shortly after its first reading, the Turner government was defeated in the federal elections and the bill was not reintroduced in the newly elected House.

The bill was named An Act relating to self-government for Indian Nations. Its preamble recognized that "Indian communities in Canada were historically self-governing" and affirmed the commitment of the government and Parliament of Canada to provide for "the recognition of the constitutions of Indian Nations and the powers of their governments". S.6 of the bill provided for this recognition, subject to certain conditions such as the establishment of basic democratic institutions. An interesting feature is the condition that the Indian constitution should provide for the application of the Charter of Rights and Freedoms and should respect Canada's international obligations and the provision that every law made by an Indian Nation would have to be in conformity with the Charter and with

international human rights instruments signed by the government of Canada. A special panel to examine applications for recognition was to be set up. The objects of Indian governments as described in s.15 were, inter alia, the protection and enhancement of individual and collective rights, the promotion of the general welfare of the community and its cultural heritage, and the use and management of land and resources. Among the legislative powers were matters such as education, local taxation, voting, membership and enforcement of laws. Among the executive powers of the Indian government was the capacity to enter into agreements with the federal or provincial governments. Provision was also made for additional legislative and executive powers to be acquired by way of agreements with the Minister. Among these additional powers were matters such as public health, public order, environment, agriculture and the administration of justice. Under s.26, the Minister had the power to appoint an administrator to exercise the essential functions of the Indian government if he was of the opinion that the Indian government was no longer able to perform its functions.

Bill C-52 differed in several aspects from the existing legislation examined above. It can be noted that it did not prescribe the organs of Indian self-government, but made reference to Indian "governments", various "mechanisms" and "systems" through which the powers had to be controlled according to democratic principles. The Sechelt and Cree-Naskapi acts provide for the maintenance of the already established system of band councils and for specific rules of electoral procedure, which however depart from the Indian Act model[18] in this respect. The model of Bill C-52 left even more room for the development of institutions adapted to the individual conceptions of the different bands. This can be explained by the fact that Bill C-52 purported to be a framework legislation applicable to all Indian nations of Canada. With regard to

the jurisdiction of Indian governments, it conferred powers in relation to important matters such as public health, public order, environment and the administration of justice subject to agreements with the Minister. These powers are conferred to the band councils without any subjection to control by the minister in the Sechelt and Cree-Naskapi acts. The power of the Minister to appoint an administrator for the Indian Nation at his discretion in the event of its inability to function is however also not found in the latter act. The panel for the recognition of Indian nations was to comprise a chairperson and six members, three of which were to be Indians. However, the Minister merely had to consult with Indian representatives before making the appointments to the panel, so that these could not be vetoed by them. Bill C-52 thus did not confer an autonomy for the decision of vital matters upon Indian communities but maintained the control and supervision of the government.

The proper evaluation of Bill C-52 as a model of self-government is rendered difficult by its dual character. On the one hand, Bill C-52 introduced a number of new concepts in the field of aboriginal self-government and did provide for a range of powers for Indian governments going far beyond those provided by previous legislation. In this respect, Bill C-52 demonstrated an attempt to "clear the field" of provincial and federal jurisdiction. Bill C-52, to the same extent as the Cree-Naskapi Act, could be seen as a first step in a negotiation process with the objective to confer on Indian Nations a wide measure of self-government. Upon a wide interpretation, then, Bill C-52 contained the potential for an effective exercise of self-government.

If the language of the bill is interpreted strictly, on the other hand, it can be said that the federal government unilaterally spelt out the conditions under which Indian governments would be recognized and subjected them to its scrutiny. This is

evidenced in particular by ss. 26 and 27 which provided for the administration of Indian governments by an appointed administrator in case of their "breakdown" and left a wide measure of discretion to the minister. Under s.31, any law enacted by an Indian government could have been disallowed by the Governor in Council. According to s.40, all federal laws were to remain applicable to and in respect of Indian Nations, subject to their constitutions and laws. S. 41 however spelt out a presumption against the application of provincial laws. The basic principle thus remained that Parliament had jurisdiction over Indian Nations, except for those areas of jurisdiction it would have agreed to "vacate". The degree of "self-determination" thus appears to be limited. Self-government in a strict sense would have been made possible by Bill C-52, but within limits dictated by Parliament. Finally, it may be noted that the operative provisions of Bill C-52 did not make any reference to the Constitution Act, 1982, and to its provisions on aboriginal rights. It did not recognize any right to self-government. The self-governing powers granted to the Indian Nations would not receive constitutional protection under s.35(1) of the Constitution Act, 1982, unless the "agreements" referred to in s.17(2), s.18, s.22 and s.23 of Bill C-52 were deemed to be "treaties" in the meaning of s.35(1). However, these agreements would not necessarily have spelt out rights of Indian Nations. It thus seems that Parliament could repealed Bill C-52 (had it ever come into force) at any time. The value of the self-government model contemplated by Bill C-52 is in that respect reduced since it ultimately would have rested on the authority of the federal government.

III. The proposals made at the 1987 First Ministers' Conference on Aboriginal Constitutional Matters

The focus of the proposals made at the 1987 FMC was the entrenchment of a right

to self-government. In this respect, they differed from the previous legislative enactments and proposals which did not make any express reference to the right to self-government. For that reason also, they only represented a proposal for a constitutional framework as a basis for individual models of self-government. Such a constitutional framework would however accommodate a broad range of individual options and thereby leave the most room for aboriginal self-determination and the exercise of a right to self-government, compared to Bill C-52, which contained detailed provisions despite its character as framework legislation.

1. The position of the federal government

The position of the federal government for the 1987 FMC was that a right to self-government could be entrenched in the constitution subject to a definition of the right by subsequent agreements. S. 35.01 of the federal draft amendment[19] submitted at the conference provided that aboriginal peoples had the right to self-government within the Canadian federation but that the scope of aboriginal powers and jurisdiction should be determined by way of agreements. S. 35.03 of the draft provided that self-government rights set out in these agreements would be deemed to be treaty rights within the meaning of s.35, if so declared in the agreement and if approved by Parliament or by the provincial legislatures. S. 35.04 provided for the application of the Charter of Rights and Freedoms "to the extent that its application is appropriate in the circumstances". S. 35.06 provided that nothing in s.35.01 would derogate from the jurisdiction, legislative powers or rights of Parliament or any of the provinces except in accordance with the agreements under s.35.03. Finally, the draft provided for a review conference within ten years after the coming into force of the amendment. The position of the government

stood in sharp contrast to the position of the aboriginal groups.

2. The aboriginal position

The main features of the joint aboriginal proposal[20] were

- that an inherent right to self-government was recognized under s.35(01);
- that the federal and provincial governments be committed to negotiating agreements to identify the scope of self-government and related matters;
- that it be ensured that aboriginal governments had the necessary taxation powers within their territories;
- that the federal and provincial governments be committed to provide aboriginal governments with sufficient financial resources to enable them to govern their affairs.

A similar proposal was submitted by the ICNI[21]. It provided that:

- the right to self-government was included in the rights protected under s.35(1), either as a treaty right of an aboriginal right;
- the federal government would be committed to negotiate self-government agreements with aboriginal groups and with the provinces;
- self-government agreements would be ratified by Parliament or by the provincial legislatures;
- the government would be committed to ensure that aboriginal governments had the necessary power of taxation and to provide them with adequate financial assistance;
- aboriginal persons and collectivities could apply to a court of competent jurisdiction in case of an infringement of their rights.

3. Evaluation

It is apparent from these proposals that the federal and the aboriginal proposals were fundamentally opposed. Whereas the government wanted to entrench a contingent right, the aboriginal proposal was based on a constitutional recognition of an inherent right to self-government. The aboriginal draft did not make the right conditional on the negotiation of agreements, but considered it as falling under the rights already protected under s.35(1) of the Constitution Act, 1982. The aboriginal draft provided a definition of s.35(1) in that it defines the right to self-government as an aboriginal or treaty right.

It is apparent from the federal draft that the right to self-government was to remain an "empty shell" until defined by agreements. The non-derogation clause relating to the government's jurisdiction appears to indicate that the ultimate control over Indian jurisdiction was to rest with the federal and provincial governments. The federal draft was inconsistent with the recognition by the government that the right to self-government is a historical right of aboriginal peoples. This recognition has been expressed on various occasions[22], but did not find its way into the federal draft. The clause stating that nothing in the first three sections derogated from any aboriginal rights (s.35.05) does not seem to be compatible with the provision protecting the federal and provincial jurisdictions (s.35.06). The negative wording of the latter suggests that the present federal or provincial jurisdiction in respect of Indians was to remain unchanged as a basic rule, from which exceptions could be made by way of individual agreements. To confer any meaning on the protective clause in s.35.05, it has to be interpreted in the sense that "any rights of the aboriginal peoples of Canada" do not include a right to self-government, which would be consistent with the government's position relating to s.35(1). In effect, the aboriginal peoples may be prevented from reasserting their sovereignty. S.35.06 in effect means that the

right to self-government does not imply any separate or independent jurisdiction of Indian Nations, but the establishment of some "jurisdictional enclaves"[23] within provincial jurisdiction. Within these enclaves, Indian Nations may possibly obtain a wider range of responsibilities and competences than at present. Nonetheless, the federal draft would not constitute an adequate basis for the establishment of a third order of government within Canada. By contrast, the aboriginal draft, by making separate provision for the recognition of an inherent right to self-government and for subsequent negotiations, put the right into its proper context, leaving room for arrangements adapted to the conceptions of the different bands.

The federal draft in s.35.01(2) further made reference to the "proprietary rights" of the bodies exercising the right to self-government, which raises the question as to what extent the aboriginal rights to land and to its resouces would be affected by the amendment. The term reappeared in s.35.06, which referred to the proprietary rights of the federal and provincial governments. This use of terms and the provision that these mutual proprietary rights should be defined by agreements suggests that Indian Nations would be considered as private land owners, which raises the same issue as under s.23 of the Sechelt Act[24]. The federal and provincial governments by the use of these terms and the corresponding non-derogation clause possibly intended to avoid any infringement of their competences under s.92A of the Constitution Act, 1867, in particular of the provincial competence in respect of natural resources. The federal draft could thus be interpreted as excluding any rights to natural resources and their management from the scope of "aboriginal rights" protected under s.35(1) of the Constitution Act, 1982, an interpretation which could be supported by s.35.05 of the federal draft if the latter is interpreted as indicated above, namely as excluding the rights

referred to in the draft from the scope of "aboriginal rights" protected under s.35(1).

Another feature of the federal draft was the necessity of a trilateral negotiation process between aboriginal communities and the federal and provincial governments. If differed from the aboriginal proposal insofar as the latter only provided for the participation of the provinces if a matter under their jurisdictional competence was affected. In the trilateral process, the provinces would in effect have had a veto power over any of the agreements contemplated by s.35.02, even though their interests would not have been directly affected. This entrenchment of a provincial role in the constitutional process relating to aboriginal matters would represent a significant change from the present situation.

S.35.04 of the federal draft provides that the Charter of Rights and Freedoms would apply to all aboriginal entities exercising the right to self-government. In this respect, it placed them on the same level as the federal or provincial governments. However, subs.(2) would have allowed for the application of s.33 of the Constitution Act,1982, which permits a derogation from the Charter's application. This raises the issue of the protection of individual rights and of the relation between individual and collective rights. Aboriginal peoples place more emphasis on the protection of collective rights and their governments would be likely to apply the latter clause. As noted above[25], s.25 of the Charter can be construed as a derogation from its application to aboriginal governments. This finding may obviate the need for a reference to s.33. The question of the application of the Charter may have implications on the extent of the aboriginal government's jurisdiction and will be examined in more detail further below.

Generally, it can be said that the federal draft did not provide for a satisfactory model of self-government. Aboriginal governments could only have been

established pursuant to agreements and not pursuant to an entrenched right to self-government. The jurisdiction of the federal government would have remained as an organizing principle. The wording used and the general structure of the federal draft suggest that aboriginal governments would have received a delegated authority on an individual basis, similar to that of municipalities, and would not have been recognized as entities exercising an original right to self-government. It may be contended that the right to self-government and its specific negotiated elements would be entrenched subsequently and thereby be placed on a higher level than municipalities. The possibility of negotiating the specific implementation of the right to self-government does provide for an element of free choice for the aboriginal peoples concerned. However, the range of options offered by the federal proposal would be too limited to allow for the full exercise of self-determination and self-government. As with Bill C-52, the federal government maintained its ultimate authority and prescribed the bounds within which self-government would be exercised, without any previous constitutional unconditional guarantee of the right to self-government. For this reason, the federal draft cannot be considered as an implementation of Canada's international obligations.

IV. Nunavut/Dene Public Government

The concepts of aboriginal self-government underlying the Nunavut and Dene proposals were initiated by the Indian and Inuit populations in the Northwest Territories. The specific legal, historical and grographical situation of the Northwest Territories gave the original impulse to that development[26]. The main feature of both concepts is that they advocate a public - as opposed to ethnic - government representing all persons residing in the Nunavut and Dene territories[27]. The Inuit and the Dene have proposed the division of the Northwest

Territories into the territories of Nunavut and Denendeh.

The Canadian government appears in principle willing to accede to the proposal. On January 1987, an agreement concerning the division of the territory was concluded between the Western Constitutional Forum and the Nunavut Constitutional Forum, representing the residents of the Northwest Territories and the Dene and Inuit populations respectively[28]. The agreement was preceded by a referendum held in 1982, which approved the division[29]. The boundary agreement establishes a boundary between the two territories and sets out the constitutional development to take place in the near future.

1. Nunavut

The model of government envisaged by the Inuit people is described in the Nunavut Constitutional Proposal approved in September 1985 by the Nunavut Constitutional Conference[30]. Only two aspects will be addressed here, namely jurisdiction and the protection of individual rights. The Nunavut proposal emphasized the need for an effective transfer of jurisdictional powers necessary to preserve the "essential identity" of the Inuit population and those relating to economy and decision-making[31].

With regard to human rights, the proposal affirms the respect for individual and minority group rights, to be implemented through a specific Human Rights Code for Nunavut[32]. The specific aspects of the division of powers and the jurisdiction of the Nunavut government were elaborated in a working paper commissioned by the Nunavut Constitutional Forum[33]. It is apparent from the working paper that the Nunavut government would or rather should have a status similar to that of a province in the Canadian federation, i.e. have a range of exclusive powers corresponding to the specific needs of Nunavut, but with provision for concurrent

powers and joint-policy making in certain areas[34]. Nunavut is regarded as part of a federation, the characteristic of which is the existence of "independent and coordinate political units on a territorial basis which share 'internal sovereignty' with the federal government[35]. The concept of a third order of government is clearly apparent here. Emphasis is placed on the criterion of the accountability of the government to its people and the specific needs and aspirations of the Nunavut population, which differ from the rest of Canada[36]. Despite the majority population of Inuit in the north, the Nunavut government would be a public government, representing all the residents, however with some safeguards with a view to preserving the specific cultural, linguistic and economic traditions[37].

The proposed exclusive powers relating to self-government would include the organization of government institutions and the establishment and amendment of a Nunavut Constitution[38]. Other legislative powers would include matters of a local and private nature, similar to the competence of provinces under s.92(16) of the Constitution Act, 1867[39]. In the field of natural non-renewable resources, as an example of economic matters, the proposal advocates that powers should ultimately be exclusive, similar to those of the provinces under s.92A of the Constitution Act, 1867[40]. With regard to the protection of human rights, the enactment of a specific instrument was proposed[41]. A recent survey concerning this proposal concluded that the Charter of Rights and Freedoms would probably afford sufficient protection of civil and political rights, but that a Human Rights Code should be enacted by the Nunavut legislative assembly to deal with discrimination. It was further recommended that social, cultural and economic rights should be stated as non-enforceable objectives in the Nunavut Act (which would create Nunavut) or its preamble, and that the latter should include a reference to the Universal Declaration of Human Rights[42]. The question of

aboriginal or collective rights was not addressed specifically in the survey nor in the official proposal, which only referred to s.35 of the Constitution Act, 1982, as one of the provisions "of particular interest to residents of Nunavut"[43].

2. Dene public government

The Dene proposal to a large extent resembles the one of Nunavut.

It also advocates the creation of "a new province-like jurisdiction", entailing "a clear division of powers with the federal government", based on the fact of original occupancy and reflecting Dene values and political traditions[44]. The proposal asserts that Denendeh (as the new entity would be named) should have the same basic constitutional powers each province has, relating inter alia to the governmental institutions, local trade and commerce, natural resources, local community development[45]. The Dene government would also be a public government[46]. One feature which is not apparent to the same extent in the Nunavut proposal is the specific power to control lands and resources assumed by the Dene as the majority population in Denendeh. The proposal states that, "The Dene will maintain exclusive ownership, use, control, occupancy and resource ownership over a large area of land within Denendeh ... With respect to the development of non-renewable resources on exclusive Dene land, the Dene will strive to make decisions that are consistent with resource development decisions made by the government of Denendeh"[47].

With regard to the protection of fundamental rights and freedoms, a "Charter of Founding Principles" entrenching fundamental rights is also part of the proposal. However, contrary to the Nunavut proposal, the Dene Charter would entrench specific collective aboriginal rights of the Dene, in addition to the provisions

protecting individual rights and freedoms, which have been inspired by those of the I.C.C.P.R.[48]

3. Evaluation

The Nunavut and Dene proposals provide for a model of aboriginal self-government fundamentally different from others in that they contemplate a public and not an ethnic government. A corollary thereof is the need to define the position of the aboriginal majority within the proposed territories. The Dene proposal is more explicit in this respect in that it advocates specific Dene control and powers within Denendeh and consequently the entrenchment of specific aboriginal rights. Contrary to the Nunavut proposal, the implication of the Charter of Founding Principles appears to be that the Charter of Rights and Freedoms would not apply to the Denendeh government. In the case of Nunavut, the Charter of Rights would presumably apply. Since both proposals advocate the creation of a new province-like jurisdiction, this creation would take place under the Canadian constitution. The protection of aboriginal rights would then take effect through the application of s.35 of the Constitution Act, 1982.

The Nunavut and Dene proposals, if implemented, would appear to represent an adequate exercise of self-government, since both models would provide for sufficient autonomous powers. In terms of the process of self-determination, it appears that the elaboration of the proposals and the creation of the Nunavut and Western Constitutional Forums was determined "freely ... without external interference", to use the wording of resolution 2625. The Dene proposal contains a detailed procedural scheme comprising several phases from "consensus building" to "negotiation", "ratification" followed by a referendum by all eligible residents

leading to "final agreement and implementation"[49]. It must be noted, however, that the creation of the two constitutional forums only represents a preliminary stage in the "self-determination" of aboriginal peoples of the north. It remains to be seen to what extent the federal government will exercise influence or even interfere with the envisaged process. It may also be noted that the two proposals do not expressly mention the right to self-determination or to self-government, although they do refer to international human rights instruments. Nonetheless, the ongoing political process evidenced by these proposals can be regarded as an exercise of self-determination, albeit in an early stage. These proposals could be implemented by corresponding agreements between the federal government and the aboriginal peoples in question[50]. These agreements could then be formalized by legislative enactments such as those passed subsequently to the James Bay Agreement and to the negotiations with the Sechelt band.

CHAPTER 12

Legal Character of the Various Models

Introduction

The description of the existing and proposed models of "self- government" (some of them being more models of self-administration) will identify some characteristic legal features which aboriginal governments should possess to be qualified as self-governing. The constitutional framework underlying aboriginal self-government would have to be adapted consequently. The example of the U.S. model of Indian self-government may provide some illustration and guidance.

I. Character of the authority exercised by aboriginal governments

The issue of the source of the authority or jurisdiction to be exercised by an aboriginal entity is a fundamental one in the context of aboriginal self-government. If the authority exercised by the aboriginal entity is only delegated by Parliament, then it can at any time be curtailed or withdrawn by Parliament and is thus not compatible with self-government, since the ultimate decision-making power would rest with an authority external with regard to the aboriginal peoples. A body exercising delegated authority would be subordinated to Parliament or a provincial legislature. An example of delegated authority in the Canadian domestic context would be that of a municipality[1]. The power of Parliament (or of a provincial legislature) to delegate authority can be considered as one aspect of the principle of parliamentary sovereignty[2]. For this reason, retained aboriginal sovereignty would be inconsistent with any delegation of authority to an aboriginal government by Parliament. To the extent that the right to self-government is based on

retained sovereignty, the authority exercised by aboriginal governments can only be original.

In the context of the Canadian federation, this implies that any act of Parliament relating to aboriginal self-government can merely recognize original aboriginal authority and provide for the necessary adaptations in the Canadian domestic law. The proper characterization of the existing legislation relating to aboriginal self-government is however difficult.

On the one hand, it may be contended that the mere existence of an act of Parliament conferring certain powers of self-government on aboriginal entities does not necessarily imply a delegation of authority. Federal legislation such as the Cree-Naskapi or Sechelt acts can be distinguished from "ordinary" legislation delegating authority to subordinate bodies in that they were passed subsequent to negotiations between the government and aboriginal peoples. The rights protected under these agreements would fall under s.35(1) of the Constitution Act, 1982 (as "treaty rights") and thereby be entrenched. The subsequently passed legislative instruments cannot therefore limit or abridge these rights. The Cree-Naskapi and Sechelt acts, although formally conferring powers on the aboriginal bodies set up under these statutes, did so subject to agreements and may thus be considered as a special category of legislation recognizing a treaty right to self-government in respect of the matters set out therein. This would appear to be in conformity with the intentions of the drafters. The Sechelt Act for example was intended "to restore self-governing rights to the band"[3]. Bill C-52 was based on similar intentions[4]. Had the intention of the drafters been to delegate authority to the aboriginal self-governing entity, it may be argued, a negotiated agreement preceding the legislation would not have been necessary.

On the other hand, the wording of the Cree-Naskapi or the Sechelt acts does suggest that the by-law making power of the band councils is granted by and therefore derived from the authority of Parliament. Both acts were passed pursuant to s.91(24) of the Constitution Act, 1867, and replaced the Indian Act in its application to the bands in question. These statutes were thus passed in the exercise of Parliament's jurisdiction over Indians. While Parliament did attempt to "clear the field" of jurisdiction in the Cree-Naskapi Act by establishing a presumption against the application of federal and provincial laws, the Sechelt Act however was based on the presumption that federal and provincial laws did apply to the band and to reserved lands. It was already noted that none of the two acts expressly recognize a right to self-government[5].

In the light of these different arguments, the legislation relating to aboriginal self-government could be qualified as expressing "a negotiated and entrenched delegation of authority". In other words, the aboriginal self-government contemplated by the legislation has a higher status than that of a mere recipient of delegated authority, but is not expressly recognized as exercising original sovereign authority. It may be argued, though, that there is an implicit recognition of original sovereignty if "self-government" is seen in relation to specific activities[6]. Since the legislation was the result of negotiations by the interested parties, it could be considered as a limited expression of self-determination on the part of the aboriginal peoples. It is submitted, however, that the stages of the process of implementing the right to self-determination of peoples should be reversed, namely, that the content of the right should be negotiated subsequently to its constitutional recognition and entrenchment.

II. Constitutional protection/constitutional recognition of aboriginal jurisdiction

The Dene and Nunavut models and the recommendations of the Special Committee provide a good illustration of the jurisdiction of future aboriginal governments. Aboriginal self-determination and self-government even within the Canadian federation would imply an exclusive jurisdiction, i.e. internal sovereignty, for the fundamental subject-matters relating to the government and the economy. However, since this jurisdiction would be exercised "within the Canadian federation", the question arises as to the constitutional recognition or even protection of an autonomous aboriginal jurisdiction.

It must be noted that the recognition of an inherent right to self-government with corresponding jurisdiction does not entail that aboriginal peoples would revert to their ancestral organization, i.e. that the "clock would be turned back". The existence of the domestic Canadian legal framework and political institutions has to be taken into account and cannot be bypassed by aboriginal peoples, in particular in situations where they come in close contact with white people and their socio-economic system. As Nemetz J. stated in the Sparrow case with regard to fishing, "Any definition of the existing right must take into account that it exists in the context of an industrial society with all of its complexities and competing interests"[7]. This does not, however, warrant the conclusion - as submitted earlier[8] - that Parliament has to maintain jurisdiction over aboriginal peoples. What it does imply is that aboriginal jurisdiction and federal jurisdiction have to co-exist and to cooperate or share jurisdictions in certain areas, as was suggested in the Nunavut proposal[9]. This may help to explain the apparent paradox that an inherent right to self-government cannot be granted to or conferred upon aboriginal peoples, but despite that fact has to be recognized and implemented through the means of the

existing legal and in particular constitutional framework in Canada. If aboriginal entities are to exercise autonomous jurisdiction, this will necessarily entail changes to the scope of federal or provincial jurisdiction. These changes would have to be effected through the existing legal mechanisms. Aboriginal self-government within confederation would imply some form of constitutional recognition of the existence of a new entity. This does not mean that the constitutional recognition would have a constitutive effect. The present constitutional amending procedures only provide for the participation of the provinces and of the federal government for the creation of new provinces. However, even if the necessary majority of provinces did not consent to a constitutional amendment admitting an aboriginal entity (e.g. Nunavut or Denendeh) into confederation, it would nonetheless exist de facto. An analogy may be drawn here with the doctrine of recognition under international law, which states that the recognition of new states has only declaratory character[10].

"Constitutional recognition" of aboriginal governments, then, it is submitted, appears to have political effect only. If the issue is viewed in the context of self-determination and of Canada's international obligations, then Canada is under a legal duty (under international law) to recognize aboriginal peoples exercising their right to self-determination and the governmental institutions subsequently established. The appropriate means of implementing the subsequent integration into Canadian confederation would be by way of agreements negotiated between the Canadian federal government and the aboriginal people concerned, and possibly with the participation of the province directly affected. This mode would be in accord with international law. Para. 5(4) of resolution 2625 mentions the "integration with an independent State" as one of the modes of implementing the right to self-determination.

The existence of such a third order of government within Canada would not run counter, it is submitted, to the spirit of the Canadian constitution, which according to the Preamble of the Constitution Act, 1867, should provide for "the eventual Admission into the Union of other Parts of British North America". The term "other parts" could be interpreted as encompassing aboriginal peoples as new legal and political entities within the Canadian federation. It may be noted in this context that by the time of enactment of the British North-America Act, 1867[11], the Indians were considered as distinct entities, a fact which was reflected in the various proclamations issued (among them the 1763 Royal Proclamation) and the treaties concluded between them and the British colonizers. The same fact ultimately found expression in s.91(24) of the B.N.A. Act, 1867. In this respect, this early negotiation process is underlying the B.N.A. Act, 1867. The negotiation of aboriginal autonomy would thus be in accord with the intentions of its drafters.

The contention that the existence of sovereign units other than provinces within a federal state is legally possible can be supported by the United States' example.

III. The U.S. model of Indian government

It is beyond the scope of the present discussion to provide a detailed analysis of the U.S. approach to Indian self-government, which has witnessed considerable changes over time. Only the major features of the present approach shall be described here[12].

The main distinction between the Canadian and the U.S. approaches is that the concept of inherent and retained sovereignty is expressly recognized and applied by U.S. courts[13]. The U.S.S.C. held in 1978 that an Indian could be convicted for the same offence by a federal and a tribal court, thereby acknowledging the separate jurisdiction of tribal courts[14]. The U.S.S.C. stated that "... the powers of self-

government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among the members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status" and went on to quote the dictum from Worcester v. Georgia "that a weaker power does not surrender its independence - its right to self-government, by associating with a stronger, and taking its protection"[15]. The U.S.S.C. found that "Indian tribes have not given up their full sovereignty" and held that this retained sovereignty was the source of the tribe's separate criminal jurisdiction[16].

Under U.S. constitutional law, then, Indian tribes are considered as units with original, albeit limited sovereignty. A consequence thereof is that the constitutional Bill of Rights does not apply to Indians tribes[17]. The U.S. Constitution grants Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" (Art. 1,s. 8, para.3. The reference to Indian tribes and foreign nations in the same heading indicates that they were already considered as independent entities in early U.S. constitutional law. This view was confirmed by the early decisions of the U.S.S.C.

Contrary to the Canadian constitution, however, the U.S. Constitution does not protect the right to self-government from infringement by federal laws. An example of a federal law restricting the powers of Indian tribes is provided by the Indian Civil Rights Act[18], which imposes limitations on Indian tribal powers relating to certain fundamental rights and freedoms. Another federal law, the Indian Self-Determination Act[19], provides for the possibility of increased Indian control over their affairs by way of agreements to be concluded between the federal government and Indian tribes upon the request of the latter. On the whole, however, the federal control over Indian tribes through the Bureau of Indian Affairs

(the U.S. equivalent of the Canadian Department of Indian Affairs and Northern Development) is still very extensive[20], so that in effect Indian tribes in the U.S. appear to have a similar range of powers than their Canadian counterparts under the Indian Act. The only significant difference remaining between the two approaches thus seems to be one of terminology, the retained sovereignty of Indian tribes being explicitly acknowledged in the U.S., whereas the concept is only implicitly contained or indirectly referred to in Canada. Sanders notes that the explicit recognition of tribal sovereignty is "clearly important" as a "founding principle"[21], without however indicating the practical scope of this importance. Despite the express recognition of retained aboriginal sovereignty, the absence of constitutional entrenchment remains as an obstacle to effective self-determination. The U.S. model thus does not provide further guidance in the present discussion.

Chapter 13:

The Conflict between individual and collective rights

Introduction

This chapter will examine one specific issue concerning the implementation of a right to self government by the aboriginal peoples.

It was noted earlier that one of the features of Bill C-52 was the reference to the Charter and to international law. The application of the Charter to the self-governing entities was also one element of the federal draft proposal at the 1987 FMC. These examples raise the issue of the relation between individual human rights and collective rights. If self-government is seen in the general context of human rights, the question arises as to the application of indivual human rights standards to the entity exercising its collective right to self-government. This issue can be addressed from both the domestic and the international perspective.

I. The Charter and the right to self government

In the course of the present discussion, it was examined whether s.25 had the effect of exempting the self-governing entity from the application of the Charter[1]. The specific character of aboriginal rights and of aboriginal societies was also referred to in that context[2].

The right to self-government of aboriginal peoples is an "aboriginal right" protected under s.25 of the Charter. It is submitted here that s.25 consequently has the effect of exempting the aboriginal entity exercising the right to self-government from the application of the Charter.

This proposition can be supported by the divergence of values underlying

aboriginal rights and those rights protected by the Charter.

The operative provisions of the Charter are concerned only with individual rights and freedoms. They reflect values of a liberal democracy based on the concept of individual liberty. The contrasting feature of aboriginal societies is the emphasis on collective values. This is not to say that aboriginal societies as a general rule do not recognize the concept of the individual as opposed to the collectivity and correspondingly of individual rights. The caveat expressed earlier[3] applies here. If specific aboriginal communities and specific activities are examined, the concept of the individual or of individual rights can be seen to exist in several instances. With regard to trapping activities, for example, anthropological evidence appears to indicate that families or individual trappers and not the communities are the relevant "units" in respect of the use and management of traplines[4]. The difficulty for external observers to assess the role of the individual trapper in this respect caused ambiguity in the legal definition of the corresponding rights and led to the introduction of registration systems failing to reflect adequately aboriginal needs and conceptions[5]. Despite this observation, it may nonetheless be said that the values underlying aboriginal societies are essentially collective, even though individual aspects are apparent. The aboriginal collectivity has at least as much importance as its individual members, which is not the case for a liberal democracy such as Canada. The Charter does not contain any provision concerning a duty of the individual towards the community, but merely reflects the state-individual dichotomy and the protection of the rights of the latter against infringement by the former[6].

For this reason, the application of the Charter to aboriginal entities is faced with an inherent difficulty. An illustration of the potential conflict between individual and collective rights is provided by the Lovelace case brought before the U.N.

Human Rights Committee in 1977[7]. At issue was an alleged discrimination on the grounds of sex. The relevant provision of the Indian Act (s.12(1)b) provided that an Indian woman lost her status as an Indian when marrying a non-Indian, which was not the case in the opposite situation. The government of Canada stated in its submission that the Indian community was divided on the issue of equal rights and that it should not be endangered by a legislative change[8]. Aboriginal groups have argued that an equality rights provision would endanger their collective rights, in particular the right to self-government. In a statement made before the House of Commons Standing Committee on Indian Affairs, the AFN said that the Charter was "in conflict with our philosophy and culture and organization of collective rights" and "As Indian people, we cannot afford to deal with individual rights overriding collective rights. Our societies have never been structured in that way, unlike yours, and that is where the clash comes as well with the Charter of Rights issue under the Constitution. If you isolate the individual rights from the collective rights, then you are heading down another path that is even more discriminatory"[9]. This statement, although it may appear to confirm the fears of the federal government that aboriginal governments would disregard individual human rights, is to some extent politically motivated rhetoric and should be read cum grano salis. Nonetheless, the aboriginal position was in essence supported before the Committee by legal scholars. Prof. Sanders pointed out - with regard to the determination of membership - that, "if ethnicity or cultural factors are to be an element in the determination of membership, it seems to me clear that they cannot be organized or administered on a national level"[10]. The Report of the Special Committee recommended that aboriginal rights should predominate over any claims of non-members to protection under the Charter of Rights[11].

At least with regard to equality rights, this debate can now be presumed to be

resolved, since s.35(4) of the Constitution Act, 1982, provides that the aboriginal rights protected under subsection (1) are guaranteed equally to men and women. The existence of a separate equality provision for aboriginal rights can be taken to indicate that the protection of individual aboriginal rights should be dealt with separately and not by the application of the Charter.

If the issue of diverging values is left aside, the applicability of the Charter to aboriginal governments would also appear to be incompatible with its own wording. S.32(1) provides for its application to Parliament and the provincial legislatures, as well as the respective governments, in respect of all matters within the authority of the former bodies. The Charter thus applies to all bodies set up under the authority of Parliament or a provincial legislature, bodies which therefore derive their authority from Parliament or a provincial legislature. It was noted earlier that aboriginal peoples exercising their rights to self-government would in theory not derive their authority from any of the institutions set up under the constitution[12]. As Sanders observes, "A tribe or band should not be seen as simply an extension of the federal government, in the way that a municipal government is an extension of a provincial government. It is of course, true that Indian governments long preceded the federal and provincial governments in this country. The tribes and bands were recognized by the British and the French. While there has been some reorganization of the tribal populations as a result of 300 years of colonialism, the fundamental fact is that Indian governments were not created by the constitution or by the Indian Act, but by Indians. The present Indian Act still recognizes what it calls "traditional" governments from some bands"[13] (emphasis added).

In view of the obstacle created by s.32(1) of the Charter and the above-mentioned divergence of values underlying the concept of aboriginal rights and an

individual rights instrument such as the Charter, it may indeed be argued that effective self-government implies that Indian Nations have the right to fashion their own legal system according to the values underlying their type of society. The result may be that the protection of individual rights may not play as prominent a role as it does in the Canadian society and legal system. The position of the federal government as apparent in the proposals discussed above is that aboriginal nations should be modelled according to the Canadian legal and political system, in particular according to the Charter. It is submitted here that this position reflects a paternalistic approach to the issue of Indian self-government which cannot be acceptable to aboriginal peoples. In a recent case before the S.C.C., Chief Justice Dickson said in referring to a decision of the S.C.C. taken in 1929 that the "language used by Patterson (who referred to Indian societies as being primitive) reflects the biases and prejudices of another era in our history; such language is no longer acceptable in Canadian law and is inconsistent with the growing sensitivity to Native rights in Canada"[14]. This statement can be applied to the position maintained by the Canadian government. It is submitted that, by interpreting s.35(1) of the Constitution Act, 1982, as encompassing a right to self-government, aboriginal peoples would be able to draft their own Charter of Rights, which would thereby receive implicit constitutional recognition. An example of a collective aboriginal rights instrument is the Charter of Founding Principles proposed by the Dene[15]. With regard to equality and aboriginal membership rights, it may be noted that section 12(1)(b) of the Indian Act has been repealed and that Indian bands have received a larger degree of autonomy for the determination of their own membership, which is also one aspect of self-government[16]. The question nonetheless remains as to how potential conflicts between individual and collective rights could be resolved.

It is proposed here that the reference to the international human rights instruments mentioned earlier may serve for this purpose.

2. International human rights law and the right to self-government

It was noted that the Charter is concerned with the protection of individual rights. The same can be said of the international human rights instruments. The right to self-determination protected in Art. 1 of the I.C.C.P.R. is an exception to the general focus of the United Nations on the protection of individual rights[17]. It has been argued that the right to self-government can be derived from the right to self-determination. It was also pointed out that the right to self-determination - and therefore the right to self-government - is a fundamental human right. If the relevant provisions of the Constitution Act, 1982, are interpreted in the light of international law, as suggested above, it is submitted that the right to self-government has to be exercised according to the international human rights standards. If aboriginal peoples invoke their right to self-determination under international law, international human rights standards should also apply to the entity exercising the right to self-determination or to self-government. As Humphrey notes, albeit not with reference to aboriginal peoples, "if the principle of self-determination is worthy of respect, it carries with it the corollary that a people that succeeds in determining its political future has the duty to protect any minorities that remain with its jurisdiction"[18]. This statement can be extended to the protection of individual rights generally. The apparent contradiction that the international human rights standards would be applicable to aboriginal governments, but that the Charter would not, can be explained by the differing characters of the international and the domestic legal orders. Whereas the latter can only serve as an instrument for the recognition of aboriginal self-government,

the former grants aboriginal peoples a limited subjectivity to the extent the right to self-determination is applicable to them. The application of the Charter to aboriginal governments would be incompatible, as noted above, with the exercise of original authority. As subjects of the right to self-determination under international law, however, aboriginal peoples may assert the right to self-determination against an independent state, which carries with it a corresponding duty of that state to promote the realization of the right. Under the international legal order, aboriginal peoples have emerged as distinct legal entities, exercising an inherent right based upon the principle of human dignity, the respect for which can be considered as the common goal of both individual and people's rights[19]. The respect for individual human rights has been qualified as a "yardstick for the definition and the exercise of the rights of peoples"[20]. Under international law, aboriginal peoples thus are not entities derived from other subjects of international law, but are recognized as independent "units", albeit with a limited subjectivity. The different position of aboriginal peoples in the domestic and international legal system justifies a different approach with regard to the subjection of aboriginal governments to international human rights standards.

It appears that aboriginal peoples would not object to the application of the international human rights law to their self-governing entities[21].

The formal application of international human rights law to aboriginal entities would however necessitate the participation of the Canadian government. The I.C.C.P.R. as an instrument protecting the right to self-determination and individual human rights is an international treaty to which Canada as a state is party, and which has to be implemented by legislation[22]. Its application to aboriginal governments, if the latter do not fall under Parliament's authority, would have to be effected through an act of incorporation by the aboriginal

government, since aboriginal peoples do not as yet have any capacity under international law to accede to international treaties and are correspondingly under no international obligation to respect individual human rights. In view of the recent developments in international law in relation to indigenous peoples, it may be necessary to re-define the relationship between states and indigenous peoples. At the 1987 session of the U.N. working group, indigenous representatives and individual jurists stated that indigenous peoples as subjects of international law should have access to the I.C.J. and be represented at the General Assembly[23]. The possibility for indigenous peoples to become parties to international human rights treaties would be another possible facet of their international subjectivity. These examples point towards a new direction in international law. It would however go beyond the scope of the present discussion to examine this issue in more detail[24].

CONCLUSION

The recent developments relating to the rights of the aboriginal peoples of Canada provide a unique illustration of the first stages of the development of "new" legal concepts (or of the re-emergence of old concepts), both from the domestic and the international perspective. The foregoing analysis attempted to bring together the recent developments in Canadian constitutional law and in international law. The right to self-government of the aboriginal peoples of Canada derives from their inherent right to self-determination, which finds its expression both in international law and, it is submitted, implicitly in the recognition of aboriginal rights in the Canadian constitution. From a strictly legal perspective, the right to self-government derives from the fact of original occupancy (as recognized in the domestic legal context) and from the right to self-determination under international law as two distinct sources. From a philosophical point of view, the inherent right to self-government is rooted in the concept of the fundamental dignity of all human beings, which underlies human rights both in domestic and in international law.

The discussion of the right to self-government under international and domestic law assumed the character of an overview, in view of the generality of the concept of "self-government". The generality of the analysis is also due, as was noted in the introductory chapter, to the global notion of "aboriginal peoples", which does not reflect the diversity of Canada's native population. The object of this analysis was not, however, to examine the specific situation of a particular native community, but to identify the legal framework within which the right to self-government can be exercised. Again, it is submitted that the identification of this legal framework is not constitutive of the right to self-government, the latter

deriving from the retained sovereignty of aboriginal peoples. A legal instrument such as the constitution may however serve for the recognition of the right and provide for the corresponding adaptation of the Canadian legal system.

It is submitted that this legal framework has to be defined first, so as to provide a firm basis for the specific implementation of the right. One of the basic elements of such a definition would for example be the necessary distinction, apparent both in domestic and in international law between aboriginal peoples and minorities.

The discussion of existing and proposed models of self-government provided some illustration as to possible implications for the Canadian legal order. The creation of a third order of government within Canada - taking into account geographical disparities - would appear to be an adequate implementation of an inherent right to self-government.

The first step for the creation of such a third order of government would be, it is submitted, the entrenchment in the constitution of the inherent right to self-government of the aboriginal peoples of Canada and the constitutional definition of the jurisdictional powers necessary for the implementation of the right.

NOTES

Introduction/Introductory Chapter

1. The Constitution Act, 1982, was enacted as Schedule B to the Canada Act, 1982, which was passed by the British Parliament (U.K., Elizabeth II, 1982, c.11). It came into force on April 17, 1982.

2. The Canadian Charter of Rights and Freedoms is contained in Part I of the Constitution Act, 1982, ibid.

3. The term "status Indians" refers to those Indians having status under the Indian Act s. 2(1) of which defines an Indian as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian."

4. See Morse, The Aboriginal Peoples in Canada, in: Morse (ed.), Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada, Ottawa 1985, 1 at 5-6.

5. Ibid.

6. Morse, id. at 11-12.

7. The Constitution Act, 1867 was originally enacted as the British North-America Act, 1867 (U.K., 30 & 31 Victoria, c.3).

8. Reproduced in R.S.C. 1970, Appendices, No. 1, at 123.

9. For a discussion of the definition of that term in s.52(2), see Hogg, Constitutional Law of Canada, 2d. ed., Toronto 1985, at 6-7.

10. Reproduced in R.S.C. 1970, Appendices, No. 25, at 365.

11. St. Catharines Milling and Lumber Company v. The Queen, (1889) 14 A.C. 46 (P.C.).

12. Calder et al. v. A.-G. of British Columbia, (1974) 34 D.L.R. (3d) 145.

Chapter 1

1. See Hogg, supra note 9 (intr. ch.), who refers to the aboriginal peoples of Canada as a "third force of constitutional change" (at 71).

2. Supra note 1 (intr. ch.).

3. See Scott, The Canadian Constitutional Amendment Process, reproduced from a symposium "Reshaping Confederation: the 1982 Reform of the Canadian Constitution," (1982) 45 Law and Contemporary Problems 249 at 252-253; see also Hogg, supra note 9 (intr. ch.) at 5 and 54.

4. U.K., 22 George 5, c.4, reproduced in R.S.C. 1970, Appendices, No. 26 at 401.

5. On the use of this term see Hogg, supra note 9 (intr. ch.) at 44.

6. See Gibbins/Ponting, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, Toronto 1980, at 313-314.

7. See Romanow, Aboriginal Rights in the Constitutional Process, in: Boldt/Long (eds.), The Quest for Justice-Aboriginal Peoples and Aboriginal Rights, Toronto 1985, 73 at 77. R. Romanow was provincial co-chairman of the Continuing Committee of Ministers on the Constitution, which was set up in 1978 as a federal-provincial negotiating forum.

8. Id. at 79.

9. See Woodward/George, The Canadian Indian Lobby of Westminster 1979-1982, (1983) 18 J. of Canadian Studies 119; Gibbins/Ponting, supra note 6 (Ch.1) at 214.

10. Sanders, Prior Claims: Aboriginal People in the Constitution of Canada, in: Beck/Bernier (eds.), Canada and the New Constitution -- The Unfinished Agenda, Ottawa 1983, 225 at 231-232.

11. Id. at 232.

12. Id. at 233.

13. The Queen (ex parte The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotia Indians) v. Secretary of State for

Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta et al, (1982) 2 All E.R. 118 (CA).

14. Reference Re Amendment of the Constitution of Canada, (1981) 125 D.L.R. (3d) 1 (S.C.C.).

15. Sanders, supra note 10 (Ch.1) at 234-235.

16. Id. at 236.

17. Id. at 236; Romanow, supra note 7 (Ch.1) at 80.

18. See the letter of P.M. Trudeau to Noêl Starblanket, chief of the NIB, extract reproduced in Sanders, supra note 10 (Ch.1) at 231.

19. Zlotkin, Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference, Discussion Paper No. 15, Institute of Inter-Governmental Relations, Queen's University, 1983, at 33.

20. See for example the strongly worded Dene Declaration (1975), reproduced in Watkins, Dene Nation - The Colony Within, Toronto 1977 at 3-4, and the 1980 Declaration of the First Nations adopted by the Assembly of First Nations conference, reproduced in Asch, Home and Native Land - Aboriginal Rights and the Canadian Constitution, Toronto 1984 at 125 (Appendix E).

21. See Schwartz, First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada 1982-1984, Background Paper No. 6, Institute of Inter-Governmental Relations, Queen's University, 1985, at 14; see also Zlotkin, supra note 19 (Ch.1), at 59.

22. Schwartz, id, at 28.

23. Id. at 27.

24. Id. at 26.

25. Id. at 21.

26. Id. at 25.

27. Id. at 23.

28. Grand Chief Diamond, The 1983 Constitutional Conference on Aboriginal

Rights, Presentation to the Ontario Chiefs, June 8, 1983, Grand Council of the Crees (of Québec), at 27.

29. Id. at 30.

30. Ibid.

31. Schwartz, supra note 22 (Ch.1)at 20.

32. Indian Self-Government in Canada, Report of the Special Committee, House of Commons, Issue No.40, 1st session, 32nd Parliament (1982), at 44.

33. Schwartz, supra note 22 (Ch.1)at 89-91.

34. Id. at 101-102.

35. Id. at 102.

36. Id. at 103.

37. Id. at 101. It must be noted, however, that the AFN was consulted and that substantial discussions had taken place before the release of the report.

38. Id. at 103.

39. Id. at 107.

40. Id. at 234.

41. Id. at 244.

42. Notes for an Opening Statement to the Conference of First Ministers on the Rights of Aboriginal Peoples, reproduced in Boldt/Long, supra note 7 (Ch.1), 157 at 161.

43. See Hawkes, Negotiating Aboriginal Self-Government - Developments Surrounding the 1985 First Minister's Conference, Background Paper No. 7, Institute of Inter-governmental Relations, Queen's University, 1985, at 22.

44. Id. at 22-23, 27.

45. Id. at 27.

46. Id. at 32-33.

47. Id. at 41.

48. Id. at 28

49. Supra note 47 (Ch. 1) and accompanying text.

50. The (Toronto) Globe and Mail, Feb. 6, 1987, p. 45 ("PM is urged to entrench native rights").

51. Id., Feb. 17, 1987, p.A8 ("Ottawa determined to entrench aboriginal rights, minister says").

52. Id. March 10, 1987, p. A10 ("Entrenchment of self-government favoured in poll") and March 17, 1987, p. A1/A2 ("More autonomy for native people favoured by Canadians, study finds").

53. Id. March 14, 1987, p.A1 ("Native autonomy at impasse - Talks break up in disarray").

54. Id. March 21, p. D1, D8, ("The effort to reach an accord on self-government for Canada's native peoples, which resumes next week, is a noble pursuit dogged by realities").

55. Id. March 14, 1987, p. A3 ("Completing the Circle of Confederation"), and March 23, 1987, p.A3 ("An Urgent Message from the Aboriginal Peoples of Canada").

56. Id. March 16, 1987, p. A10 ("Native leaders seek support from abroad").

57. Id. March 21, 1987, p.A3 ("U.N. Officials to observe Ottawa talks on self-rule").

58. The Montreal Gazette, March 21, 1987 ("Agree on native rights or risk international image, Lewis says").

59. Notes for an opening statement by the Right Honorable Brian Mulroney, Prime Minister of Canada, to the First Ministers' Conference, Aboriginal Constitutional Matters, Ottawa, March 26, 1987, Doc. 800-23/014, at 1.

60. Id. at 7.

61. Id. at 5.

62. Opening remarks of P.M. Mulroney at the 1985 conference, reproduced in Boldt/Long, supra note 7 (Ch.1) at 161.

63. Id. at 164.

64. Opening remarks of P.M. Mulroney at the 1987 conference, supra note 59 (Ch.1) at 7.

65. Id. at 4.

66. Id. at 6.

67. Opening remarks of G. Erasmus, National Chief, AFN First Ministers' Conference on Aboriginal Constitutional Matters, Doc. 800-23/007, March 26, 1987.

68. See The Toronto Globe and Mail, March 13, 1987, p. A8, headline: "Meeting tackles elusive issue of entrenching native rights", excerpt: "The battle hinges on two key words: is the right to self-government an inherent right, or is it a contingent right? Behind these two words are two worlds".

69. The Globe and Mail, March 25, 1987, p.A4 ("Mulroney, native leaders meeting today").

70. The account is based on this author's own observations at the conference and on information gathered from talks with participants and official observers of the conference.

71. 1987 FMC, verbatim transcript, afternoon session of March 27, 1987, at 239.

72. First Ministers' Conference on Aboriginal Constitutional Matters, Amendments to Part II of the Constitution Act, 1982, ICNI, Doc. 800-23/029. For a text of the proposal, see the Appendix.

73. The (Toronto) Globe and Mail, March 26, 1987, p.A1/2 ("Inuit would compromise on self-rule, leader says").

74. 1987 FMC, verbatim transcript, afternoon session, March 27, 1987, at 249/250.

75. Hawkes, supra note 43 (Ch.1) at 19.

76. 1987 FMC, verbatim transcript, afternoon session, March 27, 1987 at 234.

77. Report of the Special Committee at 61.

78. Id. at 123.

79. The AFN for this reason threatened to boycott the 1983 FMC, see Sanders, An Uncertain Path: The Aboriginal Constitutional Conferences, in: Weiler/Elliott (eds.), Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms, Toronto 1986, 63 at 65.

80. See Schwartz, supra note 21 (Ch.1) at 10/11.

81. Meech Lake Communiqué, Draft Statement of Principles, April 30, 1987, reproduced in House of Commons Debates, May 1, 1987, at 5661-5662 (Appendix "First Minister's Meeting on the Constitution").

82. The (Toronto) Globe and Mail, June 4, 1987, p.A14 ("Gruelling search for words ran 19 hours").

83. 1987 FMC verbatim transcript, afternoon session, March 27, 1987, at 238-239.

84. 1987 FMC, verbatim transcript, afternoon session, March 27, 1987, at 250-251.

85. Meeting of First Ministers on the Constitution, 1987 Constitutional Accord, June 3, 1987, s.16 of which reads (Multicutural heritage and aboriginal peoples) "Nothing in s.2 of the Constitution Act, 1867, affects section 25 or 27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act, 1982 or class 24 of section 91 of the Constitution Act, 1867".

86. The 1987 Constitutional Accord, Minutes of Proceedings and Evidence of the Special Joint Committee, of the Senate and of the House of Commons, Senate/House of Commons, Issue No. 17, Wednesday, September 9, 1987, 2nd session, 33rd Parliament (hereinafter: Meech Lake Report).

87. Id. at 107 (para. 2).

88. Id. at 110 (para. 13).

89. Id. at 111 (para. 18).

90. Id. at 113 (para. 26).

91. House of Commons Debates, 2nd session, 33rd Parliament, Monday, September 21, 1987 at 9131-9132.

92. See Sparrow v. The Queen, unreported, British Columbia Court of Appeal (CA 005325), decision of Dec. 24, 1986; Pacific Fishermen's Defence Alliance et al v. The Queen and Nisga'a Tribal Council, unreported, Fed. Court, Trial Division (T-1858-84), decision of Feb. 12, 1987.

93. See the (Toronto) Globe and Mail, March 24, 1987, p. A5 ("New Generation of Haida talking tough - Title to lands never lost, leader says").

94. The Labrador Inuit Association (LIA) is currently considering several options for the setting-up of a regional form of self-government, see Completing Canada: Inuit Approaches to Self-Government, I.C.N.I. position paper, Institute of Intergovernmental Relations, Queen's University, 1987, at 23-27.

Chapter 2

1. R.S.C. 1970, c.I-6.

2. See Sanders, supra note 10 (Ch.1) at 238.

3. For an overview description of the Indian legislation prior to the Indian Act, see Bartlett, The Indian Act of Canada, (1977-78) 27 Buffalo Law Review 581 at 582-584.

4. Bartlett, id. at 583; see also Mandell, Indian Nations: Not Minorities, (1986) 27 C.de D. 101 at 109.

5. Bartlett, id. at 585.

6. Sanders, supra note 10 (Ch.1) at 261-262.

7. Gibbins/Ponting supra note 6 (Ch.1) at 14.

8. Bartlett, supra note 3 (Ch.2) at 585.

9. Canada, D.I.A.N.D., The Historial Development of the Indian Act, Ottawa 1978, at 149.

10. Bartlett, supra note 3 (Ch.2) at 586-587.

11. Id. at 593.

12. Id. at 615.

13. Report of the Special Committee, at 47.

14. Id. at 17.

15. Quoted in the Report of the Special Committee, at 22.

15a. Bill C-31, An Act to Amend the Indian Act, 1st Session, 33rd Parliament, 1983-84 (assented to 28 June 1985).

16. The Minister of Indian Affairs recently proposed amendments to the Indian Act regarding increased taxation powers of band councils. The proposal was initiated by the Kamloops Band of British Columbia and received support from a substantial number of bands. See D.I.A.N.D., Communiqué, Indian Act Amendments to give Indians more control over development of reserve land, August 31, 1987, at 1; D.I.A.N.D., Proposed Amendments to the Indian Act Concerning Conditionally Surrendered Land and Band Taxation Powers, Ottawa 1987, at 1.

17. Report of the Special Committee, at 16.

18. Quoted in Mandell, supra note 4 (Ch.2) at 112.

19. Reproduced in Mandell, id. at 113.

20. Bartlett, supra note 3 (Ch.2) at 588; Sanders, supra note 10 (Ch.1) at 227.

21. See Long/Little Bear/Boldt, Federal Indian Policy and Indian Self-Government in Canada, in Boldt/Long/Bear (eds.) Pathways to Self-Determination - Canadian Indians and the Canadian State, Toronto 1984, 69 at 70; Gibbins/Ponting, supra note 6 (Ch.1) at 28-29; Bartlett, supra note 3 (Ch.2) at 588; Weaver, A Commentary on the Penner Report, (1984) 10 Can. Public Policy 215-216.

22. Quoted in the Report of the Special Committee, at 39.

23. Nicholson, Indian Government and Federal Policy: An Insider's Views, in Boldt/Long/Bear (eds.), supra note 21 (Ch.2) at 60. The writer is a former

assistant deputy minister in the Department of Indian Affairs.

24. For a detailed analysis of the committee's origins, its organization, work and reasons for its failure, see Weaver, The Joint Cabinet/National Indian Brotherhood Committee: a unique experiment in pressure group relations, (1982) 25 Can. Public Administration 211.

25. See Sanders, Aboriginal Peoples and the Constitution, (1981) 19 Alberta L.R. 410 at 424.

26. For an overview of the political development in the 1970's, see Weaver, supra note 21 (Ch.2) at 216.

27. Supra note 32 (Ch.1).

28. See Weaver, id. at 214, 220; Gibbins/Ponting, The paradoxical nature of the Penner Report, (1984) 10 Can. Public Policy at 221; Tennant, Aboriginal Rights and the Penner Report on Indian Self-Government, in Boldt/Long (eds.), supra note 7 (Ch.1) at 329-330.

29. See for example the Position of the Crees of Québec on the Report of the Special Committee of the House of Commons on Indian Self-Government in Canada, March 5, 1984, Grand Council of the Crees (of Québec) at 26.

30. 32-33 Elizabeth II, 1982-1983 (First Reading: June 27, 1984).

31. Response of the Federal Government to the Report of the Special Committee on Indian Self-Government, Ottawa, March 1984, at 3.

32. Tennant, Indian Self-Government: Progress or Stalemate ?, (1984) 10 Can. Public Policy 211 at 214.

33. Long/Little Bear/Boldt, supra note 21 (Ch.2) at 73.

34. Id. at 78-79.

35. Assembly of First Nations, A Report on the Self-Government Bill, Ottawa, 1984, at 16.

36. The Sub-Committee was subsequently upgraded to become the Special Parliamentary Committee on Indian Self-Government which issued the 1983 report.

37. The Government of Aboriginal Peoples, Policy Development Group of the Special Committee on Indian Self-Government, Ottawa 1983 at 98.

38. Id. at 99.

39. Id. at 105.

40. Long/Little Bear/Boldt, supra note 21 (Ch.2) at 76-77.

41. Sanders, supra note 25 (Ch.2) at 425.

42. D.I.A.N.D. Communiqué (December 18, 1986), Federal Comprehensive Land Claims Policy Announced.

43. D.I.A.N.D., The Process of Indian Self-Government Community Negotiations, Ottawa, Sept. 1986, at 1-2.

44. D.I.A.N.D., In All Fairness, Ottawa 1981.

45. D.I.A.N.D., Outstanding Business, Ottawa 1982.

46. D.I.A.N.D., Information, Comprehensive Land Claims Policy, statement delivered by the Minister of Indian Affairs Bill McKnight in the House of Commons, Dec. 18, 1986, at 7.

47. D.I.A.N.D., Comprehensive Land Claims Policy, Ottawa 1987 at 17-18.

48. The James Bay and Northern Québec Agreement, Editeur Officiel du Québec, 1976.

49. Kanatewat et al v. The James Bay Development Corporation and Attorney General of Québec, (1974) R.P. 38 (C.S.).

50. Sechelt Indian Band Self-Government Act, 33-34-35 Elizabeth II, c.27 (assented to 17 June 1986).

51. See for example Assembly of First Nations, Submission to the Task Force on Comprehensive Claims Policy, Ottawa, November 1985, at 10-11.

52. D.I.A.N.D., Information, supra note 46 (Ch.2) at 7-8.

53. D.I.A.N.D., supra note 47 (Ch.2) at 18.

54. See the testimony of Aurélien Gill, adviser of the Attikamek-Montagnais Council, before the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, 4 March 1987, Issue No. 18 at 6.

55. D.I.A.N.D., Communiqué, supra note 42 (Ch.2) at 2.

56. D.I.A.N.D., Information, supra note 46 (Ch.2) at 6.

57. Id. at 6.

58. Id. at 6-7.

59. Id. at 6.

60. D.I.A.N.D., Comprehensive Land Claims Policy, Ottawa 1987 at 7.

61. Id. at 12.

Chapter 3

1. See introductory chapter, "The aboriginal peoples of Canada".

2. See the proposals for the creation of public government models in the Northwest Territories, Public Government for the People of the North, Dene Nation and Métis Association of the Northwest Territories, Nov. 9, 1981, and, Building Nunavut - Today and tomorrow (The Nunavut Constitutional Proposal), Nunavut Constitutional Forum, September 1985; a local public government, the Kativik Regional Government, was set up in 1978 in Northern Québec by the Inuit, see Completing Canada, supra note 94 (Ch.1) at 19-22.

3. Sanders, supra note 79 (Ch.1) at 65.

4. See Weaver, Indian Government: A Concept in Need of a Definition in: Long/Boldt/Bear (eds.), supra note 21 (Ch.1), 65 at 65.

5. See the closing remarks of AFN Chief George Erasmus, 1987 FMC, verbatim records, afternoon session, March 27, 1987, at 215.

6. See Sanders, supra note 79 (Ch.1) at 72.

7. See Weinstein, Aboriginal Self-Determination off a Land-Base, Background Paper No. 8, Institute of Inter-Governmental Relations, Queen's University, 1986 at 6-7.

8. For an analysis of the organization and the internal political processes of the National Indian Brotherhood, see Gibbins/Ponting, supra note 6 (Ch.1) at 219-245.

9. See, for example, the statement of George Erasmus at one of the preparatory meetings of the 1987 FMC, Federal-Provincial Meeting of Ministers on Aboriginal Constitutional Matters, Halifax, Nova Scotia, January 21-22, 1987, verbatim transcript, morning session of Jan. 22, 1987 (Doc. 830-258/004), at 200-203.

10. Reproduced in Watkins (ed.), supra note 20 (Ch.1) at 3-4.

11. The declaration is reproduced in Asch, supra note 20 (Ch.1) at 126 (Appendix F).

12. Reproduced in Asch, id. at 125 (Appendix E).

13. Special Joint Committee (Senate and House of Commons) on the Constitution of Canada, 1980-81, 32nd Parliament, Minutes and Proceedings, Issue No. 16 at 9 (submission of the ICNI), No. 17 at 118 (submission of the NCC), No. 27 at 94 (submission of the NIB)

14. Id. No. 27 at 91, 94 (NIB)

15. Id. No. 17 at 67 (Native Women's Association of Canada); No. 17 at 125 (NCC); No. 27 at 76, 94 (NIB); No. 29 at 99 (Indian Association of Alberta)

16. Id. No. 28 at 11 (Attikamek-Montagnais Council); No. 17 at 67 (Native Women's Association of Canada); No. 27 at 76 (NIB); No. 31 at 28 (Union of Ontario Indians).

17. Id. No. 17 at 67 (Native Women's Association of Canada).

18. Id. No. 17 at 118 (NCC)

19. Id. No. 28 at 11 (Attikamek-Montagnais Council).

20. Id. No. 17 at 118.

21. Id. No. 31 at 15.

22. Id. No. 31 at 66.

23. Id. No. 16 at 9.

24. Id. No. 17 at 124 (NCC) No. 27 at 94 (NIB); No. 31 at 30 (Union of Ontario Indians).

25. Id. No. 17 at 124 (NCC) No. 31 at 30 (Union of Ontario Indians).

26. Id. No. 17 at 23 (ICNI); No. 27 at 78 (NIB); No. 28 at 11 (Attikamek Montagnais Council); No. 29 at 102 (Indian Association of Alberta); No. 29 at 111 (Fed. of Sask. Indians); No. 31 at 14 (Algonquin Council); No. 31 at 87 (Fed. of Sask Indians).

27. Id. No. 17 at 23 (ICNI); No. 28 at 12 (Attikamek-Montagnais Council); No. 31 at 14 (Algonquin Council).

28. Id. No. 28 at 12 (Attikamek-Montagnais Council).

29. Id. No. 17 at 23 (ICNI); No 27 at 78 (NIB); No. 28 at 11 (Attikamek Montagnais Council); No. 31 at 14 (Algonquin Council).

30. Id. No. 17 at 22 (ICNI)

31. Id. No. 17 at 124 (NCC)

32. Id. No. 26 at 23 (Nishga Tribal Council).

33. Id. No. 27 at 77 (NIB).

34. Id. No. 31 at 46 (Association of Iroquois and Allied Indians).

35. Opening Remarks by Dr. David Ahenakew, National Chief, Assembly of First Nations, to the First Minister's Conference on Aboriginal Rights, Ottawa, 15 March 1983, Doc. 800-17/028, at 9.

36. 1987 FMC, opening remarks by George Erasmus, supra note 67 (Ch.1) at 4.

37. See, for example, Assembly of First Nations, The International Covenants: The Right to Self-Determination and the First Nations of Canada, caucus of the Human Rights Coalition, Ottawa Dec. 8-11, 1983, and the opening

statement of George Erasmus at the 1987 FMC, id. at 1 and 9.

38. See supra ch. 1.

39. See the "glossary of terms" annexed to the submission of Chief Gordon Peters to the House of Commons Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence of the Committee, March 3, 1987, Issue No. 17, Appendix "Auto-5".

40. See the opening statement of G. Erasmus at the 1987 FMC, supra note 67 (Ch.1) at 3.

Chapter 4

1. Slattery, The Constitutional Guarantee of Aboriginal and Treaty Rights, (1982-83)8 Queen's L.J. 232 at 232.

2. McNeil, The Constitutional Rights of the Aboriginal Peoples of Canada, (1982)4 S.C.L.R. 255 at 262; Lysyk, The Rights and Freedoms of the Aboriginal Peoples of Canada, in: Tarnopolsky/Beaudoin, The Canadian Charter of Rights and Freedoms, Commentary, Toronto 1982, 467 at 471; Hogg, supra note 9 (intr. ch.) at 567.

3. Sanders, supra note 10 (Ch.1) at 231-232.

4. McNeil, supra note 2 (Ch.4); Gibson, The Law of the Charter: General Principles, Toronto 1986, at 72.

5. See Hogg, supra note 9 (intr. ch.) at 658-659.

6. Gibson, supra note 4 (Ch.4) at 49.

7. (1983) 140 D.L.R. (3d) 33.

8. Id. at 54.

9. Id. at 57.

10. (1979) 101 D.L.R. (3d) 393 at 403.

11. (1985) 11 D.L.R. (4th) 641 at 649.

12. Hogg, supra note 9 (intr. ch.) at 649.

13. Gibson, Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations, in: Tarnopolsky/Beaudoin, supra note 2 (Ch.4), 25 at 34.

14. Supra note 85 (Ch.1).

15. Gibson, supra note 4 (Ch.4) at 64.

16. Roget's Thesaurus of English Words and Phrases (1966) lists "preserved" as a synonym for "unimpaired", No. 670 at 240.

17. 1962 reprint, at 19 .

18. Slattery, supra note 1 (Ch.4) at 240.

19. R.S.C. 1960, c.44

20. (1970) S.C.R. 282.

21. See A.-G Canada v Lavell, (1974) S.C.R. 1349; A.-G. Canada v. Canard (1976) 1 S.C.R. 170.

22. See Sanders, The Renewal of Indian Special Status, in: Bayefsky/Eberts, Equality Rights and the Canadian Charter of Rights and Freedoms, Toronto 1985, 529 at 562.

23. Revised 4th ed., 1968.

24. Hogg, supra note at 567.

25. See Emery, Réflexions sur le sens et la portée au Québec des articles 25, 35 et 37 de la Loi Constitutionelle de 1982, (1984) 25 C. de D. 145 at 155, who however does not give a justification for his view.

26. Hogg, supra note 9 (intr. ch.) at 658; Gibson, supra note 4 (Ch.4) at 61.

27. (1985) 15 D.L.R. (4th) 321 at 408-409.

28. Slattery, supra note 1 (Ch.4) at 252.

29. Id. at 254-255; O'Reilly, La Loi Constitutionelle de 1982 - Droit des

Autochtones, (1984) 25 C. de D. 125 at 140; McNeil, supra note 2 (Ch.4) at 256; Hogg, supra note 9 (intr. ch.) at 566; Lysyk, supra note 2 (Ch.4) at 477.

30. N. Lyon, S. 25 of the Canadian Charter of Rights and Freedoms, in: Current Issues in Aboriginal and Treaty Rights, The Canadian Bar Association of Ontario, report of a conference held at Ottawa University (25 May, 1984), 1 at 8.

31. House of Commons Debates 24.11.81., Vol. 124., No. 262 at 13203-13204.

32. Supra note 25 (Ch.4) and accompanying text.

33. The Rights of the Aboriginal Peoples of Canada, (1983) 61 Can. Bar R. 314 at 331.

34. Supra note 2 (Ch.4) at 257.

35. Supra note 9 (intr. ch.) at 565.

36. Supra note 1 (Ch.4) at 263.

37. Slattery, The Hidden Constitution: Aboriginal Rights in Canada, (1984) 32 Am. J. Comp. L. 361 at 381.

38. Supra note 2 (Ch.4) at 259.

39. (1984) 1 D.L.R. (4th) 595 at 598.

40. Ibid.

41. Id. at 599.

42. (1984) 10 D.L.R. (4th) 137.

43. Sparrow v. The Queen, supra note 92 (Ch.1).

44. Id. at 34, 41.

45. Id. at 30, 40-41.

46. (1963) 41 D.L.R. (2d) 485 at 491-492 (Ritchie J.).

47. Supra note 20 (Ch.4)

48. R. v Burnshine, (1974)44D.L.R. (3d)584; R. v. Miller and Cockriell, (1975)70 D.L.R. (3d)324.

49. Supra note 11 (Ch.4) at 649.

50. See also Hogg, supra note 9 (intr. ch.) at 340-341.

51. This is also the conclusion reached by Slattery, supra note 1 (Ch.4) at 240.

52. Sparrow v. The Queen, supra note 92 (Ch.1) at 29.

53. Id. at 30 and 40.

54. Supra note 1 (Ch.4) at 255-256.

55. Id. at 257, 260.

56. Slattery, supra note 37 (Ch.4) at 384.

57. Factum of the Attorney-General at 13.

58. Sanders, supra note 33 (Ch.4) at 316.

59. See Russell, The Political Purposes of the Canadian Charter of Rights and Freedoms, (1983) 61 Can. Bar. R. 30 at 43-44.

60. See Axworthy, Colliding Visions: The Debate over the Charter of Rights and Freedoms 1980-81, in: Weiler/Elliott (eds.), supra note 79 (Ch.1) 13 at 19.

61. (1978) 84 D.L.R. (3d) 420 at 438 (S.C.C.).

62. La Forest, The Canadian Charter of Rights and Freedoms: An Overview, (1983) 61. Can. Bar R. 19 at 25.

63. See Bleckmann/Bothe, General Report on the Theory of Limitations on Human Rights, in : DeMestral/Cotler et al., The Limitation of Human Rights in Comparative Constitutional Law, Cowansville (Québec) 1986, 105 (Ch.6) at 106-108.

64. Boldt/Long, Tribal Traditions and European-Western Ideologies, in: Boldt/Long (eds.), supra note 7 (Ch.1) at 336.

65. Id. at 337.

66. See Miller, Two Concepts of Authority, (1955) 57 American Anthropologist 271 at 280, 287-288.

67. See Hoebel, Authority in Primitive Societies, in: C.J. Friedrich (ed.), Authority, Cambridge 1958, 222 at 226, 228; Miller, id. at 283.

68. Boldt/Long, supra note 7 (Ch.1) at 339. With particular regard to the Iroquois Indians, see Hurley, Children or Brethren: Aboriginal Rights in Colonial Iroquoia, University of Saskatchewan Native Law Centre, Saskatoon 1985, at 39-40.

69. Though aboriginal rights are prima facie collective rights, they may also be exercised individually. This will be discussed in more detail below, see Ch.4 at III.2. b. and Ch. 5 I.

70. Supra note 92 (Ch.1) at 34.

71. An Act relating to self-government for the Sechelt Indian Band,(1986), 33-34-35 Elizabeth II, c.27.

72. Sparrow, supra note 92 (Ch.1) at 29.

73. Ibid.

74. Supra note 25 (Ch.4) and accompanying text.

75. (1985) 13 D.L.R. (4th) 321 at 339.

76. (1986) 24 D.L.R. (4th) 390 at 399.

77. Id. at 397 and 403.

78. Supra note 48 (Ch.2).

79. Id. at XXII.

80. Slattery, supra note 1 (Ch.4) at 238.

81. Mr. Justice Rand in Switzman v. Elbling, (1957) 7 D.L.R. (2nd) 337 at 358 (S.C.C.).

82. Supra note 13 (Ch.1) at 124-125.

83. Supra at 72.

84. See Zlotkin, supra note 19 (Ch.1) at 38-40.

85. Elliott, Aboriginal Title, in: Morse (ed.), supra note 4 (intr. ch.) at 48.

86. 1966 reprint.

87. Sanders, supra note 10 (Ch.1) at 252; Morse, supra note 6 (intr. ch.).

88. Supra note 92 (Ch.1) at 3.

89. Id. at 4.

Chapter 5

1. Magnet, Collective Rights, Cultural Autonomy and the Canadian State, (1986) 32 McGill L.J. 170 at 173.

2. See Hudson, The Rights of Indigenous Populations in National and International Law - A Canadian Perspective, unpublished, LLM-Thesis, McGill University 1985, at page i and 1.

3. Leslie, Les Droits des Minorités Ethniques et Nationales - L'Aspect Politique et Collectif, (1986) 27 C.de D. 161 at 169.

4. See Woehrling, Minority Cultural and Linguistic Rights and Equality Rights in the Canadian Charter of Rights and Freedoms, (1985) 31 McGill L.J. 50 at 55, 89.

5. See supra note 89 (Ch.4) and accompanying text.

6. Supra Ch. 4, III.2.b. (Part 2).

7. Magnet, supra note 1 (Ch.5) at 184.

8. See infra Part 3, The International Legal Context, Ch.8, II.3.

9. Supra note 7 (Ch.4) at 65.

10. Id. at 62.

11. Id. at 61-62.

12. Id. at 63.

13. Supra note 18 (Ch.3) and accompanying text.

14. See Deschênes, Qu'est ce qu'une minorité ?, (1986) 27 C. de D. 255 at 260-262.

15. See for example with regard to the Dene Indians in the Northwest Territories, Abele, Dene-Government Relations: The Development of a New Political Minority, in: Nevitte/Kornberg (eds.), Minorities and the Canadian State, Oakville, Ontario 1985, 239 at 240.

16. See the statement of Kirk Kickingbird (Fed. of Sask. Indians) before the Joint Committee (supra note 13 (Ch.3)), No. 29 at 111-112.

17. See Woehrling, La Constitution Canadienne et la Protection des Minorités Ethniques, (1986) 27 C. de D. 170 at 176-182.

18. See Carignan, De la Notion de Droit Collectif et de son Application en Matière Scolaire au Québec, (1984) 18 R.J.T. 1 at 39-42.

Chapter 6

1. See supra note 14 (Ch.3) and accompanying text.

2. Supra note 11 (intr. ch.) at 244-245.

3. (1965) 52 W.W.R. 193 at 208.

4. Supra note 12 (intr. ch.).

5. Id. at 226.

6. Id. at 160.

7. (1980) 107 D.L.R. (3d)513.

8. Id. at 542.

9. Id. at 544.
10. Supra note 75 (Ch.4).
11. Id. at 335-336.
12. Supra note 76 (Ch.4).
13. Id. at 401.
14. Id. at 407.
15. Id. at 399.
16. Supra note 92 (Ch.1).
17. Id. at 9.
18. Id. at 22-23.
19. Supra note 13 (Ch.1).
20. Id. at 123.
21. Id. at 123-125.
22. (1823), 21 U.S. (8 Wheaton) 543.
23. Id. at 574.
24. Id. at 587-588.
25. (1831), 30 U.S. (5 Peters) 1.
26. Id. at 16.
27. Id. at 17.
28. Id. at 16.
29. Id. at 17.
30. (1832), 31 U.S. (6 Peters) 515.

31. Id. at 542-543.

32. Supra note 22 (Ch.6).

33. Id. at 544.

34. Id. at 559-560.

35. Id. at 554 and 557.

36. Id. at 560-561.

37. (1835), 34 U.S. (9 Peters) 777.

38. Id. at 745-746.

39. Id. at 746-747.

40. Supra note 12 (intr. ch.).

41. Supra notes 15-16 (Ch.3) and accompanying text.

42. Supra notes 65-67 (Ch.4) and accompanying text.

43. Calder, supra note 6 (Ch.6) and accompanying text.

44. Supra note 68 and accompanying text.

45. Porter, Traditions of the Constitution of the Six Nations, in: Boldt/Long/Bear, supra note 21 (Ch.2) 14 at 15-16; Hurley, supra note 68 (Ch.4) at 28-30.

46. Porter, id. at 16-17.

47. Ahenakew, Aboriginal Title and Aboriginal Rights: The Impossible and Unnecessary Task of Identification and Definition, in: Boldt/Long, supra note 7 (Ch.4) 24 at 28-29.

48. Marule, Traditional Indian Government: Of the People, by the People, for the People, in: Boldt/Long/Bear, supra note 21 (Ch.2) 36 at 36-37.

49. Victoria, De Indis et De Jure Belli Reflectiones (1696), J.B. Scott (ed.), Classics of International Law, Washington 1917 (Translation by J. Bate), at 127.

50. Supra note 31 (Ch.6) and accompanying text.

51. Supra note 6 (Ch.6) and accompanying text.

52. Supra note 9 (Ch.6) and accompanying text.

53. Supra note 17 (Ch.6) and accompanying text.

54. Supra note 27 (Ch.6) and accompanying text.

55. Elliott, supra note 85 (Ch.4) at 111-113.

56. Supra note 12 (intr. ch.) at 167.

57. Id. at 168.

58. Id. at 208.

59. Id. at 216.

60. Supra note 7 (Ch.6).

61. Id. at 551.

62. Supra note 75 (Ch.4) and accompanying text.

63. Supra note 1 (Ch.2) and accompanying text.

64. Sanders, supra note 10 (Ch.1) at 262..

65. The Cree-Naskapi Act was passed pursuant to s.9 of the James Bay Agreement. The legislation will be discussed in infra, Part 4, Ch. 10, II. The Sechelt Act will be discussed in Part 4, Ch. 10, III.

66. Bill C-31, supra note 15a (Ch.2).

67. Supra note 16 (Ch.2).

68. This issue will be addressed below, Part 4, Ch. 10, I.

69. See for example the 1752 "Treaty or Articles of Peace and Friendship Renewed" between the Governor of Nova Scotia and the Micmaq Tribe, which states, "It is agreed that the said Tribe of Indians shall not be

hindered from, but have free liberty of hunting and Fishing as usual..." reproduced in: Wildsmith, Pre-Confederation Treaties, in Morse (ed.), supra note 4 (intr. ch.), 122 at 189-190.

70. Zlotkin, Post-Confederation Treaties, in: Morse (ed.), supra note 4 (intr. ch.), 272 at 273-274.

71. Supra note 48 (Ch.2).

72. Cf. s.2.1. of the agreement.

73. Simon, supra note 76 (Ch.4) at 409; this principle has recently been reaffirmed by the Québec Court of Appeal; the court had to determine the legal character of a document given to the Huron Indians by the British Governor in 1760 (shortly after the surrender of Montréal), which inter alia allowed them "the free Exercise of their Religion, their Customs, and Liberty of trading with the English...." Sioui et al. c. Le Procureur Général de la Province de Québec, unreported, Cour D'Appel du Québec, No. 200-10-000137-856, 8 Septembre 1987, at 7 and 10.

74. Sanders, Indian and Inuit Government in Canada, unpublished paper, July 1978 at 3.

75. Supra at 95.

Chapter 7

1. Supra note 22 (Ch.6) and accompanying text.

2. See for example the 1767 Proclamation, issued as an instruction to the governors of several provinces, which states: "Whereas the peace and security of Our Colonies... does greatly depend upon the Amity and Alliance of the several Nations or Tribes of Indians bordering upon the said colonies..." reproduced in: Wildsmith, supra note 69 (Ch.6) at 191-192.

3. Art. 2 para. 1 of the U.N. Charter reads: "The Organization is based on the principle of the sovereign equality of all its Members."

4. For a survey of the origins and evolution of the concept, see Wildhaber, Sovereignty and International Law, in: MacDonald/Johnston, The Structure

and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory, The Hague 1983, at 425-435.

5. Island of Palmas case, Netherlands v. U.S. (1928), Permanent Court of Arbitration, 2 R.I.A.A. 829 at 838.

6. See Brownlie, Principles of Public International Law, 3rd ed. 1979, at 109.

7. Id. at 126.

8. Wildhaber, supra note 4 (Ch.7) at 435-436.

9. Id. at 437.

10. Id. at 436.

11. Supra note 22 (Ch.6).

12. Id. at 587.

13. Supra note 5 (Ch.7) at 845.

14. Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law. (1953) 30 B.Y.I.L. 1 at 5.

15. Jennings, General Course on Principles of International Law, (1967 II) R.d.C. 323 at 422.

16. Brownlie, supra note 6 (Ch.7) at 132-133; Johnson, Consolidation as a Root of Title in International Law, (1955) Cambridge L.J. 215 at 224-225.

17. Supra note 49 (Ch.6) at 128.

18. Scott, J.B. (ed.) Classics of International Law, Oxford 1934, Vol. 2 (Translation by C.H. and W.A. Oldfather).

19. Id. at 364-365.

20. Scott, J.B. (ed.) id., Oxford 1950, Vol. 1 (Translation by G.L. Williams/W.H. Zeydel) at 221-226.

21. Worcester v. Georgia, supra note 30 (Ch.6) at 573.

22. Ibid.

23. Supra note 5 (Ch.7) at 846; see also Brownlie, supra note 6 (Ch.7) at 149.

24. Brownlie, id. at 150.

25. Id. at 142.

26. Western Sahara, Advisory Opinion, I.C.J.-Reports 1975, 8 at 39 (para. 80)

27. See Clinebell/Thomson, Sovereignty and Self-Determination: The Rights of Native Americans under International Law, (1978) 27 Buffalo L.R. 669 at 688.

28. Gibbins/Ponting, supra note 6 (Ch.1) at 5; see also the statement of John Snow (Indian Association of Alberta) before the Joint Committee (supra note 13 (Ch.3)) No. 28 at 99.

29. For a survey of the development of the economic relations between Europeans and Indians, see Trigger, Natives and Newcomers - Canada's "Heroic Age" Reconsidered, Montreal/Kingston 1985, at 135-144.

30. Brody, Maps and Dreams, Vancouver/Toronto 1981 at 62-63.

31. Brownlie, supra note 6 (Ch.7) at 136.

32. Supra note 70 (Ch.6) and accompanying text.

33. Zlotkin, supra note 70 (Ch.6) at 274).

34. See Opekokew, The First Nations: Indian Government in the Community of Man, Saskatoon 1982, at 16-18.

35. Simon v. The Queen, supra note 76 (Ch.4) at 409.

36. Worcester v. Georgia, supra note 30 (Ch.6) at 582.

37. R. v. White and Bob, supra note 3 (Ch.6) at 197.

38. Supra note 76 (Ch.4) at 404.

39. Supra Ch.6, III.1. (Part 2).

40. Supra note 6 (Ch.7) at 157.

41. Id. at 160.

42. See for example the statement of AFN representative Gordon Peters, Presentation to the Standing Committee on Aboriginal Affairs, 3 March 1987, at 3 ("...one of the earliest treaties we had with the colonizers was around 1650...the two-row wampum. What that said, in effect, was, 'let us co-exist, share, have mutual respect -- neither one of us will dominate the other'").

43. This is evidenced by the treaties of "peace and friendship" concluded between the colonizers and the European settlers, supra note 69 (Ch.6) and accompanying text.

44. See Wildhaber, supra note 4 (Ch.7) at 437: "Sovereignty, then, is a term apt to describe the 'normal case' of a state".

45. Ibid.: "But states subject to various forms of political and economic pressure and dependencies in fact do not, as a rule, lose their legal, formal sovereignty".

46. Supra note 27 (Ch.6) and accompanying text.

47. Brownlie, supra note 6 (Ch.7) at 111.

48. Convention on Relations between the Three Powers and the F.R.G.,(26 May 1952), Art. 1(2), (1959) 331 U.N.T.S. 327.

49. This principle and its application to aboriginal peoples will be the object of chapter 8 infra; see generally Sanders, the Re-Emergence of Indigenous Questions in International Law, (1983) 3 C.H.R.Y.13; with regard to recent developments in international law, Alfredsson, International Law, International Organizations and Indigenous Peoples, (1982) 36 J. of International Affairs 113, observes that, "A related question is whether some indigenous peoples, rather than gaining a new right to external self-determination, can retain it", at 115 (emphasis added).

50. For an overview of the different theories, see Wildhaber, supra note 4 (Ch.7) at 432-435.

51. Verdross/Simma, Universelles Völkerrecht -- Theorie und Praxis, 3rd ed., Berlin 1984, at 234 (para. 395).

52. Brownlie, supra note 6 (Ch.7) at 120.

53. Andress/Falkowski, Self-Determination: Indians and the United Nations - The Anomalous Status of America's Domestic/Dependent Nations, (1980) 8 Am. Indian L.R. 97 at 108; Clinebell/Thomson, supra note 27 (Ch.7) at 679.

54. Montevideo Convention on the Rights and Duties of States, 1933, 165 L.N.T.S. 19, Art. 1.

55. Clinebell/Thomson, supra note 27 (Ch.7) at 674; Deloria, Behind The Trail of Broken Treaties, New York 1974 at 165.

56. The legal aspects of the situation of Indian tribes in the U.S. will be examined in Ch. 12, infra.

57. The Cree Grand Council has recently been granted observer status at the U.N., see The (Toronto) Globe and Mail, March 3, 1987, p. 49.

58. This is acknowledged by Andress/Falkowski, supra note 53 (Ch.7) at 108.

59. See supra notes 13-15 and accompanying text.

60. Brownlie, supra note 6 (Ch.7) at 92.

61. See the arbitral award in the Tinoco Arbitration, where the arbitrator stated "The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such", (1923) 1 R. I.A.A. 369 at 381.

62. This fact, as well as the criterion of recognition is apparently overlooked by Clinebell/Thomson, supra note 27 (Ch.7) at 673-679.

63. See the statements of various aboriginal groups referred to supra Ch. 3.

64. Cayuga Indians case, (1926) 6 R.I.A.A. 173 at 179.

65. Andress/Falkowski, supra note 53 (Ch.7) at 109-110.

66. Under Art 71 of the U.N.Charter, the Economic and Social Council (ECOSOC)"may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence". The conditions for the recognition of consultative status are

laid out in ECOSOC-Res. E/288(X)(27. February 1950) and E/1236 (XLIV) (23 May 1968). NGOs having that status are allowed to take part in the sessions of U.N. committees and working groups and to make submissions. They are not allowed to vote.

67. ECOSOC decision 227 (LXII), 13 May 1977. See Yearbook of the United Nations, 1977, Vol. 31, at 760.

68. There are currently nine international organizations of indigenous peoples having consultative status with ECOSOC, see Alfredsson, Fourth Session of the Working Group on Indigenous Populations, (1986) 55 N.J.I.L. 22 at 24.

69. Supra note 57 (Ch.7).

70. Under Art.68 of the U.N Charter, the ECOSOC "...shall set up commissions in economic and social fields and for the promotion of human rights ..."; the Commission on Human Rights is currently composed of 43 representatives of member states; on the creation of the commission and its work, see generally Marie, La Commission des Droits de l'Homme de l'O.N.U., Paris 1975.

71. Cobo, Study of the Problem of Discrimination against Indigenous Populations, U.N. Doc. E/CN.4/Sub. 2/1986/7 (Vol. 1), Add 1, (Vol. 2), Add. 2, (Vol. 3) Add.3 (Vol. 4).

72. The definition will be discussed in more detail below, infra Ch. 8, II.1.

73. ECOSOC authorized the creation of the working group in its resolution 1982/34 of 7 May 1982.

74. Report of the Working Group on Indigenous Populations on its fourth session, U.N.Doc.E/CN.4/Sub.2/1985/22, 27 August 1985, at 3. The working group is composed of five members (hereinafter: 1985 Report of the Working Group).

75. The voluntary fund was established pursuant to U.N.G.A. Res. 40/131 of 13 Dec. 1985.

76. The resolution was adopted on March 10, 1987 (54th meeting). See Commission on Human Rights, 43rd session, Draft Report of the Commission, U.N. Doc. E/CN.4/1987/L.11/Add.8, page 16-17. The resolution was supported by Canada.

77. The draft principles are set out in Annex II to the Report of the Working Group on Indigenous Populations on its fifth session, U.N. Doc. E/CN.4/Sub.2/1987/22, 24 August 1987 (hereinafter: 1987 Report of the Working Group).

78. 1985 Report of the Working Group, supra note 74 (Ch.7) at 19 (para. 83).

79. See the Declaration of Principles of the World Council of Indigenous Peoples (1984) and the Draft Declaration of Principles proposed jointly by the Indian Law Resource Center and five other organizations. Report of the Working Group, id., Annexes III and IV.

80. 1987 Report of the Working Group, supra note 77 (Ch.7), at 8-9 (para. 33).

81. Id. at 15 (para. 56).

82. Id. at 14 (para. 52).

83. Id. at 15 (para. 54).

84. See generally Higgins, The Development of International Law through the Political Organs of the United Nations, London 1963, at 1-10.

85. International Labour Organization, Convention (No. 107) concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries, 26 June 1957, 328 U.N.T.S. 247 (1959).

86. See Barsh, Revision of ILO Convention No. 107, (1987) 81 A.J.I.L. 756 at 756.

87. Id. at 759-760.

88. 1987 Report of the Working Group, supra note 80 (Ch.7) at 10 (paras. 37-40).

89. This was also noted by the working group at its most recent session, in view of the increasingly large number of participants, 1987 Report of the Working Group, supra note 77(Ch.7) at 6 (para. 21).
In 1985, approximately 250 persons (governmental observers, representatives of national liberations movements, of non-governmental organizations in consultative status -- indigenous peoples and others --, indigenous peoples' organizations and other organizations, individual experts and scholars) took part in the session, 1985 Report of the Working Group, supra note 74(Ch.7) at 3-5 (paras. 6-9) (with a list of participants). In 1987, approximately 370

persons took part in the session. 1987 Report of the Working Group, supra note 77(Ch.7) at 5 (para. 12).

90. See supra note 76 (Ch.7) and accompanying text.

91. Supra note 29 (Ch.3) and accompanying text.

92. Supra notes 74 and 77(Ch.7); Barsh, Indigenous Peoples: An Emerging Object of International Law, (1986) 80 A.J.I.L. 369, notes that the term "populations" has been used in the reports and resolutions of the Working Group "to avoid any implicit recognition of the right to self-determination", at 376.

93. The 1987 session of the working group was attended by the Grand Council of the Crees (of Québec), the AFN, the Federation of Saskatchewan Indian Nations, the NCC, the Union of New Brunswick Indians and several individual band representatives, 1987 Report of the Working Group, supra note 77(Ch.7) at 4-5 (paras. 9-10).

94. There are currently three applications of Canadian aboriginal groups pending before the Committee.

Chapter 8

1. Art. 38 (1) of the I.C.J. Statute is commonly regarded as enumerating the main sources of international law, see Brownlie, supra note 6 (Ch.7) at 3; Verdross/Simma, supra note 51 (Ch.7) at 322, both with further references.

2. U.N.G.A. Res. 1514 (XV), Dec. 14, 1960, 15 U.N.G.A.O.R., Supp. No. 16, 66-67 (hereinafter: resolution 1514). The resolution was adopted by 89 votes to 0, with 9 abstentions.

3. U.N.G.A. Res. 2625 (XXV), (Oct. 24, 1970), 25 U.N.G.A.O.R., Supp. No. 28, 121 (hereinafter: resolution 2625). The resolution was adopted without a vote.

4. See for example U.N.G.A. res. 545 (VI), res. 637A (VII), res. 637B (VII), res. 637 (VIII), res. 742 (VIII) res. 837 (IX).

5. The two covenants were adopted unanimously and opened for signature, ratification and accession by the U.N. General Assembly in Res. 2200 (XXI)

on Dec. 16, 1966. The covenants are set out in the annex to the resolution. They both entered into force in 1976. By the end of 1986, the I.C.C.P.R. had received 85, the I.E.S.C.R. 88 ratifications (Canada signed and ratified both covenants); see Marie, International Instruments Relating to Human Rights-Classification and Chart showing ratifications as of 1 January 1987, (1987) 8 H.R.L.J. 217 at 225-226.

6. Final Act of the Helsinki Conference on Security and Cooperation in Europe (1975), reproduced in 1975 14 I.L.M. 1293. The act was adhered to by 35 States.

7. The Charter was signed on June 26, 1981 and entered into force in October 1986; at the end of 1986 it had received 31 ratifications; see Marie, supra note 5 (Ch.8) at 228.

7a. Marie, supra note 8 (Ch.8) at 225-226.

8. Brownlie, supra note 6 (Ch.7) at 5, with further references.

9. See Sloan, The Binding Force of a "Recommendation" of the General Assembly of the United Nations, (1948) 25 B.Y.I.L. 1 at 24-25; Falk, On the Quasi-Legislative Competence of the General Assembly, (1966) 60 A.J.I.L. 782 at 786; Castaneda, Legal Effects of United Nations Resolutions, New York 1969 at 170-171; see also the arbitral award rendered by R.J. Dupuy, Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. The Government of the Lybian Arab Republic (19.1.1977), reproduced in (1978) 17 I.L.M. 1 at 28-30. See also the memorandum by the U.N. Office of Legal Affairs on the use of the terms "Declaration" and "Recommendation", which states that, "... a 'declaration' is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected", Commission on Human Rights, 18th session, U.N. Doc. E/CN.4/L.610 (April 2, 1962) at 2 (para.5).

10. Arangio-Ruiz, The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations, (1972) 137 R. C. 419 at 522-523.

11. With particular regard to the right to self-determination, see Asamoah, The Legal Significance of the Declarations of the General Assembly of the United Nations, The Hague 1966 at 179-184.

12. Schreuer, Recommendations and the Traditional Sources of International Law, (1977) 20 G.Y.I.L. 77 at 105.

13. Bin Cheng, United Nations Resolutions on Outer Space: "Instant" International Customary Law ?, (1965) 5 I.J.I.L. 23 at 27.

14. Sinha, Has Self-Determination Become a Principle of International Law Today?, (1974) 68 A.J.I.L. 332 at 339-347; White, Self-Determination: Time for a Re-Assessment?, (1981) 28 N.I.L.R. 147; for an account of the U.N. practice relating to decolonisation, see L. Chen, Self-Determination: An Important Dimension of the Demand for Freedom, (1981-82) Proceedings of the A.S.I.L. 88 at 90 et seq.

15. Sinha, id. at 358.

16. The drafting of the I.C.C.P.R. started as early as 1948, see Pechota, The Development of the Covenant on Civil and Political Rights, in: Henkin (ed.), The International Bill of Rights, New York 1981, 32 at 38-39.

17. Davies, Aboriginal Rights in International Law: Human Rights, in Morse (ed.), supra note 4 (intr. ch.), 745 at 777.

18. Treaty on the Basis of the Relations between the Federal Republic of Germany and the German Democratic Republic (21.12.1972), reproduced in (1973) 12 I.L.M. 16.

19. The statements are reproduced in Marston, United Kingdom Materials on International Law, Part Three: I.E. (Subjects of International Law - States - Self-Determination), (1984) 55 B.Y.I.L. 430 at 434.

20. Brownlie, supra note 6 (Ch.7) at 6-7.

21. Brownlie, supra note 6 (Ch.7) at 515; Kiss, The People's Right to Self-Determination (1986) 7 H.R.L.J. 165 at 174; I.C.J., Legal Consequences for States of the Continued Presence of South-Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion (1970), I.C.J.-Reports 1971, 3, sep. op. Ammoun at 89-90.

22. This definition of jus cogens is contained in Art. 53 of the Vienna Convention on the Law of Treaties, reproduced in Brownlie, Basic Documents in International Law, 2nd ed. Oxford 1972, at 233; among the generally accepted norms of jus cogens are the principles contained in Art. 2 of the U.N. Charter, e.g. the prohibition of the use of force, see Verdross/Simma, supra note 51 (Ch.7) at 74-75.

23. I.C.J., Western Sahara advisory opinion (1975), I.C.J.-Rep. 1975, 8, at 24 (para. 56); Bennett, Aboriginal Rights in International Law, Occasional Paper No. 37, Royal Anthropological Institute of Great Britain (1978), at 4; Cassese, The Self-Determination of Peoples in: L. Henkin (ed.),

supra note 16 (Ch.8), 92 at 111; Chowdhury, The Status and Norms of Self-Determination in Contemporary International Law, (1977) 24 N.I.L.R. 72 at 73: Clinebell/Thomson, supra note 370 at 712; Dinstein, Collective Human Rights of Peoples and Minorities, (1976) 25 I.C.L.Q. 102 at 106; Gros-Espiell, The Right to Self- Determination -- Implementation of United Nations Resolutions, Study prepared for the U.N.Sub-Commission on the Prevention of Discrimination and Protection of Minorities, U.N.Doc. E/CN.4/Sub.2/405/Rev. 1 (1979), at 10 (para. 61); Higgins, supra note 84 (Ch.7) at 103; Thürer, Self-Determination, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 8 (1985) 470 at 475; contra: Gross, Essays on International Law and Organization, The Hague/New York 1984, at 273-274.

24. Vasak, Towards a Specific International Human Rights Law, in: Vasak (ed.), The International Dimension of Human Rights, Paris 1982, Vol.2, 671 at 676-677.

25. U.N.G.A. Res. 637 (VII), 1952; Cassese, in: J.P. Cot/A. Pellet (eds.), O.N.U.-La Charte, Commentaire Article par Article, Paris-Bruxelles 1985, at 46; Gros-Espiell, supra note 23 (Ch.8) at 10 (para. 59).

26. White, supra note 14 (Ch.8) at 168.

27. Id. at 148.

28. The covenant is one of the three international human rights instruments commonly referred to as "The International Bill of Rights", see Henkin, supra note 16 (Ch.8), at 16.

29. See the "general comment" 12(21) of the Committee on Art. 1 of the covenant, Report of the Human Rights Committee, U.N. G.A.O.R. 39th session (1984), Suppl. No. 40 (A/39/40), at 142 (Annex VI). Under Art. 40 (4) of the covenant, the Committee "...shall transmit ... such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments ...". In view of the Committee, these comments fulfill the purpose of assisting the States parties in their reporting obligations under the covenant, by making available to them the Committee's experience. Report of the Human Rights Committee, U.N. G.A.O.R., 36th session (1981), Suppl. No. 40 (A/36/40) at 107 (Annex VII, introduction).

30. White, supra note 14 (Ch.8) at 148.

31. Under Art. 2 of the Optional Protocol to the I.C.C.P.R., individuals may submit a "communication" to the Committee on the ground that their rights

under the covenant have been violated. The Optional Protocol came into force on March 23, 1976; by the end of 1986, it had received 38 ratifications (including Canada), see Marie, supra note 8 (Ch.8) at 226.

32. Communication No. R.19/78; summary of the decision in (1984) 5 H.R.L.J. 194.

33. Id. at 197-198.

34. P.C.I.J., advisory opinion, ser. B No. 17 (1930), Interpretation of the Convention between Greece and Bulgaria respecting reciprocal emigration signed at Neuilly-sur-Seine on Nov. 27, 1919 (Question of the "Communities"), at 21.

35. Dinstein, supra note 23 (Ch.8) at 104.

36. Gros-Espiell, supra note 23 (Ch.8) at 9 (para 56).

37. Cobo, supra note 71 (Ch.7). The definition is reproduced in Daes, Native peoples' Rights, (1986) 27C. de D.123 at 131. The author is the current chairperson of the U.N. Working Group on Indigenous Populations.

38. Supra note 90 (Ch.7) and accompanying text.

39. Daes, supra note 37 (Ch.8) at 130.

40. Supra note 9 and accompanying text.

41. A. Cristescu, The Right to Self-Determination: Historical and Current Developments on the Basis of United Nations Instruments (1981), U.N. Doc. E/CN.4/Sub. 2/404/Rev.1 at 40 (para. 275).

42. Supra at 119-120.

43. Ibid.

44. 1961 reprint.

45. Ibid.

46. Supra note 29 (Ch.8) at para. 1

46a. Supra Ch. 5, I. (Part 2).

47. Tomuschat, Protection of Minorities under Art. 27 of the International Covenant on Civil and Political Rights, in: Völkerrecht als Rechtsordnung, Festschrift fur Hans Mosler, Berlin 1983, at 949, 974 amd 979.

48. Convention for the Protection of Human Rights and Fundamental Freedoms (4.11.1950), Council of Europe, European Treaty Series No. 5. The Convention entered into force on Sept. 3, 1953; by the end of 1986, it had received ratifications from all 21 members of the Council of Europe, see Marie, supra note 8 (Ch.8) at 226.

49. Supra note 6 (Ch.8).

50. Supra note 7 (Ch.8).

51. The fact that the protection of minorities has been so far effected through an "individualistic approach" in the U.N., focussed on the rights of the individual group members and not on the rights of the group, has been noted by a member of the working group, 1987 Report of the Working Group, supra note 80 (Ch.7) at 13 (para. 49).

52. Tomuschat, supra note 47 (Ch.8) at 975 and 962-963.

53. The Convention was adopted for signature and ratification by U.N.G.A. res. 2106 A (XX) of 21 December 1965. It entered into force on January 4, 1969. By the end of 1986, it had received 124 ratifications (including Canada), see Marie, supra note 8 (Ch. 8) at 237.

54. The Committee is set up pursuant to Art. 8 para. 1; States are required to submit reports under Art. 9 para. 1.

55. Supra note 32 (Ch.1).

56. 7th Report of Canada (27 August, 1985), U.N. Doc. CERD/C/107/Add. 8 (4 November 1985), at paras. 14-16, 19, 35-36; 8th Report of Canada (10 February 1986), U.N. Doc. CERD/C/132/Add.3 (6 May 1986), at paras. 7 and 19.

57. Committee on the Elimination of Racial Discrimination, 34th session, provisional summary record of the 781st meeting (4 March 1987), at 8-12.

58. See the statement submitted by the International Indian Treaty Council to the U.N.Commission on Human Rights, U.N. Doc. E/CN.4/1986/NGO/36 at 4.

59. Decision of the Committee reported in (1981) 2 H.R.L.J. 158. It must be noted that the term "decision" is not used as a technical term. Under Art. 5 para. 4 of the Optional Protocol to the covenant, the Committee forwards "views" to the State and the individual concerned, which indicates that the Committee does not render binding judicial decisions.

60. States are requested to submit reports to the Committee under Art. 40 para. 1 of the Covenant.

61. 18.4.1979, U.N. Doc. CCPR/C/1/Add. 43 (Vol. 1), 10.5 1979, at 11.

62. The fact that many States Parties to the covenant "completely ignore" Art. 1 in their reports was noted by the Committee in its "general comment" on Art. 1, supra note 29 (Ch.8) at para. 3.

63. Presentation of Canada's Supplementary Report on the International Covenant on Civil and Political Rights, Opening Statement of the Canadian Delegation, Geneva, October 31, 1984, at 16-20.

64. Supra note 41 (Ch.2) and accompanying text.

65. Canada, Department of the Secretary of State, March 1983, Supplementary Report of Canada on the Application of the Provisions of the International Covention on Civil and Political Rights in Response to Questions Posed by the Human Rights Committee in March 1979, at 95-104.

66. Supra note 73 (Ch.8) and accompanying text.

67. Report of the open-ended working group set up by the Commission on Human Rights to consider the drafting of a declaration on the rights of persons belonging to national, ethnic, religious and linguistic minorities, UN Doc. E/CN.4/1987/32 (9 March 1987), at para. 5.

68. Ibid. and U.N. Doc. E/CN.4/1986/43 (10 March 1986).

69. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Proposal concerning a definition of the term "minority" submitted by Mr. Jules Deschênes, UN Doc. E/CN.4/Sub.2/1985/31, 14 May 1985, at para. 181.

70. Report of the open-ended working group set up by the Commission on Human Rights to consider the drafting of a declaration on the rights of persons belonging to national, ethnic, religious and linguistic minorities,

U.N. Doc. E/CN.4/1986/43, 10 March 1986, at 3 (para. 9).

71. See supra note 15 (Ch.5) and accompanying text.

72. Supra note 69 (Ch.8) at paras. 23-38.

73. Supra note 77 (Ch.7) and accompanying text.

74. Reproduced in Rigaux, The Algiers Declaration of the Rights of Peoples, in: A. Cassese, UN Law/Fundamental Rights - Two Topics in International Law, Alphen aan den Rijn 1979, 211 at 219. The Declaration was drafted by "... a group of jurists, political scientists, sociologists, representatives of trade unions and political parties of various countries, as well as members of several liberation movements ...", Rigaux, id. at 211.

75. See for example the statement cited by Mr. Deschênes in his proposal concerning the definition of a minority, supra note 69 (Ch. 8) at paras. 32-33, and the 1987 Report of the Working Group, supra note 77 (Ch.7) at para 52.

76. Emerson, Self-Determination (1966) A.S.I.L. Proceedings 135 at 138; for a survey of the different positions taken see Kaur, Self-Determination in International Law, (1970) 10 I.J.I.L. 479 at 485-488.

77. Emerson, ibid.

78. Gros-Espiell, supra note 23 (Ch.8) at 9 (para. 57).

79. Supra note 3 (Ch.8).

80. Supra note 2 (Ch.8).

81. Bennett, supra note 23 (Ch.8) at 13; Sinha, supra note 14 (Ch.8) at 340-341.

82. For a description of the major western States' position in the U.N., see Pomerance, Self-Determination in Law and Practice: The New Doctrine in the United Nations, The Hague 1982, at 38-39; see also generally on the western conception, Cassese, Political Self-Determination - Old Concepts and New Developments, in: Cassese (ed.), supra note 74 (Ch.8), 137 at 140-141.

83. U.N.G.A. Res. 1541 (XV), 15 Dec. 1960, Principle IV.

84. On the drafting history of the covenants, see generally Pechota, supra note 16 (Ch.8).

85. On the creation of the committee, its composition and its agenda, see Hazard, New Personalities to Create New Law, (1964) 58 A.J.I.L. 952 et seq.

86. On the early developments in the U.N. see Emerson, Colonialism, Political Development and the U.N., (1965) 19 International Organisation 484 et seq.

87. Emerson, Self-Determination, (1971) 65 A.J.I.L. 459 at 465.

88. Emerson, ibid., noted that after the end of colonialism, other categories of peoples would be likely to assert the right to self-determination.

89. White, supra note 14 (Ch.8) at 148.

90. Supra note 30 (Ch.8) and accompanying text.

91. Davies, supra note 17 (Ch.8) at 778-779.

92. Supra note 23 (Ch.8).

93. Id., sep. op. Dillard at 122.

94. Supra note 22 (Ch.8). The convention is not yet in force; however, most of its provisions are generally considered as declaratory of customary international law, see Brownlie, supra note 6 (Ch.7) at 601.

95. Pomerance, supra note 82 (Ch.8) at 45.

96. Supra note 78 (Ch.8) and accompanying text.

97. Emerson, The Fate of Human Rights in the Third World, (1975) 27 World Politics 201 at 207; see also Delbrück, International Protection of Human Rights and State Sovereignty, (1982) 57 Indiana L.J. 567 at 571.

98. For a survey of the practice of states with regard to secession, see Turp, Le Droit de Sécession en Droit International Public, (1982) 20 C.Y.I.L. 24 at 58-67.

99. Id. at 75-76.

100. Id. at 53-54.

101. Id. at 46-47.

102. Id. at 52.

Chapter 9

1. Supra Part 1, intr. ch. ("The aboriginal peoples of Canada").

2. The term is used by Brownlie, The Indian Brotherhood of the Northwest Territories: The Political Option and Strategies in the Light of International Law, Legal Opinion prepared for the NIB, 1977, at 3.

3. Id. at 4; see also Hawkes, Aboriginal Self-Government -- What does it mean?, Discussion Paper, Institute of Inter-governmental Relations, Queen's University 1985, at 25.

4. Supra note 3 (Ch.8) and accompanying text.

5. Supra Ch. 6, I.

6. Supra note 18 (Ch.3) and accompanying text.

7. Supra note 12 (Ch.3) and accompanying text.

8. Supra Ch. 6, II.

9. Supra Part 1, intr. ch.

10. On this problem see Weinstein, supra note 7 (Ch.3).

11. Blackstone, Commentaries of the Laws of England, 9th ed., London 1783, Book IV, Ch. 5, at 67.

12. See MacDonald, The Relationship between International Law and Domestic Law in Canada in: MacDonald/Morris/Johnston, Canadian Perspectives on International Law and Organization, Toronto 1974, 88 at 111.

13. Green, International Law: A Canadian Perspective, Toronto 1984, at 69.

14. LaForest, May the Provinces Legislate in Violation of International Law?, (1961) 39 Can Bar R. 78 at 80.

15. MacDonald, supra note 12 (Ch.9) at 119.

16. Claydon, The Application of International Human Rights Law by Canadian Courts, (1981) 30 Buffalo L.R. 727, in view of this potential negative effect argues that the provinces could be prevented from violating international customary law without endangering their autonomy, at 730-731.

17. (1939) 2 D.L.R. 417.

18. Id. at 430.

19. The Cree-Naskapi Act is one of the acts passed pursuant to the James Bay and Northern Québec Agreement and implements the provisions of the agreement. The measure of self-government powers it provides for will be described in Part 4, infra Ch. 10, II.

20. Supra note 71 (Ch.4).

21. Green, supra note at 69; MacDonald, supra note at 122; Hogg, supra note 9 (intr. ch.) at 245.

22. The P.C. in the Labour Conventions case (A.-G. Can. v. A.-G. Ont. (Labour Conventions), (1937) A.C.326) held that the provinces had the competence to implement international treaties dealing with matters under their competence. This decision, although still being valid, has been severely criticized, see Hogg, supra note 9 (intr. ch.) at 251-256.

23. Verdross/Simma, supra note 51 (Ch.7) at 550-551.

24. Brownlie, supra note 6 (Ch.7) at 52-53.

25. Hogg, supra note 9 (intr. ch.) at 630.

26. Hogg, supra note 9 (intr. ch.) at 662.

27. Turp, Le Recours au Droit International aux Fins d'Interprétation de la Charte, (1984) 18.R.J.T. 353 at 364; Cohen/Bayefsky, The Canadian Charter of Rights and Freedoms and Public International Law, (1983) 62 Can. Bar. R. 265 at 299; for a comparison between the Charter and the I.C.C.P.R., see Tarnopolsky, A Comparison between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights, (1982-83) 8 Queen's L.J. 211.

28. (1984) 5 C.L.R. (4th) 121 (Alta. C.A.).

29. Id. at 148-149 (diss. op. Belzil).

30. See also Claydon, International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms, (1982) 45 S.C.L.R. 287 at 295; Hayward, International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications, (1985) 23 U.W.Ont. L.R. 9 and 13-16.

31. (1987) 1 S.C.R. 313.

32. Id. at 348.

33. This has been criticized by Humphrey, The Canadian Charter of Rights and Freedoms and International Law, (1985-86) 50 Sask.L.R. at 12-13.

34. For a recent discussion of this issue and generally of the implementation of international human rights law in the domestic sphere, see Eick, Enforcing International Human Rights Law in Domestic Courts, unpublished, LLM-Thesis, McGill University 1987, Part I, Ch. 1.

35. Supra note 41 (Ch.2) and accompanying text.

36. Supra Part 2, Ch. 4, I.3.

37. Supra Part 3, Ch. 9, III.2.

38. Supra Part 3, Ch. 8, III.1.

39. The Declaration was adopted by the General Assembly of the United Nations on Dec. 10, 1948, by 48 states with 8 abstentions. Several of its provisions are considered as being general principles of law, the Declaration itself as a guideline for the interpretation of the U.N. Charter, see Brownlie, supra note 6 (Ch.7) at 570-571, with further references.

40. Supra note 6 (Ch.8).

41. Schachter, Human Dignity as a Normative Concept, (1983) 77 A.J.I.L. 848 at 853.

42. Supra Part 2, Ch. 4, III.4.

43. Supra note 31 (Ch.9).

44. Id. at 349.

45. Ibid.

Chapter 10

1. Supra note 1 (Ch.2).

2. See supra note 66 (Ch.6).

3. Supra note 14 (Ch.2) and accompanying text.

4. Report of the Special Committee, supra note 32 (Ch.1) at 47.

5. Id. at 39.

5a. See Bartlett, Citizens Minus: Indians and the Right to Vote, (1980) 44, Sask. L.R. 362 at 363.

6. An Act respecting certain provisions of the James Bay and Northern Québec Agreement and the Northeastern Québec Agreement relating principally to Cree and Naskapi local government and to the land regime governing Category IA and Category IA-N land, 1983-84, 32-33 Elizabeth II, c.18.

7. Supra note 48 (Ch. 2).

8. The other federal act implementing the agreement is the James Bay and Northern Québec Native Claims Settlement Act, 1976-77, 25-26 Elizabeth II, c.32.
The Québec legislature passed a total of 20 acts to implement the agreement.

9. 1986 Report of the Cree-Naskapi Commission, Ottawa 1987, at 11.

10. Id. at 5.

11. Id. at 35.

12. Id. at 33.

13. (1978) S.Q., c.92.

14. Supra note 92 (Ch. 1) at 34.

15. Supra at 68-69

16. An Act relating to self-government for the Sechelt Indian Band, (1986) 33-34-35 Elizabeth II, c.27

17. House of Commons Debates, Feb. 7, 1986, at 10584.

18. Report of the Special Committee, supra note 32 (Ch.1) at 59.

19. Ibid.

Chapter 11

1. Report of the Special Committee, supra note 32 (Ch.1) at V.

2. Id. at 44.

3. Id. at 47.

4. Id. at 59.

5. Id. at 64.

6. Id. at 135.

7. Id. at 136.

8. Response of the Federal Government, supra note 31 (Ch.2).

9. Id. at 1.

10. Id. at 3.

11. Id. at 4.

12. Ibid.

13. Ibid.

14. Ibid.

15. Id. at 5.

16. Id. at 4.

17. An Act relating to self-government for Indian Nations, (1983-84) 32-33 Elizabeth II, C-52.

18. Although couched in technical terms, Part III of the Cree-Naskapi Act ensures that every member of the band may take part in the decision-making procedures, which the band may regulate according to their traditional systems.

19. 1987 FMC, Doc. 800-23/028, Ottawa, March 27, 1987. For the text of the federal and aboriginal proposals, see the Appendix.

20. Id., Doc. 800-23/030.

21. Id., Doc. 800-23/029. The text of the ICNI proposal is reproduced in the Appendix.

22. See for example the statement of D. Crombie in the House of Commons, supra note 15 (Ch.10) and the preamble to Bill C-52.

23. The position that Indian reserves can be characterized as "enclaves ... withdrawn from provincial regulatory power" has been taken by Laskin, J. (dissenting) in Cardinal v. A.-G. Alberta, (1974) 40 D.L.R. (3d) 553 at 569 (S.C.C.). The majority of the court however rejected the concept, see the judgment delivered by Martland J., id. at 559.

24. Supra Ch. 10, III.

25. Supra Part 2, Ch.4, I.2.

26. For an overview and the recent developments concerning the proposals of the historical and political background, see Completing Canada: Inuit Approaches to Self-Government, ICNI position paper, Institute of Intergovernmental Relations, Queen's University 1987 at 29-32.

27. There already is one example of a local public government initiated by aboriginal peoples, the Kativik Regional Government in Northern Québec, see Completing Canada, id. at 19-22.

28. Boundary and Constitutional Agreement for the Implementation of Division of the Northwest Territories between the Western Constitutional Forum and the Nunavut Constitutional Forum, January 15, 1987, Iqaluit, Nunavut, Canadian Arctic Resources Committee, Ottawa 1987.

29. ICNI position paper, supra note 26 (Ch.11) at 31-32.

30. Building Nunavut - Today and Tomorrow (The Nunavut Constitutional Proposal), Nunavut Constitutional Forum, Ottawa 1985.

31. Id. at 17-18.

32. Id. at 22.

33. Malone, Nunavut: The Division of Power, Working Paper No. 1, Nunavut Constitutional Forum, Ottawa.

34. Id. at 14-22.

35. Id. at 5.

36 Id. at 26.

37. Id. at 48-49.

38. Id. at 68.

39. Id. at 78.

40. Id. at 111

41. Id. at 37.

42. Richstone, Securing Human Rights in Nunavut: A Study of a Nunavut Bill of Rights, Nunavut Constitutional Forum, Ottawa 1986,

43. Malone, supra note 33 (Ch. 11)at 34-35.

44. Public Government for the People of the North, Dene Nation and Métis Association of the Northwest Territories, Yellowknife, 1981, at 1-2.

45. Id. at 4.

46. Id. at 1.

47. Id. at 10.

48. Id. at 6-9.

49. Id. at 32-35.

50. Id. at 26.

Chapter 12

1. Hogg, supra note 9 (intr. ch.) at 284.

2. Id. at 260.

3. Supra note 15 (Ch.10) and accompanying text.

4. Supra, at 32.

5. Supra at 167 and 170.

6. Supra at 168; see also the recent judgment of a Québec provincial court in a case relating to the by-law making power of a band under the Cree-Naskapi Act, in which the court held that the latter recognized an autonomous jurisdiction of the Crees and therefore was not a delegation of power to the latter. "Toutefois, en raison de l'esprit qui se dégage de la Convention (the court refers to the James Bay Agreement) et des textes législatifs qui l'ont suivi, la Cour ne croit pas être ici en face d'une législation déléguée au sens où on l'entend généralement en droit public." La Bande D'Eastmain c. Donald Gilpin, unreported, Cour Provinciale (Québec), District D'Abitibi, No. 640-27-000041-869, 1er Avril 1987, at 21.

7. Supra note 92 (Ch.1) at 34.

8. Supra at 68.

9. Malone, supra note 33 (Ch.11) at 15-18.

10. This appears to be the leading opinion, although the issue still remains controversial. See Brownlie, supra note 6 (Ch.7) at 90-93, with further references.

11. Now the Constitution Act, 1867.

12. For an account of the evolution and different stages of the policy and the law relating to Indian self-government in the U.S., see Sanders, Aboriginal Self-Government in the United States, Institute of Intergovernmental Relations, Queen's University, 1985 at 3-48. See also Mason, Canadian and United States Approaches to Indian Sovereignty, (1983) 21 Osgoode Hall L.J. 422 at 449-456. For a detailed survey of the history of the relations between Indians and the U.S. federal government, see Deloria/Lytle, The Nations Within - The Past and Future of American Indian Sovereignty, New York 1984.

13. Sanders, id. at 48-49.

14. United States v. Wheeler, (1978) 435 U.S. 313.

15. Id. at 426.

16. Id. at 423-424.

17. Sanders, supra note 12 (Ch.12) at 49.

18. 25 U.S.C. 1301-26 (1976).

19. 25 U.S.C. 450 (1976).

20. Mason, supra note 12 (Ch.12) at 455-456.

21. Supra note 12 (Ch.12) at 62.

Chapter 13

1. Supra, Part 2, Ch. 4, I.1.d.

2. Id., III.2.b.

3. See intr. ch., I., and Ch. 3, I. (Part 1).

4. For an overview of anthropological findings relating to aboriginal peoples in Northern Québec, see Hutchins, The Law Applying to the Trapping of Furbearers by Aboriginal Peoples in Canada: A Case of Double Jeopardy, in:

Nowak/Baker (eds.), Wild Furbearer Management and Conservation in North-America, Ontario Ministry of Natural Resources, Toronto, forthcoming, at 8-11; see also Brody, Maps and Dreams -Indians and the British Columbia Frontier, Vancouver/Toronto 1981, at 98 (with regard to Indian tribes in B.C.).

5. Hutchins, id. at 17-19; Brody, id. at 95-96.

6. The Universal Declaration of Human Rights (supra note 39 (Ch.9) provides in Art. 29 para. 1 that "Everyone has duties to the community ...", without however specifying any of them.
A more recent example of a human rights instrument with a dual approach to individual rights is provided by the African Charter on Human and People's Rights, supra note 7 (Ch.8), which in Chapter II provides for a catalogue of duties of the individual towards society and the state.

7. Supra note 59 (Ch.8).

8. Id. at 159.

9. Canada, House of Commons, Standing Committee on Indian Affairs and Northern Development, 6th Report (1982), at 58:22 (hereinafter: Standing Committee).

10. Id. at 58:15. A similar view was taken by Prof. Fleming, id. at 58:16.

11. Supra note 32 (Ch.1) at 110.

12. Supra Ch. 12, I. (Part 4).

13. Standing Committee, supra note 9 (Ch.13) at 58:22-23.

14. Simon v. The Queen, supra note 76 (Ch.4) at 399.

15. Supra note 48 (Ch.11) and accompanying text.

16. Supra note 15a (Ch. 2). Under s.10 of the amended Indian Act, a band may assume control of its own membership pursuant to its own rules, if the majority of the band consents thereto.

17. Van Dyke, Human Rights and the Rights of Groups, (1974) 18 Am.J.Pol.Sc. 725 at 725.

18. Humphrey, Preventing Discrimination and Positive Protection of Minorities: Aspects of International Law, (1986) 27 C. de D. 23 at 24.

19. Marie, Relation Between People's Rights and Human Rights: Semantic and Methodological Considerations, (1986) 7 H.R.L.J. 195 at 203.

20. Ibid.

21. This is evidenced by the frequent invocation of international law by aboriginal peoples, see supra notes 26-29 (Ch.3) and accompanying text; see also Standing Committee, supra note 9 (Ch.13) at 58:13.

22. See supra note 21 (Ch.9) and accompanying text.

23. 1987 Report of the Working Group, at 20 (para. 77).

24. For a recent discussion of this issue, see Tomuschat, Rights of Peoples, Some Preliminary Remarks, in : Y. Hangartner/S. Trechsel (eds.), Völkerrecht im Dienst des Menschen, Festschrift fur Hans Haug, Bern 1986, 337.

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APPENDIX:

The draft constitutional amendments tabled at the 1987 FMC

APPENDIX I

DOCUMENT: 800-23/028

FIRST MINISTERS' CONFERENCE

ON

ABORIGINAL CONSTITUTIONAL MATTERS

Federal Draft

Schedule

Amendment to the Constitution of Canada

Ottawa

FEDERAL DRAFT

SCHEDULE

AMENDMENT TO THE CONSTITUTION OF CANADA

1. The Constitution Act, 1982 is amended by adding thereto, immediately after section 35 thereof, the following sections:

Right to self-government

"35.01.(1) The aboriginal peoples of Canada have the right to self-government within the context of the Canadian federation.

Jurisdiction, etc., of bodies exercising right

(2) The jurisdiction, legislative powers, proprietary rights and other powers, rights and privileges of bodies or institutions exercising the right to self-government referred to in subsection (1) shall be determined and defined through agreements described in section 35.03.

Scheduling, nature and scope of negotiations

35.02.(1) The government of Canada and the provincial governments are committed to discussing with representatives of aboriginal people the scheduling, nature and scope of negotiations to be undertaken pursuant to subsection (2) and to providing to all aboriginal peoples of Canada equitable access to those discussions and to the process of negotiation.

Request for negotiations

(2) Any identifiable group of aboriginal people living in a particular community or region may request the government of Canada, and the government of any province in which the community or region is located, to negotiate an agreement relating to self-government.

Commitment to negotiate

(3) Where the government of Canada and the governments of any provinces have received a request to negotiate an agreement pursuant to subsection (2), those governments shall negotiate with representatives of the group that made the request

* This could be drafted as additional subsections to section 35.

for the purpose of concluding an agreement that is appropriate to the circumstances of that group.

Agenda for negotiations

(4) Negotiations pursuant to subsection (3) may relate to any matter respecting self-government including, where appropriate, jurisdiction, powers, land, resources, funding and preservation and enhancement of language and culture.

Participation of territories

(5) The government of Canada may invite elected representatives of the government of the Yukon Territory or the Northwest Territories to participate in discussions referred to in subsection (2) and negotiations referred to in subsection (3), where the negotiations relate to communities or regions within the Yukon Territory or the Northwest Territories, as the case may be.

Deemed treaty rights where legislatures approve

35.03. Self-government rights that are set out in any agreement concluded with aboriginal people living in a particular community or region that

(a) includes a declaration to the effect that this section applies in respect of those rights, and

(b) is approved by an Act of Parliament and an Act of the legislature of each province in which that community or region is located

are deemed to be treaty rights for the purposes of section 35.

Application of the Charter

35.04.(1) The Canadian Charter of Rights and Freedoms applies, to the extent that its application is appropriate in the circumstances, to all legislative or governmental bodies or institutions exercising the right to self-government in respect of all matters within their authority.

Application of section 33 of the Charter

(2) For greater certainty, section 33 of the Canadian Charter of Rights and Freedoms applies, with such modifications as the circumstances require, in respect of enactments of bodies or institutions referred to in subsection (1).

Non-derogation of rights of aboriginal peoples

35.05. Nothing in sections 35.01 to 35.03 abrogates or derogates from any rights of the aboriginal peoples of Canada.

Non-derogation of legislative powers, etc. of governments

35.06. Nothing in subsection 35.01 (1) abrogates or derogates from the jurisdiction, legislative powers, proprietary rights or any other rights or privileges of Parliament or the government of Canada, or the legislature or government of a province, except in accordance with agreements described in section 35.03".

2. Section 61 of the said Act is repealed and the following substituted therefor:

References

"61. A reference to the Constitution Act, 1982, or a reference to the Constitution Acts 1867 to 1982, shall be deemed to include a reference to any amendments thereto."

Constitutional conference

3. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within ten years after this Amendment comes into force.

Review of this amendment

(2) The conference convened under subsection (1) shall have on its agenda a review of the provisions of this Amendment and its implementation.

Participation of aboriginal peoples and territories

(3) The Prime Minister of Canada shall invite representatives of the aboriginal peoples of Canada and elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the conference convened under subsection (1).

Citation

4. This Amendment may be cited as the Constitution Amendment, year of proclamation (Aboriginal peoples of Canada).

APPENDIX II

DOCUMENT: 800-23/029

FIRST MINISTERS' CONFERENCE

ON

ABORIGINAL CONSTITUTIONAL MATTERS

AMENDMENTS to PART II of the CONSTITUTION ACT, 1982

Inuit Committee on National Issues

Ottawa
March 26-27, 1987

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

35 (1) The aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized, affirmed and guaranteed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada. (NO CHANGE)

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that

(a) now exist by way of land claim agreements;

(b) may be acquired by way of land claim agreements; or

(c) may be acquired by way of self-government agreements referred to in this Part.

(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. (NO CHANGE)

(5) The rights referred to in subsection (1) include

(a) titles in and to lands, waters and sea-ice;

(b) the right of the aboriginal peoples to maintain their cultural heritage including their languages, customs and traditions; and

(c) the right to self-government.

(6) The government of Canada shall negotiate with representatives of the aboriginal peoples living in each province and territory and with the relevant provincial governments, the parties to, and the timing, nature and subject-matters of, the negotiations referred to in subsection (8).

(7) The government of each province shall participate in negotiations referred to in subsection (6) with aboriginal peoples in respect of matters within its authority.

(8) To the extent that each has authority over subject-matters identified in negotiations under subsection (6), the governments of Canada and of each province shall negotiate, at the option of the aboriginal peoples

(a) self-government agreements, or

(b) amendments to existing treaties including land claims agreements.

(9) In this Part, "self-government agreement" means an agreement that

(a) is concluded under this section with one of the aboriginal peoples;

(b) contains a declaration that paragraph (3)(c) applies; and

(c) has been ratified

(i) by an Act of Parliament for matters coming within its authority;

(ii) by an Act of the legislature of any province that is a party to the agreement, for matters coming within the authority of the legislatures of the provinces.

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the **Constitution Act, 1867**, to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

(NO CHANGE)

35.2 Parliament and the government of Canada and to the extent provided by agreements referred to in subsection 35(3), the legislatures and governments of the provinces, are committed to

(a) ensuring that aboriginal governments have the legislative authority and other powers necessary to raise revenues and derive benefits by taxation or otherwise within the territories subject to their jurisdictions; and

(b) providing aboriginal governments with sufficient fiscal resources, in the form of block funding, equalization payments or other direct transfer payments, to enable those institutions to govern their affairs and to maintain and develop aboriginal cultures; to promote economic development and employment opportunities in order to reduce regional disparities; and to provide services of reasonable quality and at levels reasonably comparable to those generally available to all Canadians.

35.3 Any aboriginal person or collectivity whose rights, as guaranteed under this Part, are infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court may deem appropriate and just in the circumstances.

35.4 This Part shall be interpreted in a manner consistent with the preservation and enhancement of the heritage of the aboriginal peoples of Canada.

35.5 Nothing in subsections 35(3) and (8)

(a) abrogates or derogates from the right of self-government or any other rights or freedoms of the aboriginal peoples;

(b) precludes the negotiation or inclusion of matters relating to self-government in land claims agreements.

APPENDIX III DOCUMENT: 800-23/030

FIRST MINISTERS' CONFERENCE
ON
ABORIGINAL CONSTITUTIONAL MATTERS

Joint Aboriginal Proposal for Self-government

Assembly of First Nations
Native Council of Canada
Metis National Council
Inuit Committee on National Issues

March 27, 1987

Ottawa
March 26-27, 1987

ABORIGINAL DRAFT

STATEMENT OF THE RIGHT OF SELF-GOVERNMENT

35(5) (a)

For greater certainty, the inherent right of self-government and la of all the Indian, Inuit, and Metis peoples of Canada is recognized and affirmed in subsection (1).

THE COMMITMENT TO NEGOTIATE

35(5) (b) (i)

Upon the request of an aboriginal people of a community or region, the government of Canada shall negotiate agreements relating to the matters referred to in (iii);

35(5) (b) (ii)

the government of a province shall participate in the negotiations, to the extent of its jurisdiction, if so requested by the aboriginal people concerned; and

35(5) (b) (iii)

the agreements referred to in this subsection shall be negotiated in good faith by all parties, and without limiting their scope, the negotiations shall include such matters as self-government, lands, resources, economic and fiscal arrangements, education, preservation and enhancement of language and culture and equity of access, as may be requested by the aboriginal people concerned.

35(5) (b) (iv)

For greater certainty, and without prejudice to the rights of any aboriginal peoples of a community or region, or its negotiation of agreements, all the aboriginal peoples of Canada are guaranteed equitable access to the processes and resources by which agreements will be negotiated pursuant to this section.

NEGOTIATIONS WILL NOT PREJUDICE OTHER PROGRAMS

35(5) (c)

No program, service, financial arrangement, claims or other process available to the aboriginal peoples of Canada, shall be prejudiced by reason of the fact that negotiations have been entered into pursuant to this section.

RIGHTS IN AGREEMENTS SHALL BE TREATY RIGHTS

35(5) (d)

For greater certainty, the rights of aboriginal people set forth in agreements reached pursuant to paragraph (b) shall be "treaty rights" within the meaning of subsections (1) and (3).

ECONOMIC AND FISCAL ARRANGEMENTS

35(6) (a)

Parliament and the government of Canada and, to the extent provided by agreements and other treaties referred to in this Part, the legislatures and the governments of the provinces, are committed to:

35(6) (a) (i)

ensuring that aboriginal governments have the legislative authority and other powers necessary to raise revenues and derive benefits by taxation and otherwise, within their territories or regions subject to their jurisdictions; and

35(6) (a) (ii)

providing aboriginal governments with sufficient fiscal resources in the form of direct payments and other fiscal arrangements to enable those governments to govern their affairs to maintain and develop aboriginal cultures, to promote economic development and employment opportunities, and to provide services of reasonable quality and at levels reasonably comparable to those available to all Canadians.

35(6) (b)

For the purposes referred to in this Part, Parliament and the government of Canada have the primary financial responsibility concerning aboriginal peoples.

COMMITMENT TO THE PRINCIPLES OF PROMOTING SELF-GOVERNMENT AND SELF-RELIANCE

35(7)

To the extent that each has jurisdiction, Parliament and the provincial legislatures, together with the government of Canada and the provincial governments, are committed to the principle of promoting self-government and self-reliance among aboriginal peoples in communities or regions in Canada, in co-operation with them.

TREATY PROCESS

35(8) (a)

Parliament and the Government of Canada are committed to fulfilling the spirit and intent of each treaty made between an aboriginal people and the Crown

35(8) (b)

In order to fulfill the spirit and intent of treaties, the Government of Canada is committed to clarify, rectify, renovate or implement those treaties as may be requested by the aboriginal peoples concerned.

35(8) (c)

The results of the negotiations contemplated in paragraph (b) shall be set out in

(a) an amendment to a treaty,

(b) an adhesion to a treaty, or

(c) a new treaty,

as determined by the aboriginal peoples concerned.

35(8) (d)

At the request of the Indian, Inuit or Metis peoples concerned, the government of a province is committed to participate in the negotiations contemplated in paragraph (b) to the extent of its jurisdiciton, in a manner that does not abrogate or derogate from the role and authority of the government of Canada to conclude treaties with any of the aboriginal peoples of Canada

35(8) (e)

For the purposes of this subsection, references to "treaties" includes "land claims agreements" subject to paragraph (f)

35(8) (f)

Notwithstanding paragraph (d), a government of a province is committed to participate in negotiations contemplated in paragraph (b) for the purposes stated therein with respect to land claims agreement to which it is a party.

INTERPRETATION

35(9) (a)

The rights of the aboriginal peoples of Canada shall be interpreted in a broad and liberal manner, so as to promote the preservation and enhancement of the heritage and cultures of the aboriginal peoples.

35(9) (b)

Without limiting the generality of subsection (a), treaty rights of the aboriginal peoples of Canada shall be interpreted in accordance with the spirit and intent of the specific treaties including land claims agreements concerned.

NON-DEROGATION

35(10)

Nothing is subsections (5) to (8) abrogates or derogates from any rights or freedoms of the aboriginal peoples of Canada.

LEGISLATIVE POWERS NOT EXTENDED

35(11)

Nothing in this (sub)section extends the legislative powers of Parliament or a provincial legislature.

List of Abbreviations

A.C.	Appeal Cases
Add.	Addendum
AFN	Assembly of First Nations
A.J.C.L.	American Journal of Comparative Law
A.J.I.L.	American Journal of International Law
All E.R.	All England Reports
Alta.	Alberta
Am.Indian J.	American Indian Journal
Am. Indian L.R.	American Indian Law Review
Am. J. Comp.L.	American Journal of Comparative Law
A.S.I.L.	American Society of International Law
B.C.C.A.	British Columbia Court of Appeal
Buffalo L.R.	Buffalo Law Review
B.Y.I.L.	British Yearbook of International Law
c./ch.	chapter
C.A.	Court of Appeal
Can. Bar. R.	Canadian Bar Review
C.de D.	Cahiers de Droit (Université Laval)
CERD	Committee on the Elimination of Racial Discrimination
CCPR	Covenant on Civil and Political Rights
C.J.C.	Chief Justine of Canada
C.H.R.Y.	Canadian Human Rights Yearbook
C.S.	Cour Supérieure
Ct.	Court

C.Y.I.L.	Canadian Yearbook of International Law
D.I.A.N.D.	Department of Indian and Northern Affairs
diss. op.	dissenting opinion
D.L.R.	Dominion Law Reports
Doc.	Document
ECOSOC	Economic and Social Council (United Nations)
fed.	federal
FMC	First Ministers' Conference
G.A.	General Assembly (United Nations)
G.A.O.R.	Official Records of the General Assembly
G.Y.I.L.	German Yearbook of International Law
H.R.L.J.	Human Rights Law Journal
I.C.C.P.R.	International Covenant on Civil and Political Rights
I.C.E.S.C.R.	International Covenant on Economic, Social and Cultural Rights
I.C.J.	International Court of Justice
ICNI	Inuit Committee on National Issues
I.C.L.Q.	International and Comparative Law Quarterly
I.J.I.L.	Indian Journal of International Law
I.L.M	International Legal Materials
Indiana L.J.	Indiana Law Journal
L.N.T.S.	League of Nations Treaty Series
McGill L.J.	McGill University Law Journal
MNC	Métis National Council
NIB	National Indian Brotherhood
NCC	Native Council of Canada

N.I.L.R.	Netherlands International Law Review
N.J.I.L.	Nordic Journal of International Law
Ont. H.C.	Ontario High Court
P.C.	Privy Council
P.C.I.J.	Permanent Court of International Justice
P.M.	Prime Minister
Québec S.C.	Québec Superior Court
Queen's L.J.	Queen's University Law Journal
R.de C.	Receuil des Cours (Académie de Droit International de La Haye)
R.I.A.A.	Reports of International Arbitral Awards
R.J.T.	Revue Juridique Themis (Université de Montréal)
R.P.	Revue de Pratique
R.S.C.	Revised Statutes of Canada
Sask. Ct. Q. B.	Saskatchewan Court of Queen's Bench
S.C.	Statutes of Canada
S.C.C.	Supreme Court of Canada
S.C.L.R.	Supreme Court Law Review
S.C.R.	Supreme Court Reports
sep. op.	separate opinion
S.Q.	Statutes of Québec
s./ss	section/sections
T.D.	Trial Division
U.K.	United Kingdom
U.N.	United Nations
U.N.T.S.	United Nations Treaty Series

U.S.	United States
U.S.C.	United States Code
U.S.S.C.	United States Supreme Court
U.W.Ont.L.R.	University of Western Ontario Law Review
Vol.	Volume