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San Jose State University, 1992

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FROM PATERNALISM TO A THIRD ORDER OF GOVERNMENT: THE QUEST FOR SELF-GOVERNMENT BY THE FIRST NATIONS OF CANADA

A Thesis
Presented to
the Faculty of the Department of Political Science
San Jose State University

In Partial Fulfillment
of the requirements for the Degree
Master of Arts

by
ROBERT M. NOONAN, JR.

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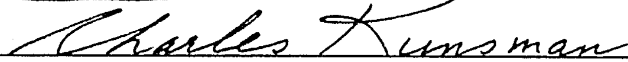

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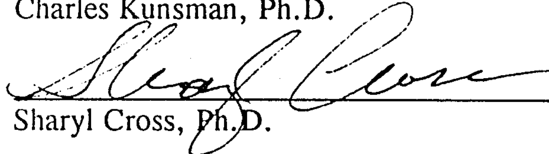

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ABSTRACT

FROM PATERNALISM TO A THIRD ORDER OF GOVERNMENT:
THE QUEST FOR SELF-GOVERNMENT BY THE
FIRST NATIONS OF CANADA

By Robert M. Noonan, Jr.

For over two hundred years the Canadian government amassed a plethora of regulations to control every aspect of Indian life. Now the Federal government is poised to return self-government to the Native population. Both sides of the negotiations speak in terms of establishing a third order of government which would be unique to federalism. Running concurrent with the creation of a third order of government is the concept of a third order of land control. The Aboriginal peoples would be allowed to regain jurisdiction over some of the vast amounts of land that they lost to the Crown. While there has been considerable momentum to implement these concepts, there has also been tremendous institutional foot dragging which threatens to scuttle the whole process. Since the Indians find themselves in the middle of the current Constitutional crisis in Canada, these aspirations for self-government and land control need to be better understood.

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INTRODUCTION

A DECLARATION OF THE FIRST NATIONS

> We the Original People of this Land know the Creator put us here. The Creator gave us Laws that govern all our relationships to live in harmony with nature and mankind. The Laws of the Creator defined our rights and responsibilities. The Creator gave us our spiritual beliefs, our Language, our culture, and a place on Mother Earth which provided us with all our needs. We have maintained our freedom, our Languages, and our traditions from time immemorial. We continue to exercise the rights and fulfill the responsibilities and obligations given to us by the Creator for the Land upon which we were placed. The Creator has given us the right to govern ourselves and the right to self-determination. The rights and responsibilities given to us by the Creator cannot be altered or taken away by any other Nation.[1]

The Aboriginal peoples of Canada have never accepted the concept that the price of their well-being in their land was the abandonment of their cultural distinctiveness and special status. And yet the policy of the Canadian government until recently has been one of assuming that the Indian people, left to their own devices, were doomed to extinction and the only proper strategy for dealing with such a situation was one of assimilation. As a result, the history of the relationship between the Aboriginal people and Canada has been one in which the Government of Canada has routinely used its institutional power to deprive Indians of their heritage, their lands, their self-sufficiency, and their inherent right to self-determination.

For over two dozen decades, those governing Canada amassed a plethora of regulations to control every conceivable aspect of Indian life. Until

the mindset of the rule makers and the rule enforcers change, the Aboriginal people will never be able to reach their full potential. The misunderstood cross-cultural differences between the white man and the Indian have made communications difficult, and where communications are difficult, it is not unusual for an atmosphere of mistrust to surface. Through it all, the Native people have never given up their fight to regain their right to self-government. The Aboriginal people have made Aboriginal rights one of the key issues being negotiated as a part of the current Constitutional crisis.

While ensuring that Quebec remains an integral part of Canada, that the Senate is reformed, and that national-provincial relationships are specifically spelled out, the current Constitutional talks provide a unique opportunity for the Government of Canada to establish a new relationship with the Aboriginal people. The First Nations maintain that constitutional renewal and national unity can be legitimately achieved only if the Indians' inherent right to self-government is anchored in the Constitution in a manner acceptable to the Indians, to the provincial governments and to the Federal government. The inherent right of self-government is not something that is given back to the Indians, but rather something to be recognized in the supreme law of Canada.

Both the Federal government and the Aboriginal people speak of this self-government as a third order of government which would be unique for federalism. The third order of government, as it is envisioned, would have its own set of expressed powers and complete autonomy to exercise those powers on the reserve . Almost all the powers would be transferred from the provincial level of government. No other federal system has a third level of government like this one, that is specifically intended for a minority indigenous population.

Running concurrent with the concept of a third order of government is the concept of a third order of land control. Besides Federal land and Provincial land, there would be Native land which would not be under the control of any provincial government. Before the third order of land can be introduced, however, there needs to be a final settlement as to who has jurisdiction over what tracts of land. Until recently, the government operated on the assumption that Indian title to the land had long ago been extinguished. But recent Supreme Court of Canada decisions have held that extinguishment exists only where specific language in a treaty says it exists. As a result, about half the land mass of Canada currently is involved in a process of comprehensive lands claims, which could greatly expand the amount of land that the Indians would control.

The purpose of this thesis is to explore the potential for the creation of and the chances for the success of a third order of government and a third order of land in Canada. While there has been considerable momentum to implement these concepts, there has also been tremendous institutional foot dragging which threatens to scuttle the whole process. The best estimates point to twenty years or more before the final outcome will be realized, but in the meantime, the process begs to be explored in depth.

The Aboriginal people were the first inhabitants of Canada and their societies and cultures are an essential element of the country. Therefore, they should be allowed to develop on their own in order to continue to contribute to the overall future of Canada. Today Canada's Aboriginal population, which includes registered Indians, Inuit, and Métis, numbers over 1,044,000 representing 2.8 percent of Canada's population. About sixty-two percent of the registered Indians live on 2,231 reserves and belong to 631 bands.[2]

Canada's Aboriginal population or the First Nations or the Native people can be broken down into the Indians, Inuit, and Métis. The common usage definition of each follows:

(1) Indians

(a) Status Indians: persons recorded as Indians in the Indian Act register.

(b) Non-Status Indians: persons who are of Indian ancestry and cultural affiliation, but who are not registered as Indians. This would include those Indians who have been enfranchised.

(c) Treaty Indians: persons who are registered members of, or can prove descent from, a band that signed a treaty.

(2) Inuit: Persons descended from the indigenous people who inhabited the northernmost portions of the Northwest Territories, Quebec, and Labrador.

(3) Métis: persons of mixed Indian and European ancestry, who distinguish themselves from the Indian and Inuit.[3]

Since 1969, non-aboriginal Canadians have increasingly acknowledged, and deplored, the social, economic, and political inequities faced by the Aboriginal people. Canadians affirm that the Native people should be allowed to make their own decisions on how they should be governed. Indians should be able to decide for themselves their needs in the areas of health, education, welfare, housing, band government, hunting and trapping, wildlife management, economic development, resource development, alcohol and drug control, crime, taxation, pollution control, adoption, and employment. While the Federal government is committed to negotiation on all these issues, the provincial governments are upset because each of these issues is a provincial

prerogative. Simply put, the provinces are afraid that a third order of government will diminish their power.

On the other hand, the First Nations argue that the right of self-government is based on an inherent or God-given right which never has been given up. Self-government must be restored to each band or local community, but the level or degree of self-government desired by each band will be negotiated. Some bands will want only a limited amount of control, preferring to allow the government to continue to deliver most necessary services. Other bands will want complete control of all services and monies delivered by the government. Since the needs of each band will differ, the degree of governmental institutionalization will differ, and the human resources available in each community will differ, the definition of self-government will vary from band to band. There is the unlikely potential that this process could yield 631 different band governments. However, it is more likely that the process will yield one or two dozen different models for the bands to choose from.

Just as complex as the self-government issue is the question of lands claims. All Indian land is conserved by the Indian Act. This theoretically protects the Aboriginal people from the loss of their land, because it can only be ceded to the Crown of England or, more recently, the Federal government of Canada. This concept has severely hampered the Indian, because the land cannot be used by the Indian as collateral to raise investment capital for potential economic development. In essence, the Indian does not own his own land and has no real control over it. In addition, the Indian has limited access to vast tracts of land which were his habitual hunting and fishing grounds. Much of this

land was never ceded to the government and the government has been slow to discuss its disposition.

Before examining the potential for a third order of government, discussed in Chapter Four, and third order of land, discussed in Chapter Five, a foundation needs to be laid. The tension behind the current negotiations cannot be understood without an appreciation for their historical context. Many of the current problems have their origin in specific documents or concepts such as: the Royal Proclamation of 1763, the British North America Act of 1867, the Numbered Treaties, the Indian Act of 1876, enfranchisement, assimilation, and status (covered in Chapter One). The death of paternalism, the White Paper, and the Charter of Rights and Freedoms will be examined in Chapter Two. Chapter Three will focus on the impact of one law, Bill C-31, as an example of how difficult these problems are to solve. Once these important items are explained and put into context, then the third order of government and comprehensive lands claims controversies can be better explored. The current Constitutional crisis, which culminated in an October 1992 Referendum, will be reviewed in Chapter Six. As a result of the defeat of that Referendum, the aspirations of the Aboriginal people of Canada will once again be put to the test. Finally, as a contrast, an Appendix has been added which covers the American experience, i.e., how that Federal-Indian relationship has played out through history.

CHAPTER ONE
FROM FIRST CONTACT TO ASSIMILATION

When the first Europeans began to arrive on the shores of North America in the 1500's, the continent was already occupied by hundreds of independent Aboriginal nations. Each nation had its own territory, laws, customs, language, religious ceremonies and form of government. As contact was established, these nations entered into relations with the incoming Europeans (mainly the French and the English) on the basis of equality and mutual respect, i.e., on a nation-to-nation basis. The Europeans had two main goals in mind: to secure trading partners with the indigenous population and to establish military alliances against the incursion of each other.[1]

From the outset, the cultural clash between the First Nations and the foreigners was destined to be tragic. Both had developed cultures, languages and customs that were centuries old, but the contrast between them was stark. The Aboriginal people were generally nomadic and followed the movement of wildlife in order to survive, though some had established more permanent settlements based on fishing or agriculture. The Indians were able to satisfy all their material and spiritual needs by using the resources of the natural world that surrounded them. The environment and the life forms it supported provided materials for clothing, dwellings, and food. Each Aboriginal culture shared a deep spiritual relationship with "Mother Earth," but there was no concept of land ownership.[2]

On the other hand, the European mindset was entirely focused on land ownership, either privately or by the Crown. Since so few Indian bands had actually established fixed settlements, it was assumed that the vast expanse of the continent was open for the taking.

The Europeans, constrained by their own cultural values and traditions, which included belief in witchcraft and torturing people for religious reasons, regarded Native cultures as primitive and inferior. Because of this ignorance, many an early settler, who could have learned from the Indian, succumbed to the elements owing to a lack of knowledge of hunting skills, tanning and pelt care, building skills, and farming. The early explorers of the northernmost regions saw little merit in the lifestyle of the Inuit, a people that had learned how to survive in one of the world's harshest environments. As a result, many of the explorers never returned.[3]

The history of the First Nations since first contact can be told as the story of the Indians' retreat from a position of freely exercising social, political, and economic control over their life, to a point where these institutions were confiscated and replaced by parental dependency.[4]

The first item usurped was their cultural identity. The Aboriginal people were believed to be all the same and thus were lumped together under the European label "Indian." This unfortunate term resulted from Christopher Columbus' mistaken belief that he had discovered islands to the east of India. Even after it was realized that the new continent was not India but North America, the Native population was still categorized by all Europeans as Indians, not Americans nor Native Peoples. Far from having a common sense

of identity, the Aboriginal population was very diverse and ununited. Thus, it became easy prey for the deceptive practices of the incoming foreigners.[5]

The rise of fur trade in the 1700's resulted in a radical change for the Native People. The influence of French and British practices, technologies, religion, and disease took their toll on one band after another. With the fur trade came the desire for land and for settlements which were eventually followed by the influx of missionaries. Not only did the Native population need to be Christianized, but they also needed to be Europeanized, i.e., civilized. As the Indians spent more of their time in the fur trade, they spent less time providing for their own subsistence by traditional means. Soon their economy was supplanted by reliance on goods provided in trade rather than those they obtained themselves. The Christianized Indians were encouraged to "settle down" on land set aside for them which created the first reserves and with these constrictions, even more Indian culture was displaced. The Indian no longer roamed the land following the migrating herds of wild animals. Instead, the domesticated Native was kept in one place so that the missionary could maintain better control.[6] The Aboriginal people began to see the invaders as a coercive and superimposed majority who were not the inheritors of the space they occupied but usurpers of Indian land and destroyers of Indian rights and heritage. As a result, the sacred identity of the Aboriginal people was replaced by a profane identity created and imposed by the French and British.[7]

The move toward colonization began with a series of initial treaties involving "peace and friendship" signed by Champlain in the name of the French Crown during the 1600's. Likewise, the British signed treaties in the Maritimes between 1725 and 1779. Most later treaties contained the following: an

agreement of peace and amity; the cession of land; initial payments to Indians followed by small annual payments in cash and goods; guarantee of land reserved for the Indians; promises of government services such as education and health care; and a mechanism to designate a chief to administer the treaty. While the treaties had the effect of extinguishing Indian title to the lands designated, they also implied that the Aboriginal people possessed original title to the land.[8] This seemingly meaningless point evolved into an issue of extreme importance in light of modern-day land claims negotiations.

As the influence of the two great powers France and Great Britain grew, they claimed the right of sovereignty over the First Nations. After the acquisition of New France in 1763, the wardship of the Indians became the sole responsibility of the British. British King George III issued a Royal Proclamation on October 7, 1763 that a few have claimed was the Magna Carta of Aboriginal rights.[9] While it asserted sovereignty over the Aboriginal people "who live under our Protection," it also prohibited those who might molest or disturb Indians living on lands "not ceded or purchased by Us." Those lands were reserved to the Indians and could only be sold or ceded to the Crown. The Proclamation recognized the tribes (or bands as they would later become known in Canada) as nations connected to the Crown by way of treaty. The Proclamation, by acknowledging a retained sovereignty by the First Nations under the Crown's protection, later became the historic basis for efforts to return self-government to the Indians.[10]

The Aboriginal people have asserted that they never did relinquish their right to self-government through a treaty or any other form of agreement. Those governing Canada, however, assumed governmental control of the Indians

by the enactment of legislation throughout the nineteenth century. These laws severely curtailed and then abolished any right to self-government resulting in the sovereign nations becoming mere wards of the state. This scenario fits the other view of the Royal Proclamation of 1763, which was that it established the colonial policy. It became government policy that title to the land mass of Canada was vested in the Crown. The Native population could, in the meantime, use and occupy those lands not directly ceded to the Crown. The Indian understood use of the land, but he had no concept of ownership or title.[11] Treaty negotiations with Indian bands centered on which land the First Nations would be allowed to use for hunting and fishing. In exchange, the Indians assumed that the non-aboriginals would use the lands for useful purposes. The First Nations never understood that land passed out of their hands or was forfeited, because it was the Aboriginal belief that the land belonged solely to "Mother Earth."[12]

While the Royal Proclamation recognized limited Aboriginal rights to the land, it also established the government as a middleman in the process of transference of land from Indians to the incoming flood of whites. Meanwhile, the foreign hoards occupied the newly acquired land not as tenants but as owners. As compensation, the Indians were promised money, protection, farm equipment, and an education.[13]

Immediately after the 1763 Proclamation, British Indian policy was preoccupied with the need to maintain the Aboriginal as a military ally. Treaties signed in this time period, the Numbered Treaties, "...sought aid or neutrality from Indians in war, and their friendship in peace."[14] The Indian Department (formed in 1755) was an arm of the colonial military and it remained so until

1839. After the American War of Independence (1775-1783) and the War of 1812, there was a general feeling that the threat from Indian alliances with the Yankees had ended.[15]

When civilian control of the Indian Department had been established, a series of laws were passed by the Colonial legislatures of both Upper and Lower Canada. These laws defined the role of the Indian Department and diminished the rights of the Indian to self-government. It soon became clear that the rate of settlement in the expanding colonies was outpacing attempts to push the Native population back into the wilderness. Indian policy changed from one of exclusion from settlement areas to one of inclusion into land specifically set aside for the Indian which became known as "reserves."[16] The Indian would no longer be pushed out of the way, but instead, would be encapsulated on tiny reserves where he could be controlled. Once on reserves, the missionaries moved in "to protect and cherish this helpless Race...[and] raised them in the Scale of Humanity."[17] Colonial policies were designed to protect Aboriginal populations from the evils apparently inherent in contact with European settlers. Indian villages became instruments for civilization and Christianity as the missionaries built schools and churches. Ultimate assimilation of the Indians into the general population was the unstated goal.[18]

In 1850, after the union of Upper and Lower Canada, the colonial legislature passed a law which defined the term "Indian." It included any person deemed to be Aboriginal by birth or blood, any person reputed to belong to a particular band or body of Indians, and any person who married an Indian or was adopted by Indians. Thus began the concepts of "status" and band membership which were defined and enforced by non-aboriginals irregardless of

Native input. Another aspect of Aboriginal pride was removed with this action. The Indian always knew who he was and to which tribe he belonged. Now the white man was going to change all that. Instead of tribes, the Indians would be broken up into bands according to where they were kept on reserve. Lost would be the concept of nationhood, and in its place, there would be the anonymity of incarceration.[19]

Two special commissioners were appointed by the colonial government in 1856 to determine "...the best means of securing the future progress and civilization of the Indian tribes in Canada" and "...the best mode of so managing the Indian property as to secure its full benefit to the Indians, without impeding the settlement of the country."[20] A year later, the colonial legislature passed a law which put in place a method of assimilation. The Act offered monetary, property and enfranchisement inducements to Indians who would choose assimilation and cut their ties with tribal societies. While later scholars would focus on the assimilation process as a means to cultural genocide, that was not the purpose of the legislation. The main focus, at the time, was to encourage the Indian to cede his land to the Crown in return for a chance to be a citizen. The land was the key issue and the Indian would be protected as long as he had land on the reserve which could be turned over to the settlers. One of two things happened. Either the Indian reserve was to be shrunk to the bare minimum size, or the Indians would be moved to land further north which was less desirable for settlement. In other words, if the colonial government was going to commandeer the land, it was going to do it in a civilized manner. However, most Indians would not cooperate and cede the land, so they were moved north.[21]

In the Articles of Confederation, outlined in the British North America Act of 1867 (BNA), it was established that the Federal government had jurisdiction over "Indians and lands reserved for Indians."[22] Subsection 91(24) became the basis for all subsequent legislation dealing with the Aboriginal people. Status was codified in an 1868 Act which defined status, i.e., who was and who was not an Indian according to the government definition.[23] The Enfranchisement Act of 1869 assimilated all Indian women who married non-aboriginal men. The reverse, however, was not true for Indian men. All children of a marriage between an Indian woman and a white man would not be considered Indian. Thus began a practice of sexual discrimination that was hoped would result in a more rapid assimilation of Indians into the general population.[24] However, the policy failed.

Liaisons between Europeans and Aboriginals led to the creation of an additional Aboriginal group, the Métis. Mixing their two heritages, this evolving group developed its own culture and a strong sense of community. The Métis emerged most prominently in Western Canada in the mid- and late-1800's. They gradually settled in the Red River Valley of Assiniboine, located in modern Manitoba, where they farmed, trapped, traded, and developed customs and folkways. By the end of the century they had coalesced into a distinct society. While this was not the only area where the Métis settled, it was the largest such settlement and proof positive that the government policy of assimilation was not going to work well.[25]

Following Confederation, thirteen treaties were concluded between the Indians and the Government of Canada. Eleven--the Numbered Treaties--covered territory which extended from the Quebec border, across all of northern

Ontario, and across the prairie provinces into northeastern British Columbia, southeastern Yukon and the Mackenzie Valley in the Northwest Territories.[26] The reason for these treaties was to compensate Aboriginal people for the loss of more territory. An Order-in-Council from Great Britain in 1870 gave the Canadian Parliament full control of Rupert's Land (the drainage basin of Hudson Bay, north of Quebec) and the Northwest Territory for settlement.[27]

Finally, all the procedures that had evolved to handle the Indian situation were incorporated into the Indian Act of 1876. Its importance came from the fact that it codified law and policy into a document that was to influence Indian affairs for over a century. A key ingredient of the Act was "enfranchisement," a concept that reflected the assimilationist tendencies of that time. Under enfranchisement, the Aboriginal could acquire certain rights available only to non-aboriginals, but in return, the individual had to give up his or her special protected Indian Status.[28] The government, despite evidence to the contrary, believed that any Indian would gladly trade Indian Status for Canadian citizenship. Forgotten was the fact that in the beginning, the French and British treated the Indians as Nations which better reflected the reality of the situation. By the time of the Indian Act, the First Nations had not changed their standing, however it had been changed for them by the new wardmasters.[29]

A central feature of the Indian legislation was to create a colonial form of administration based on the "wardship principle." This consolidated administrative control of the Indians. Each reserve had its own Indian agent who had to give written permission for any Indian to leave the reserve. This started the pass system which was later copied by South Africa as a part of its infamous apartheid structure. The Indian Act defined virtually every aspect of

life affecting Indians and institutionalized many restrictions on them by placing them entirely in the hands of the administrator.[30] One thing needs to be clear in order to understand modern discussions about self-government and land control. It was the Indian Act, and not the Treaties, that defined the relationship between the Aboriginal people and Canada. This is the core of discussions related to self-government. On the other hand, the Treaties and not the Indian Act protected land, hunting, fishing and trapping rights. They are the basis of recent Supreme Court of Canada cases regarding First Nations' land rights.[31]

An 1880 amendment to the Indian Act declared that any Indian with a university degree would automatically be enfranchised and therefore no longer be an Indian. The missionaries lobbied for another amendment in 1884 which imposed a jail sentence on anyone participating in the Potlatch or the Towanawa dance. Thus, the last area of Indian culture--religion--became regulated. The Aboriginal people were left with a stark choice: assimilate or live a life of virtual servitude. Most of the Aboriginal people refused to lay aside their Indianness.[32]

The assimilationists believed that once the Indians were coerced into leaving the reserve, they would become self-sufficient members of Canadian society and the labor force (which they could only join if they left the reserve). After sufficient numbers had moved into the towns to find work, an 1918 amendment was passed which allowed for the enfranchisement of all Indians living off reservation. The Deputy Superintendent-General of Indian Affairs stated at the time that "...our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic."[33]

A check of census data revealed how poorly the assimilation policy had been carried out. In 1881, there were 108,547 Indians (not counting those enfranchised) which represented 2.51 percent of the total population. Twenty years later, the Indian population had grown to 127,941, but in 1911 it dipped to 105,611. Some may have pointed to these figures as proof that assimilation was working, but the 1921 figure was up to 113,724 and the figure for 1931 was back up to 128,890. By 1951, the Indian population was recorded as 165,607, which represented 1.18 percent of the total population. Clearly, assimilation was not working. The Aboriginal population continued to rise, but the one thing that the Indian birth rate could not compete with was the continued expansion of the Canadian population by immigration.[34]

The Canadian Supreme Court declared in 1939 that the Inuit held equal protection under subsection 91(24) of the Constitution Act of 1867. This was significant because the Inuit had never been listed under the definition of Indian in any Indian Act. The Inuit were the indigenous people of the Arctic. They lived mainly in the Northwest Territories above the tree line, in Northern Quebec and in Labrador. Archaeological records showed that their ancestors, the Denbigh, flourished in Canada as long ago as 2400 B.C. Inuit shared a common language, Inuklitut, and a tradition of fishing, hunting, and herding caribou.[35]

After World War II, a Special Joint Committee of the Senate and House of Commons was created to examine the Indian Act. The three-year study produced a new "democratic" ideology in the government that acknowledged cultural pluralism as a structural condition of Canadian society.[36] The government finally was ready to admit that Indians were not going to

disappear. In over a hundred years of wardship, the Indian had never lost his identity with his own cultural past, his native soil, or his ancestors. The Indian had not merged his identity with the white majority. The experts (Indian Affairs administrators, missionaries, and teachers on reserves) had claimed that the Indian had undergone transition, in isolation, to civilization. What the experts failed to recognize was the fact that the Indian could adapt to the white man's ways without a loss of identity.[37]

Actually, isolation resulted in a resistance to assimilation. By isolating the Natives on reserves, by emphasizing racial and linguistic distinctiveness and, by limiting ability to join the labor force, the whites in fact discouraged the Indians from assimilating. At the same time, those in charge of Indian Affairs did nothing to undo the societal discrimination and prejudice that had been created in the minds of the general public because of the isolation.[38]

It would be two years before the Special Joint Committee on reforming the Indian Act completed its work and recommended sweeping changes.[39] It would be another three years before the revised Act was introduced. Walter E. Harris, Minister of Citizenship and Immigration, which contained the Indian Affairs portfolio, stated when he introduced the measure, that it contained: "provisions urgently needed in the Act to give the Indian that standard of self-determination and self-government which his status now requires."[40] Harris claimed that, "every Indian or Indian organization" had been contacted to give their input--a first--and, in fact, eighteen Indians were available for testimony if the House so desired.[41]

In an earlier debate, Harris had gotten in trouble by stating: "...ever since confederation the underlying purpose of Indian administration has been to

prepare the Indians for full citizenship."[42] This had indeed been established government policy but it was not the Indian view, as Harris later admitted: "Nothing can be further from the truth, the Indian has no desire to become as one of us."[43] Yet, despite this reality, "enfranchisement" was still an integral part of the new act. The government was saying one thing and doing another.

J.H. Blackmore, a member of the opposition party and strong advocate for the Indians, did not mince words during the debate: "...ever since 1867 Canada has been consistently and progressively breaking solemn treaties with a great people, the Indians."[44] He also read from a letter written by Indian Chiefs which stated: "We Indians do not wish to become citizens of your government or any other government; we are loyal to our Indian form of government, and we want to be free to enjoy our liberty..."[45] Blackmore believed that the Indian considered himself a partner with the white man, but the relationship had never been reciprocated. In the case of the new legislation, the Indian was said to have been consulted, but of the eighteen who were available for testimony, none were ever called to testify.[46] The promise of self-determination and self-government amounted to mere empty words.

The only two significant changes in the new law were the repeal of the ban on the Potlatch and the lifting of the pass system whereby an Indian needed a written pass to leave the reserve. Thus ended the worst part of Canada's apartheid system. To a lesser degree, government intrusion into the cultural affairs of the Aboriginal people was also reduced. But, despite the 1939 Canadian Supreme Court decision, the Inuit were still specifically excluded from coverage under the Act (subsection 4(1)). An Indian woman who married a non-Indian was likewise still excluded (subsection 12(1)(b)). Government control

remained as strong as ever because, "there are some things which must remain the responsibility of the government of Canada."[47] The Indian could not be trusted to govern himself or even be consulted on how he should be governed. Paternalism continued to be the rule to follow with the Indian.[48]

CHAPTER TWO:
FROM PATERNALISM TO CONFRONTATION

The distinct goal of the Government of Canada for over one hundred years had been the assimilation of the Aboriginal population into the general population. This had worked for all other ethnic minorities that had immigrated to Canada. But the Aboriginal people were not immigrants and the great majority had no interest in becoming Canadian if it meant denouncing their Indianness.[1] The First Nations were not acting like stubborn children demanding their own way; rather they wanted the government to stop stealing their land and to leave them alone. Nevertheless, it was the established policy of the government, reaffirmed by the Indian Act of 1951, to control all aspects of the Indians' life, much as a parent would a backward child. The Indian was rarely consulted and when he was, his views were given little weight.[2] As the twentieth century passed its halfway point, the relationship between the First Nations and the Government of Canada was not yet confrontational. But time was running short to avoid a major confrontation.

Development of the paternalistic attitude grew out of the result of Indian/non-Indian contact in which the Aboriginals were clearly not successful in defending themselves or their land in the face of advancing non-Indian settlement. The government stepped in to act as a buffer between the Indians and the whites. However, it did so only as a temporary measure until the Indians could be assimilated. The provisional nature of the government effort

was illustrated by the number of departments that at one point contained the portfolio of Indian Affairs. Indian Affairs started under the Department of the Secretary of State. In 1874, it was transferred to the Department of the Interior and the Minister of the Interior became the Superintendent-General of Indian Affairs. At the turn of the century, an independent Deputy Superintendent of Indian Affairs was established in the Department of the Interior. Indian Affairs was transferred to the Department of Mines and Resources thirty years later. It was transferred to the Department of Health and Welfare in 1945, and four years later it came under the authority of the Department of Citizenship and Immigration (the agency responsible for the smooth assimilation of all new Canadians). Finally, in 1965, Indian Affairs was moved to the Department of Northern Affairs and National Resources. A year later the two responsibilities were merged to create the current Department of Indian Affairs and Northern Development (DIAND).[3]

While Indian Affairs was being shuffled around like an unwanted orphan, the Indians had made no effort to organize themselves into an effective lobbying group. Until 1968, the First Nations did not have a national organization to speak for them. But for almost twenty years there had been a steady growth of grassroots organizations representing groups of bands which later became provincial or territorial organizations.[4] With the urging of the government and much needed financial support from the government as well, these groups tentatively joined to form the National Indian Brotherhood (NIB). At first the effectiveness of the NIB was limited because the executive council consisted of the Chiefs of the larger bands or heads of united band associations. Each leader was more concerned with the needs of his constituents than for the

needs of the organization as a whole, making the national voice of the NIB very weak.[5]

While the government was suggesting the establishment of the NIB, Prime Minister Lester B. Pearson passed the baton to his fellow Liberal Pierre Elliott Trudeau. Trudeau's 1968 election had given the Liberals their first majority government in three tries and he won on the promise of a "joint society" which included a solution to the Indian problem.[6] After a year of work, the young Junior Minister of DIAND, Jean Chrétien (current leader of the Liberal Party in Parliament), tabled "A Statement of the Government of Canada on Indian Policy" in the House of Commons. The June 1969 policy paper, which quickly became known as "The White Paper," was a bombshell. Couched in subtle and persuasive language was the scheme to end paternalism by declaring assimilation accomplished.

> The Government believes that its policies must lead to the full, free and non-discriminatory participation of the Indian people in Canadian society. Such a goal requires a break with the past. It requires that the Indian people's role of dependence be replaced by a role of equal status, opportunity and responsibility, a role they can share with all other Canadians. ... The Government does not wish to perpetuate policies which carry with them the seeds of disharmony and disunity, policies which prevent Canadians from fulfilling themselves and contributing to their society. ... Indian people must be persuaded, must persuade themselves, that this path will lead them to a fuller and richer life.[7]

More specifically, the White Paper proposed that: (1) the legislative and constitutional basis for discrimination be removed through the repeal of the Indian Act; (2) there be a public recognition of the unique contribution of Indian culture to Canadian life; (3) Indians receive the same services as other Canadians and delivered through the same provincial agencies; (4) those Indian bands most

in need be given the highest level of help; (5) control of Indian lands (reserves) be transferred to the Indian people; and (6) the Indian Affairs Program within DIAND be abolished.[8]

The White Paper also recognized that any lawful obligations that the government had incurred through the signing of treaties had to be recognized. However, here the government was willing to yield to only a very narrow interpretation of treaty rights.

> The terms and effects of the treaties between the Indian people and the Government are widely misunderstood. A plain reading of the words used in the treaties reveals the limited and minimal promises which were included in them. ... The significance of the treaties in meeting the economic, educational, health and welfare needs of the Indian people has always been limited and will continue to decline. ... Many of the provisions and practices of another century may be considered irrelevant in the light of a rapidly changing society.[9]

As far as the government was concerned, its obligation under the treaties had all but been fulfilled. It was time to move beyond the treaties and special status to a point of equality.

Trudeau staunchly defended the White Paper, and its stress upon achieving contemporary equality, in a speech delivered in Vancouver on August 8, 1969. He said:

> We can go on treating the Indians as having a special status. We can go on adding bricks of discrimination around the ghetto in which they live and at the same time perhaps help them preserve certain cultural traits and certain ancestral rights. Or we can say you're at a crossroads--the time is now to decide whether the Indians will be a race apart in Canada or whether it will be Canadians of full status.[10]

While the motivation may have been noble, the implementation was strictly political. The new policy was designed to protect the government from external criticism of racism. Lost were the aspirations of the Aboriginal people themselves. Again the government had decided what the government would do to solve this problem without consultation with the other side. No one in the government had bothered to determine whether or not the Indians actually wanted to become citizens or if they truly wanted to maintain their cultural separation.[11]

Ironically, the White Paper achieved what years of governmental persuasion had failed to produce--a consensus among Indian associations. Almost overnight the NIB and the provincial Indian associations mobilized to orchestrate the defeat of the new government policy. The same groups that, almost as an afterthought, had been asked to discuss their role in implementing the new policy were unhesitatingly vocal in denunciating the plan. The Canadian public was stunned by the avalanche of Indian spokespersons condemning what appeared to be a generous and progressive policy. Unfortunately, the general public was unaware of the Indian side of the issue.[12]

Spokespersons for the Indians accused the government of determining future policy and then going through the charade of consultation with the Indian people. The NIB went further when it labeled the policy as a blatant attempt to commit "cultural genocide." The proposal to abolish special Indian status was portrayed as a blueprint for forced assimilation or, as one cynic phrased it, the policy would turn the Indian into a "little brown white man." Further, the end to the Indian Act and the treaties were shown to be the final step toward a denial of the government's historic obligation to the Indian people. Finally, the proposed

transfer of control of reserve lands to the Indian was explained as a move to end the reserve system by forcing the Indians to move to the cities.[13]

Fortunately, all the Native comment was not negative. They suggested that instead of phasing out DIAND, that the government reorient the agency to assist Indians to plan and put into effect Native programs in ways that served the needs of the Indian. Additionally, calls were made for the government to give the Indians what they required to help themselves to combat poverty, unemployment and substandard housing.[14]

The success of the First Nations in disseminating their message to the public was measured by the speed with which the government retreated from its White Paper position. In October 1969, Indian Affairs Minister Chrétien issued a statement that his new policy was only a proposal and that DIAND had no intention in shrinking from its obligations. Still, the Indians campaigned against the policy. In less than a year, the tide of public opinion had swung to the side of the Indians, but the government was not yet convinced. Two hundred leaders, representing every provincial and territorial Indian organization, convened in Ottawa during the summer of 1970 to voice their protest. Trudeau, realizing that the policy would never be accepted, officially withdrew the White Paper in 1971. Until then DIAND was powerless to change its policy.[15] The legacy of this clumsy effort to finally end the problem of what to do with the Aboriginal people has resulted in the continual suspicion by the Indians of all government programs.

Another lasting effect of the sudden rise of Indian unity was a sense that militant confrontations produced results. Included in this activity were any one or combination of the following: (1) public verbal attacks on governmental

officials and their policies; (2) seizing control of buildings, parks and roads; (3) picketing, sit-ins, marches, or boycotts; (4) delaying or halting construction programs; and (5) lobbying and the use of the news media.[16] One memorable example of confrontation occurred on Parliament Hill on the opening day of Parliament (September 30, 1974) in which hundreds of young people, who were part of the Native Peoples' Caravan, clashed with the Royal Canadian Mounted Police.[17]

When the Indians were united and focused against a specific policy, they could affect a change. From the government point of view, the Indians did not stay focused or united once the White Paper was removed. The NIB tended to be weak because its presidents were at the mercy of the provincial and territorial leaders who sporadically withdrew their support. Attention shifted from the national level to local squabbles and the public lost interest. Meanwhile, officials of DIAND were equally lax because it was difficult to determine whether their statements and ideas reflected government policy or personal opinion.[18] Little new ground was broken.

The Aboriginal people again became united when a government plan was revealed in 1979 to revise and repatriate the Canadian Constitution (BNA).[19] Immediately, 300 chiefs and elders traveled to London to lobby against such a move. The Indians, fearing loss of "special status," were still very suspicious of government motives after the White Paper debacle. The reason for the trip, which turned into a three-year lobbying effort, was the special relationship originally established with the Crown. The Crown had guaranteed Indian rights with the 1763 Royal Proclamation; all the treaties had been signed in the name of the Crown; and all Indian land was held by the

Crown. The Crown was the obvious protector of Indian rights and guarantor of the treaties, but this would be lost when Canada was able to bring its Constitution home and thus end the last vestige of British control.

By November 1981 the Trudeau government had convinced a majority of Canadian provinces to support patriation of the Constitution and, as a result, the Indians lost the ear of the British House of Commons. The Indians then turned to the House of Lords as their last resort and this too failed.[20] The Constitution came home in 1982, which meant that Canada could amend its Constitution itself without having to go to Westminster to obtain the change.

Included in the Patriation process of the Constitution was a Charter of Rights and Freedoms Amendment. It was originally designed to link civil liberties with the protection of French language rights. But the Charter of Rights went well beyond symbolism and rhetoric. It provided a means whereby the pro-federal Supreme Court of Canada could act to diminish the growing power of provinces over the federal government. More important was the entrenchment of fundamental rights (freedom of thought, conscience, and religion; freedom of opinion and expression; and freedom of peaceful assembly and association). Again, almost as an afterthought and to quiet the lobbying effort by the Aboriginals in London, language was inserted into the Charter of Rights to protect Indian treaty rights.[21]

The language of the Constitution Act of 1982, however, went a long way toward recognizing the special status of the First Nations. Section 25 guaranteed that the Charter did not abrogate or derogate from any Aboriginal treaty or other rights. There would be no adverse effects to the Indians from the Charter. Section 35 declared that existing Aboriginal and treaty rights were

recognized and affirmed--a positive characterization of Section 25. In addition, and for the first time, "Aboriginal peoples of Canada" were said to include Indian, Inuit and Métis peoples of Canada. Section 37 called for the convening of a First Ministers' Conference which would also include Aboriginal peoples' representatives and would focus on the identification and definition of the rights of those peoples to be included in the Constitution.[22] A precedent was set to start including representatives of the First Nations in all Constitutional negotiations.

The Government of Canada, be it Liberal or Progressive Conservative, had evolved to the point of perceiving the Indians as potential partners in the process of finding resolutions to their long-standing differences. On the other hand, Indian leaders continued to view the government with a very wary eye while concluding that the Constitutional process was the best means of redressing their grievances.[23] The First Ministers' Constitutional Conference, held in March 1983, did produce a little movement in the form of minor amendments to the newly repatriated Constitution. Section 25 was clarified so as to protect future as well as existing land claims settlements. Section 35 was changed to guarantee that Aboriginal rights applied equally to males and females. A subsection was added to Section 35 which required that before any new constitutional amendment could be enacted, which directly affected Aboriginal peoples, Indian representatives had to be included in the negotiation process.[24]

The next three First Ministers' Conferences also focused on the rights of Indian self-government as a part of a comprehensive package of Constitutional reform. For the Indian, the debate centered around the question of whether the

right of Aboriginal self-government flowed from inherent and unextinguished Aboriginal sovereignty, from existing treaty rights, or from the Federal and Provincial governments by way of constitutional amendment.[25] (This subject will be explored in more depth in Chapter Four.)

While the government encouraged the concept of Constitutional reform, it remained adamant in continuing to control the lives of the Aboriginal people through the iron rules of the Indian Act. It was becoming obvious to some observers that if the government continued to be too rigid in its relations with the Indians, that there might be an outbreak of violence. On the one hand, DIAND was rigid because the Indian Act was inflexible. On the other hand, there was no mechanism for the Indian to participate in the decision-making process that controlled day-to-day life on the reserves. The patience of the Indian was stretched to the breaking point.[26]

On June 28, 1985 the Government of Canada made important changes to the Indian Act when Parliament passed Bill C-31. The reason for the changes was to bring the Indian Act into line with the Charter of Rights and Freedoms by, for instance, removing the obvious discrimination against women. While the Act contained other positive features, it was passed with minimal Indian input. Without gaining an understanding of the Indian side of the equation, the government had made another technical adjustment to the Indian Act. Even though the action was taken with the noblest of motives, the government created as many problems as it solved (see Chapter Three). From the Indian standpoint, Bill C-31 soon became another example of the government telling the Indian how a problem should be solved without any thought as to the consequences that it would have on the Indian.[27] It was no wonder that the Indian did not trust the

government or have any faith that the government was truly concerned for the Indian.

In the spring of 1987 a secret constitutional conference was held, without Aboriginal participation, at a country retreat at Meech Lake in Quebec, just north of Ottawa. What emerged on June 3, 1987 was the Meech Lake Accord. It gave Quebec the right to select three of the nine Supreme Court justices. It provided that no province could block the initiation of any program, yet no province would be bound to accept the application of the federal program in their province. They could "opt out." Quebec also would be designated as having a distinct society protected by the Constitution. The purpose of the Meech Lake Accord was to ensure the continued presence and participation of Quebec in the confederation that was Canada.[28] Quebec had to be satisfied first and the Indians would have to wait.

In order to become law, the Meech Lake Accord had to be ratified by Parliament and all ten provincial legislatures by June 1989. With a little more than a year to go, in March 1990, the Meech Lake Accord began to flounder. At that point eight provincial legislatures had ratified it, but Manitoba and New Brunswick were holding out. Many Canadians began to wonder if Quebec was being given too much power and a few spoke of the unreal choice of letting Quebec separate from Canada.[29]

Meanwhile, an explosive situation was brewing on the reserve land controlled by the Akwesasne-St-Régis Mohawk band. This unique reserve straddled two provinces (Quebec and Ontario) and two countries (Canada and the United States). The trouble developed over a dispute involving gambling casinos and was between those who wanted them (on the United States side) and those

who did not (on the Canadian side). Both sides of the conflict had armed themselves and an uneasy truce was declared after a brief fire-fight on the Canadian side which left two dead. The specter of heavily armed Indians was a very unusual sight to many in Canada, while almost completely ignored on the United States side.[30]

As the deadline for the Meech Lake Accord ratification approached, it became clear that the clash of regional interests would prove more destructive than the constant battle over language. Rose Laver, writing for Maclean's, observed: "Canada has always been a marriage more of convenience than love, a partnership born of mutual expediency rather than a unifying ideology or national myth."[31] Quebec's vision of two founding nations (France and Great Britain) clashed with the multi-cultural and multi-social reality of Canada. It was a direct affront to the Aboriginal peoples. A last minute accord was reached which appeared to satisfy everyone except Premier Clyde Wells of Newfoundland, the new holdout. With assurances that the legislatures of Manitoba and New Brunswick would finally ratify and that Newfoundland would not back out of the deal, the Meech Lake Accord seemed destined to squeak through.[32] There was, however, one last twist to the story. The Manitoba legislature had one Native legislator, Elijah Harper. He was a member of the New Democratic Party (NDP), but also a committed Aboriginal activist. He was one man against the system that was set to steamroll the Meech Lake Accord through the Manitoba legislature.

The Assembly of First Nations (AFN), which replaced the NIB in 1982 as the national Indian organization, had been upset from the onset with the Meech Lake Accord because it failed to include a statement which would

entrench the Aboriginal right to self-government into the Constitution. The AFN believed that they had waited patiently for too long. It was time to get the attention of the Federal Government.[33]

Acting alone in the Manitoba legislature, Harper was able to block passage of the Meech Lake Accord through his shrewd exploitation of a procedural technicality. He denied a unanimous consent agreement which would have allowed public hearings to proceed without the required 48 hours notice. By the time that public hearings were scheduled, more than 1,500 people had signed up to testify. They could not possibly be accommodated in the three days left before the deadline.[34] As pressure mounted on the stoic figure of courage, Harper received overwhelming support from the Indian peoples who saw him as their sole spokesman. When the final hour came, Harper still refused to agree to a unanimous consent agreement to proceed. The Meech Lake Accord was dead, and the Indians had a new hero.[35] Maybe now the government would take the First Nations seriously!

A month later, the long simmering dispute by the Mohawks again erupted. The site was a small village called Oka in Quebec. This time the trouble concerned the expansion of the village nine-hole golf course which was on land that the Indians claimed as their own. When it appeared that the Indians would not get a proper hearing on their grievances, they seized the land in question. Without hesitation, the provincial police of Quebec moved in to oust the Indians and were greeted with heavy automatic-weapons fire. One policeman was killed and a siege began.[36] The siege lasted two months because the provincial government of Quebec and the Federal government refused to negotiate until the arms were laid down. On the other hand, the Indians had a

hard time believing that the government would listen after the siege was lifted. While both sides refused to talk, the Mohawks closed a bridge across the St. Lawrence River on a main commuter artery into Montreal. Federal troops were finally called in to replace the provincial police and sporadic demonstrations broke out in other parts of Canada. Indians occupied an island on the Ottawa River; the British Columbia Rail line was blocked; and rail lines were blocked in Northern Ontario.[37] In the end, facing over three thousand combat soldiers, the Mohawks were forced to give in but not before they had brought the conscience of the entire nation to bear on the Indian question.[38] The First Nations believed that they would now receive a hearing and their grievances would be taken seriously. Whether or not their dreams would finally be fulfilled would become another question.

CHAPTER THREE

BILL C-31: GOOD INTENTIONS, POOR FORETHOUGHT

The unflattering description of the relationship between the Aboriginal peoples and the Canadian government, outlined in the last two chapters, has been the view of the majority of scholars in Canada for over fifty years. Less than ten years ago, the Government of Canada publicly acknowledged the reality of this portrayal. Prime Minister Brian Mulroney admitted, during the post-Oka debate, that: "Thanks to the Indian Act of 1876, people who had never known national boundaries found that they could not even leave reserves without a pass." He went on to acknowledge that the Indian in Canada was not given the right to vote until 1960.

> The ultimate irony is that the first Canadians were the last to get the vote, and it is a further reality that contemporary Canadians do not have to scour their history books for examples of the racism, paternalism and dependency that have been so destructive of Native peoples' welfare and self-respect.[1]

Audrey Doerr, Regional Director-General of Indian and Northern Affairs for the Ontario Region, acknowledged that: "The Indian Act established a quasi-Colonial relationship between the government and Indians."[2]

It was one thing for the government to admit that its past policy was wrong, but it was another thing to actually change that policy. The Mulroney government claimed that it was committed to changing the Indian policy. But was it? Was it reaching out to meet the genuine desires of the Aboriginal peoples or was it merely passing new laws to implement old policies? Bill C-31,

passed on June 28, 1985, proved a good test of government sincerity. Bill C-31 changed the Indian Act to bring it into accord with the Charter of Rights and Freedoms. It also allowed Indian bands to control their own membership and abolished the practice of enfranchisement.[3]

Under Section 2, bands were given the right to control their own Band Lists, i.e., determine who was eligible for band membership and who was not. The Indian Register would continue and it would be up to the individuals to make sure that they were registered. In order for a band to acquire its List, all rules for membership had to be approved by the voters of that band. The new band rules could not deprive a person of membership if they were already registered. Apart from that, the band was responsible for all new additions or deletions from the List.

Section 6(1)(c) restored registration to: women who had lost status by marrying non-Indians; the children enfranchised as a result of their mother's marriage to non-Indians; persons removed from the Register as a result of protests based on non-Indian paternity; and illegitimate children of Indian women born prior to August 14, 1956. Indian males had never lost status by marrying non-Indian women. Sexual discrimination was finally removed from the Indian Act.[4] Section 6(1)(d) abolished enfranchisement. In addition, all persons enfranchised prior to April 17, 1985 were then eligible for re-registration. Persons who had been removed from band membership as a result of living outside Canada for over five years were also eligible for registration.

These were the first major changes to the Indian Act since its inception in 1867. From the moment that the bill was first introduced in the House of Commons, an unprecedented national media campaign was launched.

DIAND, print and video journalists, and the Native associations all played important roles in disseminating information about Bill C-31 throughout the entire legislative process.[5] Everyone was given the opportunity to provide their input, especially those most affected by the bill--the Indians.

After the passage of Bill C-31, all the Native associations were invited to submit separate proposals covering the implementation of the legislation for their group. DIAND, after approving 18 such plans to encourage Indian re-registration, gave those Native associations a total of $3.5 million in grants to put their plans into action.[6] Because of the success of the communications effort and the encouragement from the Native associations, 43,868 applications were received in the first two years by DIAND, representing 90,051 individuals seeking registration to gain or regain status.[7] In 1985 the status population numbered 360,000 dispersed among 592 bands. By 1990 the status population had grown to 478,000 individuals in 596 bands. More than 73,000 of the population increase was due to newly registered Bill C-31 Indians. The rest was attributed to a much improved infant mortality rate and an increasing longevity rate for the elderly.[8] The bill was finally rectifying long-standing wrongs.

Another important aspect of Bill C-31 was the control of the Band List. After two years, 490 bands had requested and received a total of $3.6 million in funds granted to help them develop their band membership rules which were necessary before they could gain control of the Band List.[9] During that time, twelve bands had assumed control of their membership rolls and another twenty-nine bands had their requests under review by DIAND. By 1990, 294 bands had submitted membership rules for review and 232 bands had assumed control of their membership. Another 230 bands were still formulating

their rules for submission.[10] It was more than obvious that the Indians were willing to accept this aspect of self-government. But technically, since DIAND had to approve all band membership rules, according to guidelines that DIAND had set, the Indians were not free to exercise autonomy in this emotional area.

Almost overlooked in the original discussion of Bill C-31 was the additional costs. Every individual who acquired Indian status as a result of the 1985 amendment to the Indian Act was eligible for federal programs and services on the same basis as other status Indians. New status Indians who lived off-reserve were eligible for post-secondary education assistance and the full range of health care available to those on-reserve. For those who moved onto the reserves, the additional services included housing, elementary and secondary education, and social assistance. In the first two years, these extra costs added up to $29 million. By 1990 the extra cost had risen to $338 million, which included 30 percent for health benefits, 27 percent for housing, 21 percent for post-secondary education and 13 percent for social assistance and services programs. The remaining 9 percent went to other programs.[11]

Prior to the passage of Bill C-31, DIAND provided funding for about 2,400 new houses and 3,000 housing renovations annually. Between 1985 and 1990, 13,374 housing units had been constructed on-reserve, of which twenty percent (2,698 units) were built with additional Bill C-31 funds.[12] On the one hand, Bill C-31 required that adequate on-reserve shelter had to be provided within twelve months of funding being made available. On the other hand, housing on-reserve had always been inadequate, and if all the new registrants decided to move on-reserve in order to increase their benefit level, then this would have further exacerbated the problem.[13]

The financial impact of the 1985 Act was added to an already bulging DIAND budget. According to the 1990-1991 Annual Report of DIAND, the Education Branch provided schooling to more than 92,000 elementary and secondary students on reserve. Financial assistance was provided to more than 21,000 Indian post-secondary students at a cost of about $189 million. The Social Development Branch provided $623 million in social assistance, child welfare and adult care services to Indian families residing on reserve. The Capital Management Directorate assisted the First Nations in establishing and maintaining public works which included water, sanitation, electrical, fire protection and community buildings. This budget was $383 million. Other major capital expenses included: housing, business loans to Indian businesses, natural resource development and salaries for a DIAND staff of 4,156 of which 820 were Aboriginal. The total 1990-1991 budget for DIAND was $4 billion.[14]

Despite the large expenditure, the Aboriginal people continued to be among the most economically disadvantaged groups in Canada, because such a high proportion of them did not work. Even with dramatic improvements, the rate of functional illiteracy (percent of the population that had less than a ninth grade education) for Indians was more than twice the rate for the general population of Canada.[15] Twenty-eight percent of the Indians had at least a high school education, one-half the rate for all Canadians. In 1970, the number of post-secondary students was less than 1,000; by 1991 the number had risen to 21,000.[16] As skilled employment and higher income depend on the level of education attained, these statistics were crucial in determining how far the Indians still needed to come.

More of the money spent on the Indian went to social services and welfare expenses than went to employment development. One-half the Aboriginal population had a low level of income and too many reported no income at all. The average Aboriginal income was less than half that of the average of the general population. Only one in two Indians claimed employment as their major source of income.[17] Fifty-seven percent of the on-reserve Indians were unemployed, while only seventeen percent of those off-reserve were unemployed. As the foregoing demonstrated, the Aboriginal people who wanted to be self-sufficient as individuals, experienced extremely poor economic conditions compared to the rest of the general population. The reason for this was that Indian communities faced significant limitations to sustained economic growth. Among those limitations were the poor educational background of the work force, the small size of many of the bands, the isolated locations of the bands, their lack of marketable goods, and the discrimination still practiced against the Indian.[18]

While the census data showed that about half the Aboriginal people lived in relative poverty, the level of income did not completely reflect the actual total standard of living. This was because the on-reserve Indians received a wide variety of free or subsidized goods and services from the federal government. Services such as social assistance and housing were not reported as income and could not be counted as such, but did tend to ease the burden of poverty.[19] The standard of living for the thirty-eight percent of Aboriginal people that lived off reserve was proportionally better because of the proximity of employment opportunities. Moreover, Indians and bands were exempt from both federal and provincial tax laws on their personal and real property on-

reserve. The most important of this personal property was income made on-reserve which was exempt from income tax. In addition, no sales tax was collected on any goods that were used or consumed on-reserve.[20]

It might surprise the casual observer that anyone would want to leave the relative security of the white man's world to reestablish their Indianness and accept all the problems that went with that decision. Yet more than 73,000 made that choice and their profile was most revealing. A little more than half (58%) of the Bill C-31 registrants were female; 43 percent graduated from high school and 25 percent graduated from post-secondary education; 59 percent were employed; 90 percent lived off-reserve; and 55 percent in their own homes. The main reasons given for registration were to gain personal identity, to acquire a sense of belonging and to correct a past injustice. In the beginning only five percent expressed a strong desire to return to the reserve.[21] The above profile revealed a newly registered population that was better educated, better employed, and better housed than the general population of status Indians.

Because the Bill C-31 population was different from that on the reserve, those who chose to return to the reserve had a major impact, and not always in a positive manner. The drafters of Bill C-31 provided for a follow-up study to judge the effectiveness of their legislation. The results, some of which have already been used in this chapter, were published in 1990. A major portion of the report contained Indian testimony concerning the impact of Bill C-31 on the reserves. A close study of that testimony, which follows, revealed how the Indian perspective differed from that of the government.

Bill C-31 was aimed at eliminating discrimination and instead may have actually compounded it. Before Bill C-31, status guaranteed the right of

membership in a band and the concomitant right to vote for chief and council, to run for public office on a reserve, and to receive all benefits accorded other band members. After Bill C-31, this was not necessarily true. DIAND could approve an applicant and add that name to the Indian Register, but that did not guarantee addition to a specific Band List, nor ensure that they were able to reside on the reserve or participate in community decisions.[22]

> If, for example, a band controls its own membership rules and does not recognize the registrant as a member, even though DIAND has affiliated that registrant with that band, or if there is a long waiting list for housing, and if the band policy is "first come, first served, based on need," then the registrant may not be able to move to the reserve.[23]

Bands who gained control of their membership list could confer membership but not status--only DIAND could do that.

Negative comments also included those that claimed that Bill C-31 was eroding the Native lifestyle. Band communities were typically small and everybody knew everybody. Consequently, there was a low level of tolerance shown to those returning women who had consciously given up their treaty rights by marrying outside and leaving their community.[24] In the same vein, there was a reluctance to accept outsiders with a different lifestyle who were thrust on the band communities. The outsides were perceived as more aggressive, less patient, more outspoken, and demanding higher expectations. As one Indian put it: "Being an Indian is a state of mind--its [sic] cultural. Living off the reserve for many years, they lose this. They come back to the reserve different."[25] In its most extreme form, this concern was articulated as a fear that the Native culture and lifestyle would be replaced by "white city values."[26]

A different variation on this theme dealt with non-aboriginal women who gained status and band membership prior to 1985 by marrying Aboriginal men. These women continued to maintain status and band membership after they divorced their husbands. Under Bill C-31 rules, they could not lose membership in bands who control membership. Thus, these non-aboriginal women continued to be viewed as Indians on paper and remained eligible for all social benefits provided for Indians. Here was a clear example of the Indians being denied control within the band community even when they had gained access to their own membership list. Had the natives been given full control of the determination of band membership, then it would have been up to the individual communities to determine whether the divorced non-aboriginal women could stay and receive a portion of the band's meager welfare pie.[27]

Other status Indians perceived Bill C-31 registrants as a threat to the few jobs available on the reserve because they were better educated, had better job skills and had more experience in the workplace. Lack of employment opportunities combined with a lack of land. Most reserves had an inadequate land base to start with and the land was already allocated to individual families. Any surplus land was being held for economic development which made bands reluctant to reassign development lands for residential purposes.[28] Bill C-31 made no provision for the acquisition of new land, just the requirement that housing be provided within twelve months of funding. Many band communities were left to try and solve the problem of a lack of land by themselves, since land claims were a subject that the government kept putting off. A spokesman for one community states: "The communities resented being left to straighten out a

mess created by the government, or mess that the government appears to have no intention of resolving."[29]

Another major complaint was the fact that the application process for reinstatement was costly, time-consuming and difficult to satisfy. Bill C-31 cut off reinstatement at the second-generation level. In order for a second-generation child to obtain status, both the parents had to prove status under section 6(1) or 6(2). Those parents who registered solely to acquire rights for their children found the documentation difficult to obtain. But without documentation, status was denied.[30] Neither the Indian Act nor Bill C-31 specified what documents the applicants needed in order to establish their eligibility for reinstatement. It became the sole discretion of the Registrar and ultimately DIAND internal policy. In many cases, the applicants had to prove their relationship to a particular ancestor who had lost status. If this went back more than one or two generations, the documentation became almost impossible to produce.[31] Unless proven otherwise, all children born out of wedlock were assumed to be fathered by non-Indians. It may seem that a recital of bureaucratic red tape involved in reregistering as an Indian is a tedious procedure. However, it is significant for two reasons. Those who traversed the bureaucratic maze did so in order to gain a sense of belonging or personal identity. Also, from the Indian perspective, most of the red tape would disappear if the band could decide alone who was a member and who was not.[32]

The lack of resources was another paramount issue to the Native people. Band councils felt betrayed since they had been promised that Bill C-31 would not upset the status quo. After Bill C-31, the tribal council administrators found themselves caught between the applicants, reinstatees, and original band

members. Each was fighting for a share of the available resources and suspicious of the other groups. While the level of demands increased, the level of resources did not increase and many bands fell financially further behind.[33] Despite the advanced warning from Aboriginal representatives at the hearings for Bill C-31, DIAND was not prepared for the tremendous increase in the workload. DIAND was also not willing to share a portion of the blame for the confusion, even though some of it was unavoidable. The band councils and those DIAND workers at the bottom of the ladder, who worked selflessly to deliver services, were left to bring some sense of order to the confusion.[34]

One of the more interesting objections to Bill C-31 was that it violated both International and Constitutional Law. According to law, a treaty can only be changed with the mutual consent of both parties. The Treaty Indians were never given the opportunity to consent to any of the changes made by Bill C-31. Therefore, they viewed the legislation as invalid. The Touchwood File Hills Qu'Appelle Tribal Council of Chiefs stated:

> [We] believe that determining who is an Indian and who should be a member of a nation or band is a sovereign right that was never relinquished. ... The treaty-making process also protected and kept intact the collective rights of Indian natives. It did not weigh in favour of individual rights. This was a reflection of the unique ideologies and special relationship Indian nations held and intended to protect.[35]

Sharon Venne, Legal Counsel for the Chiefs of Northeast Alberta, went on to elaborate:

> One of the major violations to our treaty is Bill C-31. When we entered into treaty with the British Crown, it was up to the chiefs and headmen to determine who were their members. ... The British government representatives did not determine which citizens

were to belong to which nation. This was our right which we never relinquished.[36]

The requirement that, in order to gain control of the membership list, all membership rules had to be approved by fifty percent plus one of all members old enough to vote was a violation of some Indian cultures. Many Aboriginal people simply do not vote on any issue because they follow the traditional form of decision-making by consensus of those who decide issues for the band. Most Indians view democracy as a white man's concept and not that of the Indian. In those communities, it would be impossible to achieve a fifty percent plus one vote.[37]

Because many of the First Nations were striving for greater self sufficiency, it was assumed by some new registrants that their band had obtained control of more than it actually had. As a result, band councils were accused of being too restrictive with regulations involving band housing, use of band land, and band resources when they were merely following DIAND guidelines. These assumptions have led a few of the new returnees to resent or mistrust the First Nation governments. Andrew Joseph of the Tl'Azt'En First Nation in British Columbia summarized the situation.

> The Department of Indian Affairs camouflaged themselves, and it seems that Native leaders within our communities are scapegoats between the members of our communities and the Department of Indian Affairs. Our people are kicking us on our rear and the Department of Indian Affairs would not let us proceed, would not let us change or even negotiate to change some of the policies and guidelines to meet our needs. In doing so and by this procedure, the department keeps our people divided.[38]

Keeping the Indian people divided may not have been the goal of those who passed Bill C-31, but that has, nonetheless, been one of its results. While Bill C-31 focused on eliminating the blatant discrimination against women

that had existed for years, it also created a new form of discrimination when it pitted pre-Bill C-31 status Indians against post-Bill C-31 reinstatees in a battle over the meager resources available on the reserves. Second, Bill C-31 ended enfranchisement and allowed for the majority of those enfranchised to be reinstated. But the draftees of the Act failed to realize the number of individuals who would seek reinstatement They further failed to grasp the impact that these returnees would have on the rather closed Indian communities. Third, Bill C-31 provided a mechanism to allow individual bands to acquire the right to keep its own Band List. However, the bands were required to meet all DIAND rules and not remove anyone that DIAND had placed on the list.

From the white man's perspective, Bill C-31 produced all the positive attributes listed above. But, the Aboriginal people had a different perspective. Once again, they believed that their cultural identity had been violated by well-meaning individuals in government. Once again, they were asked to trust those who were trying to right old wrongs. But once again, the Indians found that there was little to trust in a system that refused to look at the problem through their eyes. How could the Indian trust the white man when the white man would not trust the Indian to run his own life? After 400 years, the white man still believed that he knew best and that he could make the Indian happy. Until this basic attitude is genuinely changed, the government will continue to pass simple bills to solve complex problems. Meanwhile, the Aboriginal people will continue to cry out to be set free to solve their own problems, their own way, through self-government. The government may honestly believe that it is moving in a reasonable direction and at a sufficient pace to correct these inevitable conflicts. But the Indian has realized very little in concrete change

while under the control of the government. What hope does the Indian have apart from determining his own destiny through his own form of self-government?

CHAPTER FOUR

FROM WARDSHIP TO A THIRD ORDER OF GOVERNMENT

Before the enactment of the first post-Confederation legislation to concentrate on the Indians (1869), the First Nations governed themselves according to their own traditional values and systems of government. After the Indian Act of 1876, the Federal government tolerated some continuation of "band custom" in matters of local tribal government. However, when certain First Nations refused, for cultural reasons, to adopt the Indian Act's elective system of band councils, the Government of Canada had to impose it by force. The Minister of Indian Affairs was given power to depose rebellious chiefs by arresting them and confiscating their symbols of office.[1] Since assimilation was the final goal for the government, the Indians needed to learn the white man's way which included elected leadership. Ironically, the only place the Indians could vote, and the only candidates that they could vote for were those on the reservations. The unenfranchised Aboriginal could not vote in Canadian national elections until 1960.

In the early 1960's, the Federal government began to examine the concept of encouraging a limited form of self-government back onto the reserves. This coincided with the mushrooming welfare services that were introduced to keep the Indians from starving to death in the squalor that had overtaken many reserves. The Indian populations had become completely dependent on the Indian agent for welfare and social assistance. But the agents

were overwhelmed by the task. They needed the band councils to help them administer the programs and they were willing to yield, to the band councils, limited authority to oversee distribution of services. This was the first step back to the realization of self-government by the Indian, which met two important needs: to regain control over the management of matters that directly affect them, and to restore a portion of their cultural identity.[2]

Who better to administer the many social programs on the reserves than the Indians themselves? Yet, with a few exceptions, the day-to-day administration of Indian communities had been out of the hands of the Aboriginal people. The only current bylaw powers on reserves involved regulation of traffic, observance of law and order, and the preservation, protection, and management of fur-bearing animals, fish, or other game on the reserve.[3]

When the Aboriginal people speak of self-government, they describe it as coming from within the Indian community and not ultimately defined and limited by external forces. Self-government flowed from self-determination and sovereignty which the Indians had long asserted was their right. But Canadian law did not recognize such rights. A seemingly minor case in 1973 changed the picture entirely. The Calder case [Calder et al v. Attorney General of British Columbia, (1973) SCR 313 (SCC)] centered on a claim by the Nisga'a people of British Columbia that their Aboriginal title to their land had not been legally terminated. While the Indians lost this case before the Canadian Supreme Court, they won a moral victory in that six of the nine judges held in the opinion that the Indians' title did exist if it was based on occupancy since time immemorial.[4] However, on a more crucial point, the judges were equally divided. Half

believed that title had been extinguished by post-Confederation legislation, and the other half believed that none of the legislation passed since 1870 expressed an intent to extinguish Aboriginal title. While this case focused only on a land claim, legal experts quickly seized on the fact that the Indian right to the land was guaranteed in the Royal Proclamation of 1763, which also recognized the Aboriginal people as existing in sovereign nations with their own governments.[5]

A second major event on the road to self-government occurred in 1983 with the release of the Penner Report. The Special House of Commons Committee on Indian Self-Government recommended the development of a new relationship between Indians and the Federal government. Wardship or the protectorate role of government was to end and the Indians were to regain control of their lives. Bands were to be given the administrative responsibility to deliver the social and economic programs that they desired. These might include medical services, policing, education, and child welfare services.[6]

The Committee affirmed that the Constitution Act of 1982 recognized "existing Aboriginal and treaty rights," which included the right to self-government. They quoted Judy Sayers, who spoke for the Canadian Indian Lawyers' Association, when she asserted that: "...an inherent right to self-government was preserved in the Royal Proclamation of 1763...[and]...any rights or freedoms recognized by the Royal Proclamation of 1763 are now guaranteed in the Constitution Act of 1982."[7] The Charter of Rights and Freedoms clearly represented a forward step when it recognized and affirmed that Aboriginal rights existed. But the concept of self-government was still undefined. The Committee of Indian Self-Government recommended: "that the right of Indian peoples to self-government be explicitly stated and entrenched in

the Constitution of Canada."[8] What needed to be spelled out were the functions of this self-government, its structure, and the areas of jurisdiction. Little attention had been paid to the specific political structure of the Indian governments or how they might interact with provincial governments or the Federal government.[9]

The First Nations were determined to establish their legal, moral, and political authority to self-government which they perceived as crucial to protect their tribal customs, values, institutions, and social organizations. The provincial governments, meanwhile, concluded that if the Indians got their way, they would create Indian community-based governments with powers over Indian affairs far in excess of those held by provincial governments.[10] The provincial governments overstated their case because they did not want to cede any of their authority to the Indian communities. The provincial governments were worried about the undefined language of the Special Committee on Indian Self-Government which stated: "Indian First Nation governments would form a distinct order of government in Canada, with their jurisdiction defined." William Lumsdon described the third order of government as a "hybrid province," exercising both provincial and federal jurisdictional elements.[11]

Canada was established as a federation (technically a confederation) in the Constitutional Act of 1867. Under this federal system, the broad powers of government were distributed between the Federal government (in Ottawa), on the one hand, and the ten provincial governments, on the other. Each unit of government exercised its own powers without being subordinated or inferior to the other.[12] Federal powers were spelled out in Section 91 which gave Parliament power: "to make Laws for Peace, Order, and Good Government of

Canada, in relation to all matters not coming within the classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." There followed a list of twenty-nine subjects including: regulation of trade, raising of money, postal service, census, military, navigation, coinage, banking, weights and measures, patents, marriage and divorce, naturalization, and Indians. The exclusive powers of the provinces were listed in Section 92 and included: direct taxation within the province, prisons, hospitals, sale of public lands, license of business, public works, and municipal governments.[13] What the Special Committee on Indian Self-Government had proposed was not a municipal government under the control of the provinces, but a completely different "third order of government" exercising its own powers without being subordinated or inferior.

Based on negotiations, each band would choose which powers it wanted to select to exercise exclusively in the band community. These powers would then be listed in the enactment legislation passed by both the federal and provincial governments. The fact that the expressed powers of the third order of government were to be exclusive to the Indian on-reserve was one of the reasons why this concept would be unique to federalism. Since each band or group of bands was going to want to negotiate their own deal, one general purpose law would not function to yield to the Indians the self-government they wanted. Canada's indigenous population did not exist as a homogenous unit in any sociocultural or political sense. There was a great diversity of language, cultural heritage, customs, and political style. As a result, most of the bands seeking self-government were going to want an individualized structure. In addition, many communities did not have a strong infrastructure or the experts (engineers,

environmentalists, lawyers, etc.) to complete the research and development necessary to determine the type of structure that would best meet their needs. Each government unit would have to negotiate separately which meant that the process would take years or even decades. Even worse was the thought of many hundreds of different solutions surfacing in the end. William Lumsdon wondered: "How do we administer 500 some odd pieces of legislation that deal with 500 some odd First Nations?"[14]

Menno Boldt and J. Anthony Long described the overall concept as one where the Aboriginal people would be subject to Canadian sovereignty and control over Indian external affairs (that being an example of a power set aside for the Federal level of government). However, there would be constitutionally-defined limits to the control of Indian internal affairs by the Government of Canada (these being those powers set aside to operate at the third level of government). The community-based self-governments would have autonomy from both the provinces and the Federal government in those areas set aside for the band on their reserve land. Thus, the concept of a distinct order or third order of government was being openly discussed by all parties involved.[15]

It was understood from the perspective of the Federal government that each self-government would be "democratic," that is, accountable to the people. The Indians questioned this assumption, as echoed by Moses Okimaw, Legal Advisor to Assembly of First Nations (AFN), who asked: "What is democracy? Do elections mean a democracy? Is a parliamentary system democratic?" What Okimaw was pointing out was the same problem discussed in Chapter Three about a limitation of Bill C-31. It is difficult to obey a rule that calls for a vote of fifty percent plus one of all voters when the society does not use voting to

reach a decision. Canada uses a parliamentary system to make decisions for the country. The Indians use a different system, which is almost spiritual, to reach a consensus for the band. Both systems work. Some bands will use the "democratic" model in their governments, but others are going to continue to use their traditional ways.[16] This will be another point that will have to be negotiated.

Nevertheless, Boldt and Long were convinced that these community-based self-governments would pose no threat to either the provincial or federal governments because the entire focus of the band governments would be internal. The Indians were not asking for, and did not seem to want, special representation in either provincial or federal legislatures.[17] The Aboriginal people held that "Indian" was a cultural distinction rather than a "racial" one, therefore their long-sought band governments would be formed to preserve a cultural, linguistic, religious and political identity which was Indian and not necessarily Canadian.[18]

Native leaders had long sought the right to craft their own code of law. Indians believed, with good justification, that the Canadian justice system had been biased against them, not only in land claims but also the criminal justice system. The Aboriginal leaders wanted more managerial control of law enforcement on the reserves, which would include the right to determine sentences for minor offenses. There was no room in the white man's justice system for Indian cultural or traditional differences. All trials of Indians suspected of committing criminal offenses were held off-reserve and, while Indians were eligible for jury duty, none were ever picked to serve on juries where the defendant was an Indian.[19]

Education has been another area where the Aboriginal people demanded control. In the early twentieth century, the primary delivery system for education was through either military or religious groups on reserves. After World War II, secular education became the primary thrust and Indian students were moved off-reserve to be integrated into provincial schools. Between 1970 and 1980 education was moved back onto the reserves. Students were no longer removed from their parents during the school week. Recently, the trend has been toward band-operated schools whereby the local communities develop their own curricula while still remaining under the provincial educational guidelines regarding the content of core subjects. The First Nations craved greater freedom and autonomy in the education of their children.[20] By 1991 the number of schools under band control had risen to 321 out of 366. Many of these schools have introduced courses covering indigenous cultures and native languages. More importantly, band councils, rather than the school boards, have established hiring criteria which has allowed for an increase of Native teachers.[21]

While the Aboriginal people were making incremental progress toward greater control over their lives, they still concentrated on getting the entrenchment of their right to self-government into the Constitution. Section 37 of the Charter of Rights and Freedoms proposed the convening of three Constitutional Conferences--made up of each First Minister from the provinces, representatives from the territories, and delegates from the Aboriginal groups--to discuss constitutional matters that directly affected the Aboriginal people.[22]

In the four Constitutional Conferences held between 1983 and 1987, Aboriginal self-government emerged as the dominant issue. In 1984 Prime Minister Trudeau proposed that Aboriginal governments be formed and exercise

powers "delegated" from the federal and provincial levels. The proposal was flatly rejected by the Indians, who held that their right to self-government was "inherent" and unextinguished.[23] This led to a catch-22 situation. Before the government would agree to an "inherent right" to self-government, they wanted the term clearly defined. On the other hand, the Indians insisted that the concept of "inherent right" be locked into the Constitution before they would begin to negotiate its scope. Both sides agreed that self-government needed to be defined as a part of the political process.[24]

The Right Honourable Joe Clark, the Federal Minister responsible for Constitutional Affairs, explained why the Government of Canada was reluctant to recognize the "inherent right" to self-government of Aboriginal peoples in the Constitution.

> Our concern with that term is straightforward. We believe that the word--undefined or unmodified--could be used as the basis for a claim to international sovereignty or as the justification of a unilateral approach to deciding what laws did or did not apply to Aboriginal peoples. ... Our concern with inherency is not with the word but with the meaning. If we can be shown that an amendment can be drafted to ensure that an inherent right does not mean a right to sovereignty or separation, or the unilateral determination of powers, we will look at that. If Aboriginal Canadians can help define what inherency would mean in practical terms in such a way that the integrity of this federation is not put in question, we would welcome that. We are not opposed to inherency.[25]

While the Federal government stated that it was firmly committed to the principle of recognizing Aboriginal self-government in the Constitution, it suggested an interim step of community-based self-government negotiations between individual bands, provincial leaders and federal negotiations. The government hoped to define the scope of the "inherent right" to self-government

through these negotiations.[26] Government leaders were specifically interested in finding out which provincial powers the Indians wanted to co-opt.

Meanwhile, Prime Minister Mulroney created a Royal Commission on Aboriginal Peoples, which began its work in August 1991, co-chaired by Georges Erasmus, former National Chief of AFN, and René Dussault, Justice of the Quebec Court of Appeal. The Royal Commission's terms of reference were: "to consider the subject of Aboriginal self-government and to recommend methods of recognizing and affirming it."[27] The Royal Commission took its work seriously. In the Spring of 1992 it released a preliminary report that was the most far-reaching pro-Aboriginal document to emerge from the government. The document outlined six important conditions for successful constitutional reform. They were, in brief, that the right of Aboriginal self-government: "is inherent in nature, circumscribed in extent, sovereign within its sphere;" and should "be adopted with the consent of the Aboriginal peoples, be consistent with the view that section 35 (of the Constitution) may already recognize a right of self-government, and be justifiable immediately."[28]

Of the six criteria, the first three were the most important. The Royal Commission felt that it was essential for the right of self-government to be explicitly identified in the Constitution as "inherent" in nature. In other words, the right arose from sources within the Aboriginal nations, rather than from the written Constitution. This would be a direct recognition that the First Nations brought enduring powers of self-government into the Confederation.[29] Second, the Royal Commission declared that the scope of the inherent right of self-government should be described as being "circumscribed," rather than uncircumscribed in its extent. Aboriginal governments would co-exist under the

Constitution with Federal and provincial governments, which also hold limited powers. If it were not circumscribed, Aboriginal governments would possess unlimited competence in all subject areas, including defense and international affairs. Not one of the Aboriginal organizations had posed such a request. Third, and related to the second criteria, Aboriginal governments were declared to be "sovereign" in their areas of jurisdiction. Band law would take precedence over Federal and Provincial laws in specific areas of jurisdiction on reserve. In other areas, Federal and Provincial laws would prevail. Thus, the concept of a Third Order of Government was outlined.[30]

The leaders of the First Nations approached all negotiations with the government from the standpoint of the criteria laid out by the Royal Commission. Their language reflected discussions in the light of sovereignty, self-determination, and mutual recognition. However, Canadian officials had not been ready to negotiate on those terms. Frank Cassidy, Director of the Administration of Aboriginal Governments Program at the University of Victoria stated that Canadian officials speak: "in the language of extinguishment rather than recognition, and for them, self-government is the exercise of clearly circumscribed powers, circumscribed by their governments and in terms of their sovereignty."[31] Thomas Siddon, Minister of DIAND declared, at a conference on self-determination, that: "In my own mind, self-determination means giving Native people the capacity to develop and implement their own solutions to their special political, social, and economic problems." He went on to add: "It means giving them greater control over their lives." (Emphasis added.) There was no sense of mutual recognition in his language. George Watts, Chairman of

the Nuu-chah-nulth Tribal Council, denounced Siddon's remarks as reflecting outright colonialism.[32]

A dialogue between these two perspectives has not always been possible, but the Aboriginal people will persist until the Federal government is prepared to enter into meaningful negotiations. Meanwhile, most of the provincial governments have been reluctant to enter into meaningful negotiations with the First Nations because they see the Indian problem as strictly a Federal problem. The one notable exception is the Province of Ontario. Ontario, which is bigger than the states of Texas, Oklahoma and Kansas combined, contains about 23 percent of Canada's total status Indian population. Of the 126 bands, 32 are located near urban areas, 62 are in rural locations, and 32 are so isolated that they can be accessed only by small planes.[33] Audrey Doerr, Ontario Regional Director General of DIAND, has spoken of the relationship with the Indians in Ontario as one of a "partnership" with respect "to restoring and enlarging the political rights of First Nations."[34]

Premier Bob Rae's New Democratic government of Ontario negotiated and signed a "Statement of Political Relationship" with the Native population in 1991. The document went a long way to giving practical meaning to Audrey Doerr's words. As a result, Ontario became the first governmental body to officially recognize the inherent right of the First Nations of Canada to be self-governing. Furthermore, the Ontario Government committed itself to carry through with the creation of community-based First Nation governments by negotiating on a government-to-government basis.[35]

The Government of Ontario has started its negotiations based on the recommendations of the Penner Report on Indian Self-Government. The

primary political unit of Indian government is the band. It should be up to each band to decide whether or not its people want to constitute themselves into an Indian government, or join with other bands to form an Indian government of which each band would be a part. Each community-based government should have full legislative and policy-making powers on matters affecting Indian people, and full control over the territory and resources within the reserve. The exact scope of jurisdiction within the wide range of subject matters should be negotiated with each community-based government. Some of the negotiable areas include: social and cultural development, education and family relations, land and resource use, revenue-raising, economic and commercial development, and justice and law enforcement. On the other hand, some community-based governments may wish to make arrangements with the Federal and provincial governments to continue to deliver existing programs and services. A combination of these two approaches may also be negotiated.[36]

Since there are no models yet available, each band will have to determine what it is that they want to do. Once a dozen or more agreements are concluded and enacted, then the Indians will be able to choose which model they would like to use. Those working on the process in the Toronto Regional Office of DIAND suggested a cafeteria-style system for making that choice--part from Agreement A, part from Agreement B, and part from Agreement C.[37]

The Ontario government exercised the political will to become the first provincial government to enter into tripartite negotiations to develop community-based self-governments. This tripartite process, unique in Canada, has allowed the three orders of government to sit down and begin the process of negotiation toward the Aboriginal goal of total self-government.[38]

Currently 42 bands under the NAM Memorandum of Understanding plus 35 individual bands are involved at various stages of the negotiating process. This initial step represents over half of Ontario's Indian bands. Already 31 Aboriginal Framework Agreements have been signed which are the first phase of the process toward devolution or transference of control of services to the tribal councils. Once a tripartite agreement has been finalized, it goes to Ottawa where the Parliament passes legislation enacting the agreement and freeing the band or bands from compliance with the Indian Act. A companion piece of legislation is then passed by the provincial parliament in Toronto.[39]

There are two operating examples of community self-government legislation: The Cree-Naskapi (of Quebec) Act (1984) and the Sechelt Indian Band Self-Government Act (1986). The Cree-Naskapi (of Quebec) Act evolved from Quebec's desire to capitalize on the hydro-electric potential of the rivers draining into James Bay. Construction of the James Bay Project began in 1972 on Indian land. Since this violated their treaties, the Cree and Inuit went to court and obtained an injunction to halt the work. The injunction was lifted with the understanding that the Government of Quebec would negotiate the land claims dispute with the Indians. Unfortunately, the Indians were at a severe disadvantage since construction continued during the entire time of the negotiations, and there was a two-year deadline for reaching a final agreement. If they were to break off negotiations, they would be left with nothing.[40]

The final agreements were signed by the Government of Canada, the Government of Quebec, three provincial Crown corporations, the James Bay Cree, the Inuit of Quebec, and the Naskapis of Schefferville. The Aboriginal peoples had to surrender their claims, rights, and interests to all lands in

question except for those lands especially set aside for their use. In exchange, the Indian bands were to be given $225 million in compensation and limited local government rights.[41]

The Cree-Naskapi (of Quebec) Act is not a blueprint or model for community-based self-government because the bands were forced to incorporate into municipalities under Quebec law. Not only was this concept foreign to Indian custom, it also placed the band governments at the mercy of the provincial government. While the communities were given the right to regulate health, social services, and education, they had to do so according to Quebec guidelines. DIAND praised the legislation as "a bench mark in the adoption of a bilateral approach through consultations." Conversely, the agreement was roundly condemned by the AFN as a sham.[42]

The Sechelt Indian Band Self-Government Act constituted a better example of what both sides are now considering. The Sechelt Indian Band is located near the Sechelt Peninsula (about 50 kilometers northwest of Vancouver, British Columbia) on 33 separate reserves totaling 1,000 hectares. Since 1971, this enterprising community had taken all possible powers available to it under the Indian Act, which included the management of land revenues, advanced band powers like local taxation, and management of reserve and surrounding lands.[43] But the Sechelt Band wanted more control over their own affairs. Carol Etkin, Advisor in the Self-Government Section of the Toronto Regional Office of DIAND stated the following:

> The Band needed legislation that would neither remove them from the Constitutional process regarding Aboriginal self-government, nor prevent them from filing a comprehensive land claim separately from the self-government legislation. What they desired was legislation that would remove the Band from the

jurisdiction of the Indian Act, yet still allow for a continued beneficial relationship with the Federal Government.[44]

On March 15, 1986 the members of the Sechelt Band voted on a referendum to adopt self-government and to accept the transfer of land from Canada. The referendum passed by a vote of 167 to 60. Parliament then passed Bill C-93, the Sechelt Indian Band Self-Government Act and the legislature of British Columbia passed the Sechelt Indian Government District Enabling Act a year later. Finally, on June 24, 1988 Sechelt Self-Government began.[45] Under the Act, the community was set up as a legal entity with power to enter into contracts and agreements, acquire property, sell and dispose of property, and borrow money. The Sechelt Band wrote its own constitution dictating how the community would be governed. The elected council had the power to pass laws governing zoning, land use, construction, taxation, leases, education, social welfare, health services and business. In all these areas of jurisdiction, the Sechelt Band would operate independently of the British Columbia Government.[46]

The AFN sharply criticized the Sechelt agreement because they felt that it undermined the Constitutional process because it could be argued that all the powers given to the Sechelt Band were delegated rather than inherent powers. Despite the AFN objections, the Self-Government Branch of DIAND had 70 proposals for self-government from groups representing 240 bands at various stages of negotiation by 1990. Each step of the process was costly for the Indian bands. Each community or group of communities that was engaged in separate negotiations needed a cadre of experts to assist them in determining exactly what the needs of the community were: education, welfare, housing, child care, alcohol treatment centers, social services, health care, infrastructure,

economic development, or resource development. Once the needs were identified, then specific plans could be drafted as to how those needs would be met, how much they would cost, what resources were available in the community, and who would administer them once the programs started.

While Sechelt may become one of the models to follow, no one can predict what the other models will look like or how many models will emerge from the process. Therefore, it is impossible to describe what these community-based self-governments ultimately will look like. The process has just begun.[47] Very few bands, however, have the human or financial resources to do the planning, and none have the resources to be self-sufficient. DIAND usually supplied the experts, and the money to pay for them. Where they can, bands make use of advisors like Carol Etkin, who are employed by DIAND but endeavor, as much as possible, to help the bands in the negotiation process. Otherwise, because of poor human resources, bands are forced to hire outside legal help which is both expensive and not necessarily pro-Indian.[48]

While the self-government movement eventually will mean the end of the Indian Act and most functions of DIAND, the cost savings from the demise of DIAND will not offset the increase in cost from the implementation of self-government. The actual cost is unknown, but DIAND is floating a figure of $5 billion a year more than their current annual operating budget of $4 billion. Moses Okimaw believes that the DIAND figure is pure propaganda to scare the public. Brian Bergman, Associate Editor of Maclean's, helped put this into perspective.

> True, there will be start-up costs which will have to be met and they will be high. But there already are costs for welfare and criminal justice which will continue if the Indians are not made

> self-sufficient. If they are, then these costs will go down and the start-up costs will be balanced out later by a drop in payments for welfare and criminal justice. The process can pay for itself in a way.[49]

In any event, it will take a very long time before many of the communities will be even close to becoming self-sufficient.

Cost is a genuine concern that will have to be addressed by all sides. However, the Aboriginal people believe that the Canadian people owe them a great debt. Linda Jordan of the Native Women's Association of Canada stated the sentiment as follows:

> The issue of inadequate funding to meet the needs of First Nations people in this country, as obligated through our history, remains one of the single most overwhelming barriers to our achieving self-sufficiency and the regaining of our rightful place in society. We do not believe for one moment that any funding provided by the federal government is a "hand-out" or any otherwise untrue portrayal of so-called government assistance. The Canadian public is led to believe that Native peoples are a burden to the taxpayer, when in fact we are only being reimbursed and compensated for unlawful removals of our people's lands, resources and denial of rights which were supposed to have been protected and honoured through the treaties which exist. The Government of Canada has a moral and legal obligation to the First Nations peoples, and it must be fulfilled.[50]

Carol Etkin insisted that Canadians have a "great sense of justice." This process will test if that applies to more than a moral sense because the common public perception is that funding will decrease once all the agreements are signed.[51]

However, the First Nations do not want to be financial wards of the state forever. There is a strong desire to be economically independent, but as noted earlier, the conditions for economic development on many reserves is extremely poor because of the lack of a skilled work force, the lack of venture

capital, and the isolated locations. The Federal government is doing all that it can to help through its Canadian Aboriginal Economic Development strategy. DIAND is working with Industry, Science and Technology Canada and the Canada Employment Commission to improve and encourage Skill Development, Urban Employment, Capital Corporations, and Joint Ventures.[52] The more the Government of Canada can encourage economic development by the First Nations, the less will be their fiduciary responsibility. However, since this process will take a long time, the gap between the money the Indians can generate and the cost of services that they need provided will continue to be a burden on the nation.

The primary reason for Aboriginal self-government is that neither the central government in Ottawa nor any provincial government can truly know the immediate need of each individual community. Since these communities tend to be different, their needs are also different. Each band ought to be free to determine how best to meet their needs with the resources available to them. But this goes beyond mere delivery of services. Cultural and religious heritage will also be included by the Indians when they determine how their government will be formed. For the Indian, the social and cultural needs are just as important as the financial ones. Both are intended to be met by the community-based self-governments.[53]

Assembly of First Nations National Chief Ovide Mercredi summarized the First Nations' position as follows:

> We can be part of Canada. This is our homeland, and the Creator put us here with the responsibility for it. ... We are distinct peoples with inherent collective rights and freedoms. Our duty is to guarantee our survival as distinct people, which can only be

> secured by our full employment of our treaty and Aboriginal rights.[54]

While it might be simpler, from the government's standpoint, to separate out the political, economic, and social needs of the Indians, the Native people continue to lump them together to insure that they are all covered by the same community-based self-government. Self-government is not something that is taken lightly by the Aboriginal leaders. It is so fundamental because it gives the Indian the recognition to control his life and destiny.

CHAPTER FIVE:

FROM RESERVES TO A THIRD ORDER OF LAND

> We will never give you the land, but we will share the land with you. We will let you use the land for plowing and growing crops. You can raise your cattle and build your homes for your families. The treaty agreement, to our people, was a peace agreement. It was an agreement to share the land in peace. But we never agreed to surrender either the land or the mineral rights. Our people never agreed to surrender any of our rights (Bearspaw Band). Our forefathers believed that the land belonged to no person. In their eyes, it was sacred. It belonged to the Great Spirit. They believed that, as long as they were allowed to hunt for food, there would be no cause to be afraid for their future. They could not imagine people claiming ownership of land (Chiniquay Band).[1]

Native people felt an attachment to their land, a sense of belonging to a part of "Mother Earth." For Aboriginal people, their land was not a commodity but the heritage of the community, the dwelling place of generations. It was where they were born, where they spent their lives, and where they died. To lose their land was akin to losing the meaning of life. For Indian people, attachment to the land was part of a spiritual relationship with the universe. First Nations saw themselves as caretakers of the land and its resources. But the land was also a prerequisite for and vital to self-government. Communities identified themselves according to their land base and without a land base, community self-government had little to govern.[2]

As far back as the Royal Proclamation of 1763, the Crown recognized the Indian interest in their lands and set up a procedure whereby those lands

could only be ceded to, or purchased by, the Crown. This policy led to the tradition of making agreements, or treaties, by which the Federal government could obtain clear title to those lands. Between 1764 and 1923, specific treaties (the Numbered Treaties, among others) were put in force by which the government obtained much of the land of Canada. However, no treaties were signed with the Indians in Quebec, the Maritimes, and almost all of British Columbia. After 1927 there were no more settlements with the Indians for land because the Federal government took the position that Indian land grievances were illegitimate.[3]

From the very beginning, the signed treaties were perceived very differently. Aboriginal people viewed treaties as affirming rights and establishing the sharing of land and resources; while the Federal government saw the treaties as extinguishing Indian rights to land and resources. Joe Mathias, Chief Councilor for the Squamish Nation, phrased the issue in stronger language:

> ...the land question is basically a racist position. ...it was clear in political minds that Indian people were primitive. Somehow they were subhuman; therefore, they had no rights to land. Therefore, it justified the taking of land, water, and resources and giving it to the settlers.[4]

Unfortunately, it was the white man's legal framework--found in the Indian Act and in court decisions, beginning with the St. Catherine's Milling case [St. Catherine's Milling and Lumber Company v. The Queen (1889) 14 App. Case. 46 (JCPC)]--that reflected how the Indians were to be treated. After the treaties were signed, the only land left to the Aboriginal peoples were the reserves which the Indian Act defined as: "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the

use and benefit of a band."[5] The major early case on the question of the legal status of Aboriginal title was the St. Catherine's Case. The case was appealed to the Judicial Committee of the Privy Council which held that the title to unsold surrendered lands (reserves) and valuable mineral resources rested with the provinces.[6] The historic justification for either the Federal or provincial governments retaining the power to manage reserve lands was that it was necessary to prevent the white man from taking advantage of the Indian. There was a certain irony in the fact that it was perfectly legal for the government to purloin the vast expanse of Canada from the Indians, but it was the government that was fearful that unscrupulous private individuals might steal the rest of it from the unsuspecting Indian.

However, as the St. Catherine's Milling case showed, even Indian reserve land could be involuntarily surrendered by the government for such purposes as railways, highways, dams, forestry, and army bases. Indian permission was never sought in any of these cases because it was the government's position that Indian title had been extinguished.[7] The Indian Act described how reserve land could be alienated (disposed of by sale, lease, or any other means), but there was no provision for bands to acquire land.[8]

It was not until 1973, when the Supreme Court of Canada reached its historical decision in the Calder Case, that Aboriginal land rights again became a valid question. Even though the Court split in its decision, the Federal government altered its position radically with the 1973 Statement of Claims of Indian and Inuit People. Ottawa committed itself to resolving two broad classes of Native claims: "comprehensive land claims," which were based on Aboriginal peoples' traditional use and occupancy of the land in areas where

Aboriginal title had not been dealt with by treaty or in some other legal manner; and "specific land claims," which were based on obligations to Indians under treaties, other agreements, or the Indian Act, which the government had not fulfilled. An Office of Native Claims was established within DIAND to implement this new policy.[9]

Between 1973 and 1982, a total of $16.7 million was given by DIAND to provincial Indian associations for use in research and development of specific claims. In that time 255 specific claims were filed with DIAND: twelve were settled with payments of $2.3 million, seventeen claims were rejected, five claims were withdrawn, 74 claims were being negotiated, 80 claims were under government review, twelve claims had proceeded to the courts, and 55 others had been referred for administrative remedy which usually meant return of surrendered land.[10] One reason for the low number of successful claims was that the courts had taken the "ordinary meaning" approach to the treaties. In simplistic terms, if the treaty called for a medicine chest for the Indians, the government held that the "ordinary meaning" was fulfilled by storing a medicine chest in the office of the Indian Agent. The government felt no obligation to meet the entire medical needs of the Indian community in order to satisfy the meaning of the treaty.[11] Under these kinds of guidelines, the specific claims process was going to be long and extremely unsatisfying for the Aboriginal people.

Comprehensive claims, on the other hand, were based on claims to Aboriginal title arising from traditional use and occupancy of land. The majority of these claims arose in areas that had not been previously "treatied out," such as the Yukon, Labrador, most of British Columbia, Northern Quebec, and much of

the Northwest Territories. The settlements were comprehensive in that they involved elements such as land title, land use (hunting, fishing, and trapping rights), financial compensation, and other rights and benefits. All the issues under comprehensive negotiation were suppose to be land-related. However, provinces such as British Columbia, Manitoba, and Quebec were insisting that comprehensive claims also include self-government discussions.[12]

The process for completing a comprehensive land claim is as follows. Each application must be thoroughly researched and documented. Once accepted by DIAND or the tripartite process (where it exists) all sides must sign a framework agreement which specifies the scope, process, topics and parameters to be negotiated (land, compensation, self-government and freedom from the Indian Act). After completing the arduous negotiations, all sides sign an agreement-in-principle which, in turn, must be ratified by the band council or assembly. The final agreement contains implementation plans and must be ratified by the band through a referendum. Then the Federal government passes implementation legislation and the province must follow with a companion bill. Since this process is virtually the same as the one used for self-government negotiations, the provinces want to combine the two. While it might make it easier for the provinces and DIAND to have everything combined, it compounds the problem for the Indians who might be forced to trade land or compensation in order to receive the desired self-government. Indeed, most provinces are insisting that the Indians give up all future land claims in order to receive a hearing on the claims already filed.[13]

The 1983 Penner Report on Indian Self-Government recommended that: "each Indian First Nation must have full rights to control its own lands in

the manner it sees fit." The Committee went on to recommend that: "the Federal government promote the constitutional change necessary to recognize in law, full Indian First Nations rights to the lands, water, and resources of all areas now classified as reserves."[14] Meanwhile, the Federal government was pursuing a policy which forced the First Nations to extinguish all rights and interests to any future land claims in exchange for a settlement agreement on the land in question. By that point, the government had usually narrowed the claim area to the current reserve or the lands just surrounding the reserve. The Indians were not going to get a great expanse of new territory. It became obvious that the policy of the government was inconsistent with Section 35, of the Charter of Rights and Freedoms, which guaranteed Aboriginal and treaty rights including land claims agreements.[15]

However, in December 1986 the Government of Canada revised its comprehensive land claims policy. Once again they committed themselves to the resolution of comprehensive land claims through negotiated settlement agreements. The AFN was highly skeptical of the government, which in the past had hampered Aboriginal claims by providing inadequate research capabilities and insufficient funding. DIAND responded by substantially increasing the funding made available to claimants for their research and negotiation activities.[16] DIAND policy reflected a shift in focus to final settlements of land claims rather than piecemeal ones. But, the government went beyond mere real estate transactions to consideration of self-reliance, economic development, and cultural and social well-being. In other words, the government not only wanted the Aboriginal people to have the land that was rightfully theirs, but also to be

able to make full use of the potential of that land for community self-sufficiency.[17]

Native communities had traditionally relied on hunting, fishing, and trapping as a part of their economic, social, and cultural heritage. Since the wildlife harvesting areas extended far beyond the boundaries of the communities, provisions had to be made in settlements to allow for preferential wildlife harvesting rights on unoccupied Crown lands. Whether those rights were to be exclusive or shared with hunters and fishermen from the general population of Canada was a part of the negotiation process. But, in the areas where sport and commercial hunting or fishing were profitable, the Indians sought to be allowed to capitalize on the regulation of hunting and fishing licenses and through joint ventures with non-Indians for commercial fishing.[18]

While the government was accommodating in the area of wildlife harvesting, it was not as accommodating in the area of resource revenue-sharing. Many bands lived on lands with the potential for development of non-renewable resources (forests and minerals). Those bands perceived the resources as a major economic asset, but were prevented from development by the constraints of the Indian Act. According to the extinguishment theory of the Indian Act, all Indian land in Canada belonged to the Crown either federally or provincially. This included all land set aside as reserves. While the government was willing to let the Aboriginal people use the land, they were not willing to let them profit from the vast resources on or under the land. However, under the 1986 Comprehensive Land Claims Policy, the government was willing to entertain limited resource revenue-sharing agreements. Such arrangements would provide

a percentage of royalties derived from the extraction of resources in the settlement areas.[19]

Once again the Federal government chose to restrict what it would give the Indians who lived on treatied or untreatied reserve land. Resource ownership for the Indian was out of the question on this Crown land and they would not even consider the establishment of joint management boards to manage surface and subsurface resources. The Native people would be given no mechanism to protect the use of reserve land from strip mining, clear-cutting of forests, hazardous waste dumping, or pollution control.[20] This aspect of the government's policy proved that until Aboriginal rights of title could be decided, the Indian was going to be frustrated in dealing with the government.

The Supreme Court of Canada did not remain ambivalent after the Calder case. Gradually the Court shifted away from the old conservative approach to one which favored a method of interpretation that would not depend solely on the narrow technical meaning of treaties. Instead, the Court began to favor interpretations that considered the sense of the words in a manner that would naturally be understood by the Indians. In addition, the courts began to accept, as evidence, oral traditions that went beyond the written document. But this only helped with specific land claim cases covered by the treaties and not the more complex comprehensive cases which were not covered by treaties.[21]

While both sides stated a preference to settle comprehensive claims outside the courts (neither side was assured a victory), certain claims involved principles that needed the clarification of the courts. One such case resulted in the historic Sparrow [R. v. Sparrow (1990) 3 C.N.L.R.] decision. The appellant, Ron Sparrow, was charged with violation of his fishing license by the

use of a drift net. He responded that the charge violated Aboriginal rights which were guaranteed by Section 35(1) of the Charter of Rights and Freedoms. The Supreme Court of Canada ruled that the Musqueam Band's Aboriginal right to fish had not been extinguished by regulation under the Fisheries Act: "That the right is controlled in great detail by the regulation does not mean that the right is thereby extinguished." More importantly, the Court noted: "There is nothing in the Fisheries Act or its detailed regulations that demonstrates a clear and plain intention to extinguish the Aboriginal right to fish."[22]

The Sparrow decision confirmed that existing Aboriginal and treaty rights were to be interpreted generously and that Section 35 afforded these rights strong constitutional protection from erosion by the government. According to the Court, it was up to the government to show the burden of proof that an Aboriginal right had been extinguished. Also, Aboriginal rights were to be interpreted flexibly so as to permit evolution over time. After 1982 (when the Charter of Rights and Freedoms was passed), the Federal government and the provincial governments could no longer exercise their "sovereign authority in a manner necessarily inconsistent with Aboriginal rights," and thereby extinguish them.[23]

The reason the Sparrow case was so important was that it renewed focus on the two key issues that the First Nations were pursuing--self-government and land claims. Since the Royal Proclamation of 1763 affirmed that the Aboriginal peoples had a right to self-government and the Constitution Act of 1982 guaranteed that right, then there could no longer be any question that the Indians had a right to self-government. Over and above that, the debate between "delegated" and "inherent" right to self-government was also quashed

because the government could not grant a power to the Indians which they had never lost. In a similar vein, the government was going to find it almost impossible to prove that Aboriginal land title had been extinguished, except where it specifically stated so in a treaty. Therefore, it suddenly became crystal clear that in areas of Canada where there were no treaties, the government could not declare that Aboriginal title had been extinguished. If that were true, then whose land was it? Overnight comprehensive land claims took on a whole new meaning and nowhere was this more telling than in British Columbia.[24]

Very little of British Columbia is covered by treaty, except for the southern part of Vancouver Island and the area along the Peace River. This means that ninety-five percent of the province has land whose title might be in question. Until 1990, the provincial government refused to recognize Aboriginal title, because they believed that no such title existed. In 1867, Joseph Trutch, Chief Commissioner of lands and works for the newly formed colony of British Columbia, wrote:

> The Indians have really no right to the lands they claim, nor are they of any actual value or utility to them, and I cannot see why they should either retain these lands to the prejudice of the general interests of the Colony, or be allowed to make a market of them either to the Government or to Individuals.[25]

British Columbia became a province of Canada in 1871 and, as a result, Indians and Indian land came under the jurisdiction of the Federal government. But British Columbia refused to change its policy. Lieutenant-governor Trutch wrote Prime Minister John A. Macdonald in 1872:

> If you now commence to buy out Indian title to the lands of B.C. you would go back on all that has been done here for 30 years past and would be equitably bound to compensate the tribes who

> inhabited the districts now settled [and] farmed by white people equally with those in the more remote and uncultivated portions.[26]

But that was precisely what the Government of Canada was already doing. In compliance with the Royal Proclamation of 1763 the Federal government was acquiring, through treaty, land (ceded to the Crown) in return for compensation (albeit small). On the other hand, non-treatied Indians continued to lose land to settlers throughout the rest of the Nineteenth and Twentieth Century. Those Indians received no compensation for their lands. David Mackay, Chief of the Nisga'a Band told a Royal Commission meeting in British Columbia in 1887:

> What we don't like about the Government is their saying this: "We will give you this much land." How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land--our own land.[27]

The policies of both the Federal government and British Columbia were framed to protect the interests of the non-Indian, not to deal with the interests of the Aboriginal people. The Aboriginal people were left with no other alternative than to seek relief through the courts. First with the Calder case and then with the Sparrow ruling the Aboriginal people learned that, in fact, they had never lost title to their land unless they signed a treaty stating such.[28]

The Supreme Court of Canada implied in its ruling that the government of Canada needed to reach a political solution to the problem of land claims. Less than a year after the Sparrow case, the Province of British Columbia reversed its long-held position and agreed to become a party to land claims negotiations. Fittingly, the first framework agreement (the first step to comprehensive claims resolution) was signed between the British Columbia Government and the Nisga'a's First Nation on March 20, 1991. The

Government of British Columbia became committed to a policy of reaching negotiated settlements with the Indians primarily because of the fear that if the Indians turned to the courts, the province would lose control of the process.[29]

British Columbia was not alone in its concern about the future outcome of the comprehensive land claims process. Many in government across Canada wondered just how much of the land of Canada the First Nations wanted. In 1991, the Native peoples owned less than one percent of Canada's land while the comprehensive land claims covered more than one half the land mass of Canada. The outcome of these negotiations was crucial to all concerned. However, nowhere did the Indian want the non-Indian to have to vacate the cities. As George Watts, Chairman of the Nuu-chah-nulth Tribal Council said: "Why can't we as Indian people have certain pieces of land under our jurisdiction and live next to you and you have yours?"[30]

The question was simple but the answer was complex. Jack Woodward, a legal expert on the lands claims dilemma for British Columbia, noted: "Over the last 120 years, the Province has rashly alienated vast interests in the Crown lands, without making sure that the Indian burden had been properly extinguished. This could turn out to be the most costly mistake in Canadian history."[31] In other words, British Columbia had adopted a policy of assuming that the Indians had no vested interest in the land. The province had then appropriated all the land and sold, leased, or given away large portions of it to settlers, lumber companies, the fishing industry, and the mining companies. The Indians received no compensation for their loss. However, after the Sparrow decision, the province may be faced with paying full compensation, plus interest, for all the land that was illegally seized. Indeed, the mistake

involved more than just British Columbia. Quebec had been guilty of the same error. In the event of numerous settlements or a successful court case that dictates massive settlements, the Government of Canada will be asked to bail out the provinces. Beyond compensation for lands that cannot be returned to the Indian, the issue also focused on who had the rights to the rest of the land, who had the rights to the resources (including those on the reserves), and who had the right to govern. Was there, in fact, a third order of land and did those possessing that land have the right to a third order of government?[32]

Lynda Martin, Assistant Director of Claims Registration for the Department of Self-Government in the British Columbia Ministry of Aboriginal Affairs, noted that the newly-elected New Democratic Party government was more open to land claims than the Social Credit Party. A Tripartite Treaty Task Force was formed which recommended the formation of a Tripartite Treaty Commission (not yet initiated). Even though the progress was slow, the British Columbia government had accepted, in principle, the inherent right of self-government and Aboriginal title. But they were a long way from putting their acceptance into action. Martin asserted that: "British Columbia has never wanted to take responsibility for the Aboriginal people in any form."[33]

In the meantime, the Federal government had been offloading more and more financial responsibilities on the province. The dread of the cost of comprehensive land claims being dumped on the province made British Columbia very wary. The Nisga'a Land Claim had been in the pipeline for thirteen years before it reached the initial stage of a framework agreement. No other claim had progressed that far in the two years that land claims had been actively negotiated. The Native people insisted on a land base but as Martin

observed: "Much of the land of British Columbia is occupied, or has been sold, or is encumbered in some fashion. The Indian will have to be compensated."[34]

The Government of British Columbia concentrated on convincing the Aboriginal people to accept negotiated settlements instead of litigation because of the cost--British Columbia had to pay the court cost of both sides since the Indians could not afford it. The ticking time bomb would be the possibility of an Aboriginal case which reached the Supreme Court of Canada and resulted in a ruling which stated that all untreatied land belonged to the Indian. This would mean that all unoccupied land (previously used by the Indian) would have to be turned over to the Native people of British Columbia. In addition, full compensation would be due for all encumbered land that had been previously used for hunting, fishing, trapping and commerce. The thought was too scary for anyone in government to grace with a comment.[35]

Martin pointed out that one of the biggest problems in British Columbia was the bureaucracy within the old Social Credit Party government which operated with an attitude that Aboriginal issues do not exist. Many in the current government's bureaucracy have that same attitude and are hoping that if they drag their feet long enough, the problem will go away. This is certainly not the attitude to have when claims need to be negotiated and, to that end, the Department of Aboriginal Affairs is committed to continuously seeing the process through to the end.[36]

One of the major factors pushing the negotiating process to move faster is the negative effect that the slothful pace is having on the economy in British Columbia. Developers need to know who their landlords will be; investors are hesitant to commit themselves; the fishing industry wonders how

long they will be able to continue to fish in disputed territory; logging companies are madly clear-cutting in anticipation of court orders to stop; and, as a result, the job market is extremely unstable. Meares Island is a perfect example. The island is a heavily forested 8,600-hectare ancestral home of the Nuu-chah-nulth Indians. In 1980, the thirteen bands of the Nuu-chah-nulth Tribal Council filed a land claim with the Federal government to recover access to their traditional homeland in west-central Vancouver Island. While the claim was inching its way through the bureaucracy in Ottawa, the government in Victoria continued to allow logging on the disputed territory, especially Meares Island. Finally, in 1989 the Indians convinced the courts that their sacred land was being raped in the name of greed. The local court agreed and granted a permanent injunction against further logging which has not been overturned by any higher court.[37]

While both sides are still in the process of gearing up in British Columbia to consider land claims seriously, the Inuit of Northwest and Northcentral Canada have basically concluded their claims. In 1988, the Federal government concluded three major agreements-in-principle for comprehensive claims: the Dene/Métis Northwest Territories, Council for Yukon Indians, and Conseil Attkamek-Montagnais claims. The final agreements were signed in 1990 and await legislative ratification by both the Federal government and the Territories. This ended a thirteen year struggle between all the parties involved and not incidentally between the Dene and Inuit. The 13,000 Dene and Métis of the Mackenzie Valley will gain control of 70,000 square miles of land which includes surface rights and exclusive control of development. In addition, the Dene and Métis will share with the Northwest Territory the management of an area five times as large. The 17,000 Inuit, on the other hand, will assume

outright ownership of a total of 220,000 square miles--an area roughly the size of North Dakota, South Dakota and Nebraska combined--and a strong measure of control over much larger tracts.[38]

The victory was especially sweet for the Inuit who have never enjoyed protection under the Indian Act but who were finally covered by the Charter of Rights and Freedoms. The Inuit, in return, took advantage of their isolation to maintain measured social separation from whites in order to retain their unique identity. In the language of Inuit, Inuktitut (Eskimo-Aleut family of languages), "Inuit" means "people," while "Eskimo" means "eaters of raw meat" in the Algenkian tongue. The Inuit decided to drop the Eskimo label about thirty years ago and have been known as Inuit ever since. The Inuit are not Indian--they are genetically, culturally, and linguistically different.[39]

Both the Dene and Inuit hold that the land was a sacred trust because it was the land upon which the community depended for its survival The land was not a wilderness nor a frontier to be pushed back; it was, instead a spiritual and material homeland to which they must adapt in order to survive. The non-renewable resources were used sparingly so as to not take the wealth from the land. The renewable resources became the backbone of both daily life and the Native economy. From this it was easy to understand why the Dene and Inuit hated the scorched earth policy of many southern developers and why it was so important for them to gain control of the land. It was already littered with too many rusting fifty-five gallon fuel drums and abandoned United States Distant Early Warning radar sites (the DEW line). The Dene and Inuit were not going to allow their sacred territory to be turned into a dumping ground for even more dangerous materials--toxic and nuclear waste.[40]

Rather than seeking community-based self-government like the AFN, the Inuit, represented by the Inuit Tapirisat of Canada, had a larger dream. They wanted to take the eastern two-thirds of the Northwest Territories and create a new territory known as Nunavut ("Our Land"). This would include the land that they were getting from the comprehensive land claims and that which they would have shared jurisdiction over--in all more than 770,000 square miles. The reason for this approach was simple, the Inuit possessed numeric superiority. The population of the Northwest Territories was about 46,000 in the mid-1980s of which 17 percent were Dene, 35 percent Inuit, 6 percent Métis, and 42 percent non-natives. But well over half of the white population of the Northwest Territories were temporary residents or transients. The Nunavut government was written into the final agreement and will be created through the legislative action in Ottawa. However, it is unclear, at this point, whether or not the provinces must ratify the creation of the Nunavut territory.[41]

Meanwhile, other comprehensive land claims are working their way through the pipeline. In 1991 DIAND had given $4.5 million to 33 Indian bands and associations for research, development, and presentation of specific and comprehensive claims.[42] To date none of the other claims have reached the final agreement stage except the ones already mentioned and only the Cree-Naskapi (of Quebec) Act and Bill C-93 (Sechelt) have been implemented. Since those claims took 10-15 years to reach completion and the government, until recently, only allowed six comprehensive claims to be negotiated at once, it is obvious that this procedure will drag on into the next century. Meanwhile, the Indians are kept from enjoying the full benefits from lands which are rightfully theirs.

After two hundred years of the Reserve System, the Indian has been dramatically altered. Before the white man came, the Aboriginal people were free to roam their domain at will and exercise their respective cultures within them. The Reserve System ended Indians' freedom and changed their character. Where once they were able to utilize thousands of square miles for hunting and fishing, now they are confined to tiny reserves. Where once they were able to support their families off the abundance of the land, they now have become totally dependent upon the System. The whole System breeds inferiority complexes, dependency, government paternalism and domination, and stalls their initiative.

The only way to end this colonial system and restore dignity to the Native people is by restoring to them their third order of government and a third order of land. Community-based self-government will return to the Indians that which they maintained before contact with the white man. Comprehensive land claims will reinstate a measure of the land that the Indian once controlled. A third order of land will re-establish the Native people with the ability to be self-sufficient. In the current political climate, the two issues cannot be separated. Land and self-determination must be addressed together in order to make the Aboriginal people whole.

CHAPTER SIX
FROM HOPELESSNESS TO A GLIMMER OF HOPE

There is a tendency to begin any discussion of Canadian identity with the French and the British because they were the two founding groups of Canada. However, in order to do that, one must ignore the earliest Canadians, the Indians and Inuit who were there thousands of years before the Europeans arrived. Early Canadian history also reflects this mindset since it does not feature the Native people, but instead focuses on the European and the Indian's role in the story of the European settlement of Canada. The white man sees himself as the norm in Canada, but so does the Indian. Ironically, when the Native leaves the reserve and enters the white man's world, he expands his identity. But the same cannot be said of the white man. Canada must come to realize and appreciate that it is a multi-cultural society and not a bi-cultural one. Unless the viewpoint of the Indian is understood and given freedom of expression, many of his actions and attitudes will be seen to be obdurate, misguided and inexplicable.[1]

Prime Minister Mulroney reminded the First Nations' Congress in Victoria in 1991 that his vision for Canada: "recognizes the role you have played in Canadian history, the place of respect you have in Canada, today, and the contribution you will make to Canada's future." He went on to declare: "I believe that the answer to many Aboriginal problems lies in Native peoples

assuming greater responsibility for their own affairs, setting their own priorities, and determining their own programs."[2]

The deep well of public support for the Aboriginal peoples was blemished recently by the specter of violence. The armed standoff at Oka frightened many in Canada, but it also showed that the Indian could only be pushed so far. Manitoba's Chief Phil Fontaine of the Assembly of Manitoba Chiefs said on August 26, 1990: "we don't condone violence of any sort, by any group. Our preferred option, our preferred approach is to negotiate and that is in keeping with our traditions and the teachings of our elders."[3] Notice he said "preferred approach." Mohandas Gandhi noted:

> To understand nonviolence one must first understand violence and its two distinct aspects--physical and passive. Passive violence in the form of discrimination, oppression, exploitation, hate, anger and all the subtle ways in which it manifests itself gives rise to physical violence in society. To rid society of this physical violence, we must act now to eliminate passive violence.[4]

A few Canadian politicians are perfect examples of those who promote "passive violence." During the post-Oka debate in the House of Commons, Mrs. Dorothy Dobbie (Parliamentary Secretary to the Minister of DIAND) said, quite innocently: "I know that the hon. member [Ms. Audrey McLaughlin (Yukon)] has a great concern for people of native extraction, Indian and Inuit, many of whom live in her riding, and I know she has a very deep and underlying concern about the condition of <u>these people</u>. [Emphasis added.]"[5] While she may not have intended to sound discriminatory, Mrs. Dobbie's remarks were interpreted that way by Ms. McLaughlin who noted: "The hon. member across the way referred to these people, the Aboriginal people. These people are Canadians and we cannot lose sight of this. Not only are they the

people who the previous speaker refers to as "these people," but they are the first people of this country."[6]

Later, Mrs. Lise Bourgault (Parliamentary Secretary to the Minister of National Health and Welfare) strongly declared: "I urge the clan mothers not to insult their people by appointing another chief; the next chief has to be elected by the band majority, for only then will they have a strong voice which will make it possible for the government to settle the issue."[7] What Mrs. Bourgault failed to realize was that clan mothers had been appointing chiefs for the people of Kanesotake since before the European foreigners arrived. What she wanted was for the Indian to act like white men, elect their leaders and forsake their cultural heritage.[8]

Where is the sense of justice in these kinds of prejudicial remarks? But then, the Aboriginal people have suffered all too often at the hands of the justice system in Canada. Throughout Canada, Aboriginal rights have been ignored. Justice has been delayed and denied. Lands claimed by Aboriginal people continue to be exploited even while negotiations are proceeding. Logging, mining, and other forms of resource development are being vigorously pursued on the Indians' land without their permission. The government should bear the responsibility to persuade the courts that these actions violate Aboriginal rights and treaties. Instead, the government insists on orderly negotiations with the Indians while their lands are being exploited. In addition, the government insists on a moratorium on court cases until negotiations have been completed, even though that may take 10 to 20 years.[9]

Amidst the government malaise that has sometimes surrounded the relationship with the Indian, an occasional ray of sunshine breaks through. In

May 1991, Ontario Premier Bob Rae announced that Natives would be allowed to hunt and fish for food or for ceremonial purposes, ignoring provincial wildlife laws. This action, along with the signed Statement of Political Relationship, has placed Ontario in the forefront of the effort to return the Aboriginal people to their rightful place in society. For their part, the Natives of Ontario recognized Rae's action as a long-overdue acknowledgment of their traditional right to harvest the land.[10]

The First Nations of Ontario are developing a sense of trust with the Government of Ontario, which unfortunately does not exist with the Government of Canada. Moses Okimaw of the AFN said pointblank: "We don't trust the government. We can't be sure when we sign a deal that the government will live up to their side of the bargain."[11] Linda Minoose of Edmonton, Alberta remembered how the elders looked at the treaties: "...when my forefathers signed treaties they wanted to make sure that their generations to come would survive, so the treaties concluded: 'as long as the grass grows, the rivers flow and the sun shines,' which meant that the treaties would last forever."[12] Unfortunately, the treaties may still exist, while the grass has been paved over for highways, the rivers have been dammed, and the sun is blotted out by the smoke from the factories to the south. Trust is a commodity in short supply when it comes to dealing with the Federal government. A solution has to be found to the Aboriginal problem and the best hope lies in constitutional reform.

In July 1992, the Constitutional crisis came to what appeared to be a final settlement. Ever since the defeat of the Meech Lake Accord in June 1990, Quebec has threatened to withdraw from the Confederation. Quebec had a referendum scheduled for October 1992 to decide that very issue. Therefore, it

would be up to the First Ministers of the other nine provinces to complete a compromise constitutional settlement before that point. But, it would not be easy. Quebec wanted the provinces to be given exclusive authority over agriculture, communications, energy, the environment, industry and commerce, language, unemployment insurance, and public security. The central government would keep exclusive authority over defense, customs, currency, and equalization (redistribution of wealth). The shared areas of authority would include immigration, financial institutions, justice, fisheries, and transportation.[13]

In addition, the French-speaking province demanded that their "distinct society" status be implanted in the Constitution. Quebec, which has about 7 million of Canada's 26 million people, believed its French language and culture were threatened by the sea of English speakers on all sides. The province already had its own legal system based on the Napoleonic code and also laws making French the only official language.[14]

By the time the cross-country negotiations were completed in June 1992, the package had changed somewhat. With Quebec boycotting the talks, the representatives of the other nine provinces had to work out the compromise among themselves. The agreement, as it stood in June, would have given Natives self-government, recognized Quebec as a distinct society, and provided for a freer movement of goods and services across the country, dismantling provincial trade barriers. Quebec also would have received its long-sought veto over future changes to the Constitution, since the unanimous consent of all provinces would be required for future constitutional amendments.[15]

The most striking aspect of the package was the dramatic change to the Federal legislature. The House of Commons was to be expanded to 312 seats from the current 295. Representation in the House of Commons would be proportional. The Senate would become an almost equal partner in the legislature. Nicknamed the Triple-E Senate, it would be elected (instead of appointed); it would be effective (having the right of veto with a super majority of 70 percent and the right to force a joint session to examine a bill with a vote of 60 percent); and it would be equal (each province would have 8 seats while the territories got two seats each).[16]

Within three days of its proposal, the constitutional compromise was virtually killed by Premier Robert Bourassa of Quebec who objected to the Triple-E Senate. While most of the other Premiers were vocally supporting the package, Prime Minister Mulroney was ambivalent.[17] Almost two years of work, and the hopes of the Canadian people that the Constitutional question would finally be resolved, slipped away rapidly because the Prime Minister and his cabinet could not or would not decide whether or not to support it. There was paralysis at a time which called for strong leadership.[18]

If the Constitutional compromise collapsed, the Aboriginal people would lose their best chance to entrench their inherent rights into the Constitution. AFN National Chief Ovide Mercredi had been an active participant in the negotiations and had worked hard to get the Aboriginal rights into the package. They included placing the inherent rights of Aboriginal self-government into the Constitution and labeled as a third order of government, accepting a five-year delay before pursuing any self-government issues through the courts, and gaining a political accord for the Métis.[19] When it appeared that

the Constitutional deal was crumbling and that the Aboriginal part of the package might be jettisoned, Chief Mercredi called for an AFN rally on Parliament Hill. It was held on Wednesday, July 15, 1992.

Before a crowd of 400 supporters, Chief Mercredi made an impassioned plea to save the package. In part he said:

> The Prime Minister and the Cabinet need to uphold the promises that they have made to us. ... The First Nations have a bottom line too. We cannot be pushed and pushed into a cellar. We have our dignity. ... The message has been given to all the governments across Canada that the people stand side by side with the Aboriginal people in preserving constitutional gains that have been made. ... When you make a commitment, you live with it. You don't change your mind the next day to please others. ... We will say no to any more compromises. This process cannot go back to being secretive. It must remain in the open.[20]

For Chief Mercredi the package on the table was the bare minimum that the First Nations would accept. They did not want to be humiliated again. But they would be disappointed. This author overheard two newspaper reporters talking during the AFN rally. One said to the other:

> If Mulroney had wanted this to go through, he would have backed it from day one. Instead he deliberately waited a week during which the proposal was submarined by the opposition. When he did speak up, it was to say that no part of the deal was not up for renegotiation. Mulroney does not want this passed. He wants it to fail.[21]

While the newsmen were guessing that Mulroney wanted the package to fail, they were right about everything else. Within three weeks, the agreement was back at the bargaining table. As a result, a new agreement was reached in Charlottetown, on August 28, 1992. The Government of Canada decided to use the agreement to form the basis of its own referendum which was

scheduled for October 26, 1992. Many believed and many campaigned on the fact that the fate of Canada hung on that vote.

The Consensus Report on the Constitution, as the new agreement was known, stated that:

> The Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures, and traditions and to ensure the integrity of their societies, and their governments constitute one of the three orders of government in Canada.[22]

Quebec got what it wanted as well. The agreement declared: "Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition." The Senate would be elected, equal (Six Senators from each province and one Senator from each territory), and have limited effectiveness. The Senate could not veto legislation but could send a bill back for reconsideration by a joint session of the legislature.[23]

All these issues tied together in the battle to get the referendum passed. The First Nations could not get their constitutional guarantees without Quebec being satisfied, but Quebec was not satisfied with the Aboriginal self-governments. The Western provinces would not support Quebec without their Triple-E Senate and Quebec opposed that suggestion. As the vote approached, the polls were not the least bit optimistic.[24]

The polls predicted the outcome correctly. The October 26 Referendum was soundly defeated, losing in six provinces (Nova Scotia, Quebec, Manitoba, Saskatchewan, Alberta, and British Columbia) and one territory (the Yukon). Maclean's labeled the action by 75 percent of eligible Canadian voters as "the most sweeping rebuff to elected politicians in the

country's 125 years." According to Maclean's Decima poll, conducted on the day of the vote, 27 percent of those voting "No" did so because they believed that Quebec would get too much from the agreement. Only four percent of those voting "No" concluded that the Aboriginal people were given too much. Clearly the vote was not a rejection of Aboriginal positions. To a lesser extent, the vote also was not a snub of Quebec. In fact, a majority of voters (49 percent in Quebec and 56 percent in the rest of Canada) held that a defeat of the Referendum would have no impact on Canada.[25]

While most knowledgeable analysis of the Referendum vote characterized it as "a populist revolt in favour of the status quo," the Native leaders took the defeat personally. According to The Economist: "they were quick to denounce the No vote from Alberta and British Columbia as an attempt by the provinces to avoid settling huge Native land claims." William Watson, a Native Economist, told a CNN reporter: "We are sick and tired of being rejected, of being excluded from the economic prosperity of Canada, and we are not going to take it any more." National Chief Ovide Mercredi addressed members of the AFN's Ottawa headquarters and said: "Canadians have said No to us. We have obviously been rejected." He went on to hint that the Aboriginal people may pursue land claims through international courts.[26]

Despite the Indians' bitterness over this lost opportunity to entrench their right of self-government in the Constitution, the fight will continue. The focus must shift back to the provinces where individual negotiations are taking place. Eventually other provinces will take the lead set by Ontario and adopt tripartite negotiations to establish Native self-governments and to settle land claims. The threat to take land claim cases to international courts is just a threat.

Land claims are only going to be settled in Canada, and most provincial leaders realize that the provinces would be wiser to settle them by negotiations rather than let them work their way up through the courts of Canada. Parti Québécois leader Jacques Parizeau stated that after the Referendum was defeated, the Native self-government package should be renegotiated since it was "the only part of the accord worth keeping." The ulterior motive for Quebec is to combine land claims and self-government in the talks and then trade self-government for a reduction in land claims.[27]

As negotiations on self-government continue, there will not be the certainty of success that would have come from a constitutionally-based guarantee. This worries some Indian leaders because they are fearful that if enough bands opt for self-government and opt out of the Indian Act that the Act will be abolished before everyone is covered by a self-government agreement. Then that small minority would be all alone without an inalienable land base, without special economic consideration such as freedom from taxes, and without special linguistic and cultural rights.[28]

Even within the self-government arrangements as they are made there needs to be a clear distinction between economic-development programs and community-support programs. Both are important. The community-support programs must continue to be funded by the government until the communities can become self-sufficient (if ever). In the meantime, the economic-development programs must be earnestly supported and funded by the government in order to ensure that the communities have a chance to become self-sufficient. It will be true in the future that despite the best efforts of both the Federal and provincial

governments, the poor economic position of most Native communities will continue.[29]

The process of creating a third order of government for the Aboriginal people has just begun. Those individuals interviewed for this thesis all agree that the process will continue no matter what happens with Constitutional reform. However, entrenching the inherent right to self-government into the Constitution would guarantee that this process will be completed. It might seem easier to entrench Aboriginal rights into the Constitution as a separate issue, but the nature of the Constitutional crisis is such that this is not possible. Therefore, Indian rights must stand beside all the other complex issues and be considered as one.

As discussed earlier in this thesis, it would be simpler if self-government was considered strictly as a political consideration. The Indians object to this approach because they desire that self-government be restored to the state that it was before it was taken away, i.e., meeting all the political, economic, social, and cultural needs of the community. In a similar vein, it would be simpler if self-government was considered apart from land claims, but the provinces object to this. The provinces want all the issues--self-government, the cost of social programs, land claims, and compensation--on the table at once. Then they can engage in negotiations which they hope will minimize their cost. From their standpoint, there will be costs involved in starting up the self-government programs, in continuing to deliver social services, in the loss of land returned to the Indians, and in the compensation for the land that cannot be returned to the Indian. If taken separately, the provinces fear that the cost will

be overwhelming. Taken together the cost will be very high and the provinces will have to look to the Federal government for financial aid.

In any event, the government has broken new ground by considering the establishment of both a third order of government and a third order of land. Having started this process, the government needs to insure that all parties will continue to negotiate until the Aboriginal rights to land and self-determination have been completely restored. Then, and only then will the nation of Canada have something to show the world.

In the end it will be up to the Canadian people to determine the true impact of their obligation to the First Nations. But, this one thought needs to be considered in any discussion of that obligation. We live in a world that is changing rapidly. The events in Eastern Europe and the former Soviet Union in 1990 and 1991 are vivid proof that nothing has to remain static. However, change also brings uncertainty. The world is not necessarily a safer place because the Eastern bloc and the former Soviet Union are no longer under the grip of Communism. To the contrary, these countries are breaking up and ethnic violence, long suppressed, has raised its ugly and violent head. Canada has a unique opportunity to be a model to the world in solving ethnic unrest by showing that sovereign people within a country can develop a method for negotiating and making settlements between peoples of diverse backgrounds and cultures. Canada has the occasion to show the world how one state can recognize the sovereign aspirations of its individual members to become even more powerful and strong and independent. Canada can reveal the process whereby a people enslaved by paternalism can be given a third order of government and, as a result, become a partner in the bright future of that nation.

But, Canada can only do this if it has the political will and courage to do something new.

APPENDIX

THE AMERICAN EXPERIENCE

The American experience in its relationship with the Indigenous population can best be understood through a review of the historical background. From the very beginning, the Aboriginals of North America were determined to maintain control of their land leaving the European usurpers only two options to obtain that land--conquest through a "just war" or negotiation for voluntary surrender of land through treaties. Both methods were utilized, from time to time, by the Spanish, French, and English. Contention over land usage and ownership have served to define the totality of United States-Indian relationships from the first moment to the present day. Each original colony on the Eastern Coast of North America made separate treaties with the tribes of Indians with whom they came into contact. But early Indian policy was confused because of this crazy quilt of treaties. Therefore, at the Albany Congress of 1754, Benjamin Franklin proposed that all British colonial Indian affairs be centrally administered. In turn, this became the focus of the British-Indian policy in 1763 with the issuance of the Royal Proclamation.[1]

Under the Royal Proclamation all lands west of the Appalachians were designated Indian territory. For the lands east of the Appalachians, King George III required that tribes wishing to give up their land, must cede it to the Crown which would arrange for its transfer to settlers. In 1778 the rebellious thirteen colonies signed their first Indian treaty with the Delaware Tribe. The

treaty guaranteed the territorial integrity of the Delaware Nation and proposed that the Delawares might form a state and join the Confederation of States.[2] Three years later, the Articles of Confederation vested the Continental Congress with:

> the sole and exclusive right and power of ... regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated.[3]

A treaty with the Six Nations (of New York) signed in 1784 and a treaty with the Cherokees (of North Carolina) signed in 1785 were both protested by the respective states as a violation of states' rights, even though the treaties were clearly within the prerogative of the Continental Congress to sign.[4]

To restate its position, the Continental Congress passed the Northwest Ordinance (1787). It asserted:

> The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made for preventing wrongs being done to them, and for preserving peace and friendship with them.[5]

The Ordinance was a strong reassertion of congressional authority in Indian relations in the face of blatant flouting of that authority by individual states. However, it would be up to the historical record to determine how faithful the Federal government would be to its promises.

The Constitution of the United States made it abundantly clear that Indian affairs would be a congressional matter. Article I, Section 8, Clause 3 authorized Congress, "to regulate Commerce with foreign Nations, and among

the several States, and with the Indian Tribes." Article II, Section 2, Clause 2 empowered the President, "with the Advice and Consent of the Senate, to make Treaties," which would include treaties with the Indian Nations.[6]

The Trade and Intercourse Acts (1790, 1793, 1796, 1799, 1802, and 1834) served to codify the constitutional Commerce Clause as regarded the Indians. The basic concepts were borrowed directly from the Royal Proclamation: no sale of Indian lands was valid without United States sanction; non-Indians were restricted from entering Indian country; Indian trade was licensed; liquor was prohibited from Indian country; federal standards were set governing crimes by non-Indians against Indians; and "civilization and education" among the Indians were promoted. The Intercourse Acts were necessary because early treaties were inadequate in regulating relations between the Aboriginal people and whites and because the individual states ignored treaty provisions.[7]

The Louisiana Purchase was consummated in 1803 which doubled the size of the United States, hence doubling the number of Indians living within the United States. The westward movement of European immigrants increased interaction with the Native population and the need for settlement land. In 1810 the Supreme Court ruled in Fletcher v. Peck [6 Cranch 87 (1810)] that states claiming lands west of the Allegheny and Appalachian mountains did "own" them even though Indian consent to cede them had never been obtained through treaty. Aboriginal land was deemed to be "vacant" land.[8]

In his first message to Congress, President Andrew Jackson called for the removal of all the tribes east of the Mississippi. The Indian Removal Act (1830) required: "an exchange of lands with any of the Indians residing in any

of the states and territories, and for their removal west of the river Mississippi." The propaganda of a "voluntary" exchange of land was a cover for the total removal of the Native population from the entire region east of the Mississippi, opening it up for the exclusive use and occupancy by European settlers. Along with the "Five Civilized Tribes" (Creek, Cherokee, Choctaw, Chickasaw, and Seminole) other Natives were removed to the Indian territory (Oklahoma, Arkansas and Kansas) between 1832 and 1842. The relocation of the Five Civilized Tribes was accomplished because the Indians envisioned a Native nation which would be fully sovereign and federated. On the other hand, the Plains Indians would resist all military moves to relocate them.[9]

In 1827 the Cherokee Nation adopted a Constitution modeled on the United States document. The Georgia State Legislature nullified it as part of an effort to emasculate the Cherokee Nation. President Jackson refused to intervene. The Indians sought relief through the courts and ran into the convoluted logic of Chief Justice John Marshall. The majority opinion in The Cherokee Nation v. The State of Georgia [30 U.S. 1 (1831)], written by Marshall, stated that: "an Indian tribe or nation within the United States is not a foreign state in the sense of the Constitution, and cannot maintain an action in the courts of the United States," even though, "our government plainly recognized the Cherokee Nation as a state." Marshall went on to declare the Indian tribes to be:

> denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[10]

Since treaties were to be negotiated only with foreign governments, Marshall never explained how the United States could have signed (and continued to sign) treaties with the Indian tribes when they were not foreign states. He went on to assert that the Natives' status was one of "quasi-sovereignty" in that they had sovereignty enough to engage in treaty-making with the United States, but not enough to manage their own affairs as fully independent political entities. They had just enough sovereignty to cede over legal title to their lands, but no more. Indian title to land was not extinguished by Marshall, just diminished. But, he was not going to give the Indian full legal standing before the court since that would open all Indian treaties to legal scrutiny.[11] While external sovereignty was ended, internal sovereignty, i.e., self-government, remained. Marshall put in place a theory of Native sovereignty and Aboriginal title which acknowledged that Indians had a legal interest in their ancestral lands and sovereignty that was restricted in its scope. Yet, even that restricted sovereignty quickly became curtailed by further treaties, legislation of Congress and court rulings.[12]

One year later, Marshall appeared to give back to the Cherokee Nation what he had removed earlier. In Worcester v. The State of Georgia [315 U.S. 515 (1832)] Marshall described the Cherokee Nation as:

> a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.[13]

The State of Georgia had imprisoned Samuel A. Worcester, an outspoken missionary living with the Cherokees, for refusing to obey a Georgia law forbidding whites from residing in the Cherokee country without taking an oath

of allegiance to the state and obtaining a permit. The Court held that the law was void, "as being repugnant to the Constitution, treaties, and laws of the United States." State laws could be applied on reservations only if their application did not impair a right granted or reserved by Federal law and did not interfere with the self-government Congress had reserved for the tribes. But, again Jackson refused to move against the actions of the State of Georgia and free Worcester. His famous retort was: "John Marshall has made his judgment, now let him enforce it!"[14]

On November 25, 1992, the state of Georgia officially pardoned Worcester and apologized, saying: "It was a miscarriage of justice." Worcester had been released from prison only because the Cherokees were forced by the state of Georgia to leave. He joined the 17,000 Cherokees in the infamous Trail of Tears move west wherein thousands died of cold and starvation during the forced march.[15]

A pattern had emerged after eighty years of United States relations with the Aboriginal people. White settlers would begin to encroach on treaty-protected Indian lands; the Federal Government would fail in its attempt to impose order; the Indians would be forced to concede land to the settlers; the government would guarantee that no more land would be lost; and the process would start all over again. The underlying assumption by the Natives was that treaties represented legal obligations upon the United States, entered into in good faith and bilateral in nature. The Indians learned rather early how trustworthy the Federal government was going to be but, fortunately for Uncle Sam, the Indian communication system between tribes was not well established enough to widely disseminate the information. When Indians refused to step aside to the

settlers and offered armed resistance to invasion, they were accused of having committed aggression and thus libel to the consequences of an "Indian war." Meanwhile, the Indians merely desired to remain a people apart, a distinct society within America, governing themselves on their own lands.[16]

During the American Civil War, the Aboriginal question was not forgotten. In 1861, the Enabling Act for the Kansas territory contained language which indicated that the Indian reservations were intended to be permanent jurisdictional enclaves within the states. As the reservation system became more formalized, it also became more oppressive in pressuring the Indian to lay aside custom and culture. Similar events were occurring at the same time on Canadian Indian reserves. The result was a gradual breakdown of tradition with nothing to replace it. Chiefs, who had been necessary to sign treaties, were shunted aside and replaced by the Indian Agent and his Native Police. Aboriginal religions were banned by the Christian missionaries who were brought in to educate the Indian children. Indian Commissioner Francis Walker (1871-1873) revealed just how oppressive he wanted things to be:

> It was expressly declared that the Indians should be made as comfortable on, and uncomfortable off, their reservations as it was within the power of the Government to make them: that such of them as went right should be protected and fed, and such as went wrong should be harassed and scourged without intermission.[17]

By 1865 a series of reservation schools had been established under Christian organizations. The American Indians were to be Christianized and civilized in the same manner as their Canadian cousins. By 1878, the education of Indian youth had been moved off-reservation to boarding schools so that the young Indians could be weaned of Indian culture and language.[18]

A rider attached to the 1871 Indian Appropriation Act terminated the treaty-making process. The language of the rider included the following: "No Indian nation or tribe within the territory of the United States shall be recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." After 371 treaties (the last being with the Nez Perce in 1868) wherein Indian nations were recognized as independent nations negotiating on a government-to-government basis, it seemed odd that the process was stopped. However, the growing power of the United States had surpassed that of the Indian nations, so their sovereignty was diminished to a level just below that of the states of the union.[19]

For one hundred years, the Aboriginal people had been allowed to maintain their own judicial system on their reservations. This procedure was upheld in Ex Parte Crow Dog [109 U.S. 556 (1883)] wherein the Supreme Court ruled that the United States had no jurisdictional authority to prosecute one Indian for killing another on an Indian reservation. The case would have to be heard by a Native court. The decision shocked Congress, which had grown accustomed not only to the possession of plenary authority over Indian matters, but also to the casual and arbitrary exercise of that authority. Congress removed this last vestige of self-government by enactment of the Major Crimes Act (1885). From that point on all criminal justice for crimes committed on the reservations would be handled by non-Indians. In addition, Congress began to pass thousands of laws pertaining to the regulation of American Indians without the consent of, or consulting with, the Indians themselves.[20]

A year earlier, the Supreme Court put an end to the hoax that the Native could be completely assimilated into the white population if he so chose.

In Elk v. Williams [112 U.S. 94 (1884)] the Court held that, even though John Elk had voluntarily separated himself from his tribe and moved in with the white citizens of Nebraska, he was not a citizen of the United States and could not be registered to vote. The Fourteenth Amendment to the Constitution, which made all former slaves citizens, did not apply to Indians. In fact, the Court ruled that general acts of Congress were not applicable to Indians unless they specifically stated so. Indians did not become citizens of the United States until 1924.[21]

By the mid-1880s most Indian resistance against United States expansion had ceased and the Indigenous population was safely tucked away on their reservations (the land specifically set aside for their use). Congress, through the General Allotment Act (1887), moved unilaterally to break up the Indians' traditional system of collective land tenure. Land was inalienable to the Indian who believed that land was held in common by all members of the tribe. Every member of the community in each generation acquired an interest in the land as a birthright and the tribal patrimony passed from one generation to the next. But these ideas were foreign to the Euroamerican mindset. For them land was alienable, a commodity to be bought and sold. The land had to be freed from all encumbrances to make it available for the swarming mass of immigrants. The Act provided for dividing the reservations into separate parcels to encourage individual Indians in agricultural pursuits (160 acres per family and 80 acres per single person). Once each Indian had received his or her allotment of land, the balance of reserved Aboriginal land was opened up to non-Indian homesteading or incorporated into national parks and forests.[22]

Three years later, the Indian was allowed to lease the land (usually the most productive land) to non-Indians, which made a mockery of the plan to

encourage Natives to become self-sufficient farmers on their own lands. When this proved equally unprofitable for the Indian, he was allowed to sell the land to the only available buyers--the white men. The purpose of all this was "assimilation" and if that did not work then the destruction and disappearance of the Indian would occur anyway. Under this carefully controlled plan the Aboriginal was slowly separated from his land, his tribe and his tribal government. Between 1887 and 1934 Indian-held land declined from 138 million acres to 48 million acres of which 20 million acres were desert.[23]

The rental payments from land leases or funds acquired from land sales were never enough to make the Indian self-sufficient. Inevitably, the Indigenous people became more dependent on the government. Meanwhile, the loss of Indian land was finally challenged in Lone Wolf v. Hitchcock [187 U.S. 553 (1903)]. The Treaty of Medicine Lodge (1867) stipulated that no cession of any portion of the reservation could be made without consent of the Indians. The government was said to be guilty of disposing of tribal property without due process of law in violation of the Fifth Amendment to the Constitution. The Supreme Court rejected the argument since Congress held plenary authority over Indians in their tribal relations. The power of Congress foreclosed any appeal to the courts by the Indians, even when it meant that power enabled Congress to abrogate inconvenient sections of treaties with Indians at any time, while not disturbing the force of the treaty itself--ending obligation to pay for land ceded while insisting that the land had been obtained lawfully through treaty. The Court ruling made a mockery of the treaty process.[24]

After decades of stripping away Indian rights, Congress finally reversed itself and conferred through the Indian Citizenship Act (1924)

citizenship to all Indians "born within the territorial limits of the United States." Partly because of the exemplary contributions made by Indians during World War I and partly because of pressure from pan-Indian groups, the Aboriginal people were unilaterally recognized as members of a country that they had founded. Since some Indians still wanted to remain apart from the United States, the concept that citizenship was being forced on them without their consent was repugnant. Plus, citizenship did not automatically yield the privilege to vote which was withheld from those who did not pay taxes or those still under wardship. Many an Indian today holds citizenship in his tribe as far more important and sacred than citizenship in the United States.[25]

The next major move by Congress came during a period of national self-doubt and soul searching when the Indian Reorganization Act (1934) was passed. The "Wheeler-Howard Act" provided for an end to the allotment system, encouraged tribal self-government through tribal constitutions (written by white lawyers), protected and expanded tribal land bases, and established Indian preference in hiring within the Bureau of Indian Affairs. It created the illusion of a foundation for tribal economic self-sufficiency by the establishment of constitutional tribal governments, the extension of credit from Federal funds, the fostering of tribal enterprises, and the institution of modern conservation and resource development practices. Despite the appearance of change the ultimate decision-making power still remained in Washington. United States policy for administering Aboriginal peoples was described as follows:

> A Native nation is free to maintain or establish its own form of government, but periodically, Congress has by statute dictated the manner of choosing tribal officials or other aspects of the Indian nation's government. But if Congress intends to replace the authority of an established form of government, its intent must be

clearly indicated and tribal authority will continue, to the extent that it can coexist with Congress' alterations.[26]

After World War II and the defeat of those who violently oppressed minority populations, Congress finally responded to long-standing Indian demands for a means to air their grievances. The Indian Claims Commission Act (1946) provided sweeping authorization to present not only claims in law or equity arising under the Constitution, laws, treaties, and executive orders, but also claims "based upon fair and honorable dealings" that were not recognized by any existing rule of law or equity. The claims had to be filed by August 13, 1951 and were to be settled by April 10, 1972. The Indian Claims Commission streamlined the process by which justice was rendered as the wrongs of the government, in the dealings with Indians, were presented, argued, and rectified. A total of 852 claims in 370 petitions were filed in the five-year period permitted. By 1969 one-half of the claims had been decided with $305 million in awards. Eight years later the number of claims resolved had risen to 78 percent--46 percent settled for $669.1 million and 32 percent dismissed.[27]

Unlike Canada, where claim settlements usually involved the return of some land, restitution in the United States came only in the form of money. Unfortunately, the Indians rarely received the amount awarded. The government claimed "offsets" or deductions for services and materials provided to help the tribes make their claims. (In Canada the Federal government paid for both sides in negotiations.) The tribes also had to pay for their own legal counsel, historical research, anthropological support and technical work done in the litigation. Most of the settlements were eaten up by these two major deductions.[28]

In 1949 the Hoover Commission issued a report which recommended the total assimilation of Indians into the mass of the population as full, tax-paying citizens. The termination recommendation stated in part:

> It is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the U.S. subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the U.S., and to end their status as wards of the U.S., and to grant them all the rights and prerogatives pertaining to American citizenship.[29]

This would be one more example of Congressional action without consultation with the Native. Four years later Public Law 280 (1953) was enacted which gave certain states (California, Nebraska, Minnesota, Oregon, and Wisconsin) the right to assume jurisdiction over offenses committed by or against Aboriginal people on reservations within those states. This placed the Indian totally at the mercy of the non-Indian courts. President Eisenhower regretted that the action was taken without Indian consent but signed the bill anyway.[30]

Congress completed action on the Hoover Commission recommendations with House Concurrent Resolution 108 (1953) or the Termination Acts (stating in 1954). Tribes chosen for termination were those thought most ready to make their way without federal support or guidance. Among those chosen to be "freed" were the Menominees of Wisconsin, the Alabama-Coushattas of Texas; the Ponca Tribe of Nebraska; the Wyandottes, Ottawas, and Peorias of Oklahoma; and the Klamaths of Oregon--the tribes with the richest resources and greatest administrative skills. The members of these tribes were freed to enjoy life as American citizens, to pay taxes, to vote, and to become successful members of society. However, they were not allowed to have their own governments, laws, or courts.[31]

Many who received their share of tribal assets on a per capita basis went broke because they had no formal education in handling money. Instead of being cared for by the Federal government, Indians soon found themselves at the less than tender mercy of the states. Eventually 109 Indian tribes were terminated which meant that 11,400 individuals lost their status as "recognized Indians" and 1.5 million acres of Indian land were removed from protected trust status. The Aboriginal people were encouraged to leave the reservations and move to the cities where they would melt into the stream of urban life.[32]

Three years before Alaska became a state, the Supreme Court decided Tee-Hit-Ton Indians v. United States [348 U.S. 272 (1955)] which involved compensation under the Fifth Amendment for the uncompensated taking of lands held under original Indian title. In Alaska there were no signed treaties and the Indians had not ceded any of their land to the government. Therefore, under the Fifth Amendment, compensation was due for property taken. The Court, on the other hand, held that the government would only be liable under the Fifth Amendment for taking Indian title land recognized by Congress in a treaty or statute, rather than unrecognized Indian title land. Instead of the long-held "quasi-sovereignty theory" that original title rested with the Native population and could only be ceded to the Federal government, the evolved Court policy was that the Indians never held title to the land.

> The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by actions authorized by Congress, may be extinguished by the Government without compensation. ... Our conclusion does not uphold harshness or against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of

Government-owned land rather than making compensation for its value a rigid constitutional principle.[33]

This decision reversed two earlier court rulings granting Fifth Amendment compensation--United States v. Creek Nation [295 U.S. 103 (1935)] and United States v. Shoshone Tribe [304 U.S. 111, 116 (1938)]. In Tee-Hit-Ton, the Fifth Amendment did not apply because the land was regarded as "vacant land" at the disposal of the Federal government. The factitiousness of the Supreme Court's reasoning does not hold up in historical fact where the tribe can be shown to have used and dwelled on the land since before the white man set foot on the continent.[34]

Compensation for lands lost was one of two pressing issues for the Indians. The other involved water rights. According to Winters v. United States [207 U.S. 564 (1908)], "when Indian reservations are established, there is an implied reservation of enough water to effectuate the purposes of the reservation." The Winter rights are superior to all appropriations after the establishment of the reservation (which usually predated use by any other party), and they are not forfeited if not used. Using the "Winters Doctrine" the Navajo filed a brief in Arizona v. California [373 U.S. 546 (1963)] which involved Arizona suing California over water rights from the Colorado River. The court held that "water rights, necessary to make reservation land habitable and productive, were reserved under the 'Winters Doctrine' as of the time of the creation of the reservation." Therefore, the tribe was entitled to first use allotments of Colorado River water equal to that necessary to irrigate all the practicably irrigable acreage on the reserve. There have been more than 4,000 Native water rights cases brought before Federal courts since 1908 and the bulk of them have been filed since 1970. The reason these cases are so important

(especially in the west) is that if the Indians win outright control over their water, they would be in a position to lease the water rights to the highest bidder and go a long way toward becoming self-sufficient.[35]

The Indian Civil Rights Act (1968) or Public Law 284 required that Indian tribes observe the guarantees of the Bill of Rights. Indians already were protected as individuals in their relationship with the Federal government, but they were not in their relationship with the tribal governments. The Act removed another slice of Indian tribal authority by forcing tribal law to conform to the white man's culture. While the Act was well-meaning, it forced Indian judges to stop sentencing Indian criminals in an Indian manner. Just like the problem with the Canadian Charter of Rights and Freedoms, the Bill of Rights and its emphasis on individual rights runs counter to the Indian theory of the greater good for the community.[36]

In 1970, President Richard M. Nixon sent a special message to Congress which called for the end of termination and the beginning of the era of "self-determination." He also wanted Indian tribal sovereignty strengthened and more protection provided for the Indian land base. Nixon believed that termination was based on a false premise, i.e., that the Federal government had taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people, and therefore, it could discontinue the responsibility on a unilateral basis whenever it saw fit. The special relationship between Indians and the Federal government, as Nixon perceived it, was actually the result of solemn treaty obligations. While the Indians surrendered claims to vast tracts of lands, the government agreed to provide community services (health, housing, education, welfare, and public safety) comparable to that

received by other Americans. Nixon concluded: "to terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other Americans."[37]

Nixon went on to recommend a shift in policy. He wanted to strengthen the Indian's sense of autonomy without threatening his sense of community. The Indian was to be allowed to assume control of his life without being separated involuntarily from the tribal groups. The Indian was to become independent of Federal control without being cut off from Federal concern and Federal support. Along with this general legislative program, Nixon requested a special law returning 48,000 acres of land to the Taos Pueblo Indians of New Mexico. Most of Nixon's legislative package was eventually enacted in the Indian Self-Determination and Educational Assistance Act (1975) and within two years several tribes had signed contracts to assume administrative responsibility for all on-reservation programs. However, administering Federal programs on-reservation was not the same thing as self-government. Little self-determination was placed in the hands of the Native. The real emphasis of the Act was on education.[38]

After years of negotiation the Alaska Native Claims Settlement Act (1971) was passed which returned 40 million acres of land to Alaskan Natives, paid them $462.5 million over an eleven-year period, and gave them a two percent royalty on mineral development. In addition to the largest cession of land (one-twelfth of the area of Alaska) to a group of Native Americans, the Act also organized the Alaskan Natives into thirteen regional corporations and various village corporations, all accommodated under Alaskan rather than Federal charters. While this looked good in the headlines, the reality of the

situation was something different. The entire Native population of Alaska was disbanded and reorganized according to white corporate standards. In addition, all Indian land was turned into United States domestic assets--minerals and lumber could be harvested at will in return for a two percent royalty. The Alaskan Indians were given neither self-government nor land control.[39]

The Supreme Court joined the apparent policy shift regarding Indian rights with McClanahan v. Arizona State Tax Commission [411 U.S. 164 (1973)] wherein the Court ruled that the State of Arizona could not impose its personal income tax on a reservation Indian whose entire income was derived from reservation sources. The Court declared: "Indian sovereignty provides a backdrop against which the applicable treaties and Federal statutes must be read."[40] The timing of the Court decision coincided with a reversal of government policy from training Indians to work in urban areas off-reservation to a primary objective of encouraging economic development on-reservation. The goal was to develop a truly Indian economic system so that a dollar, once earned by an Indian citizen, could be spent and kept moving throughout an Indian economy. Since unemployment was over 50 percent on most reservations and the income levels for half the employed was below the poverty level, economic development could not come too soon to the reservations.[41]

"Indian Country" now comprises over 53 million acres on 507 reservations. Some of that land is energy rich with oil, coal, uranium, and water. Other land has potential for agricultural development for produce and cattle raising; while still other land can be used for forestry, commercial fishing or recreation. For over one hundred and fifty years it has been the policy of the United States government to deprive the Aboriginal of the development

opportunity of his land in order to force the Indian to leave. Within the last ten years, that policy has changed to one where the Indian is being encouraged to become self-sufficient by the wise use of the resources available on the reservations. River water use is just one example of this effort; wildlife management is another. Fish and wildlife management activities are being conducted on 125 reservations in 23 states. These resources provide food, shelter, clothing, and tools to the Indians. They can also be developed for sport hunting and fishing to provide economic development for the reservation.[42]

According to President Ronald Reagan it should be the responsibility of the Federal government not to hinder but encourage the tribes to take advantage of economic development. Furthermore, he believed that the voters stood to gain from the rapid development and management of the vast resources found on Indian land. Most importantly, economic development and resource management would provide the Indians with their most immediate need--employment. Reagan wanted the tribal councils to determine how best to develop their resources in a way that served the community fully: "The only effective way for Indian reservations to develop is through tribal governments which are responsible and accountable to their members.[43]

Indian reservations are the land base for tribes of people who exercised sovereignty from time immemorial and who never recognized that they lost their right of self-government. Today, reservations are recognized in Federal law as distinct political communities with basic domestic and municipal functions. Each tribe is free to adopt and operate under the form of government of its choosing, to determine the terms of tribal membership, to license and control business on-reservation, to regulate domestic relations of members, to

levy taxes, to regulate Indian property on-reservation (building codes and zoning), and to administer justice for certain crimes committed on-reservation. In addition, each tribe is free to define the authority and the duties of its officials, the manner of their appointment or election, the grounds for their removal, and the rules they must observe. However, all these powers are subject to Congressional manipulation as Congress sees fit.[44]

It is Congress' responsibility and the Bureau of Indian Affairs' delegated task to protect and provide for the needs of those on-reservation. Yet, there are those who, for reasons of greed and racism, want Congress to more tightly regulate and control the Indians so that they will be forced to give up their remaining resources. The lumber industry wants free access to the trees; the oil industry requires more test wells; the mining industry seeks to open more land for mining; and the western states demand unlimited use of the Colorado River water.[45] On the other hand, it is the specific duty of Congress, as part of regulation of commerce with the Indians, to protect the Indian from these corporate raiders. The Federal-Indian trust relationship is all that the Indians have to protect them. However, a few in Congress have chosen to abuse that relationship by threatening to unilaterally terminate the relationship with the threat: "If you criticize us too severely, the Congress may terminate Indian programs and services."[46]

When Marshall defined the Indian nations as "domestic dependent nations," he did so knowing that the responsibility rested with Congress. The Federal government had made promises in treaty after treaty to give a permanent homeland to the Indians that would be economically viable. Those lands were ostensibly secured "forever," but Congress had the right to appropriate Indian

land for government projects such as dams, reclamation projects, highways, military bases, and national parks. Congress can do this unilaterally and legally because Congress has the right to consent to "a breaking of the Nations' word."[47]

Theodore W. Taylor described tribal governments as a "fourth level of government." Originally Congress established the Federal-Indian relationship as one which pre-empted the exercise of state power over Indian reservations. Reservations were jurisdictional islands within state boundaries and out of state control. Recently, the Supreme Court began to seriously chip away at the pre-emption status of the reservations and to allow the states to exercise more control. States can collect sales taxes on goods purchased on-reservation by non-Indians. Tribal courts have no general criminal jurisdiction over non-Indians. Conviction of an Indian by a tribal court does not bring with it double jeopardy protection from trial by state or federal courts for the same crime. Tribes can no longer regulate land use of on-reservation land owned by non-Indians.[48]

Indian sovereignty is slowly being eroded away on the reservations and the tension between tribal governments and the states continues to mount. The Supreme Court expressed the opinion in 1886 that: "Tribes owe no allegiance to the states, and receive from them no protection. Because of the local ill feelings, the people of the states where they are found are often their deadliest enemies." The Court's blunt characterization of tribal-state relations is still applicable today, especially as many states point out that Indians who do not pay state taxes demand state services. On the other hand, Indian government powers in many aspects are usurped by both Federal and state control and would

probably be in conflict with city governments if any of the reservations were near large cities. Many states believe that since there are so few powers reserved for the states that there should be none left for the Indian governments.[49] The concept of a "third order of government" for Indians, as is being explored in Canada, would be repugnant to most states.

The two most contentious current issues between states and the Indians are land claims and gaming casinos. Recently there have been rather substantial and controversial land claims settlements. In 1988 the Puyallup Indians in Tacoma, Washington, received $66 million and 300 acres of prime land in the port of Tacoma based on an 1854 treaty. Two years later, the Shoshoni-Bannock people on the Fort Hall reservation in Idaho were awarded the right to use 581,000 acre-feet of water flowing through the Snake River under a 1868 treaty. Most recently (November, 1992) the Department of Interior announced the transfer of 400,0000 acres of public land in Arizona to the Hopis tribe. However, there are some in Congress who intend to try and block this latest land return for political reasons.[50] Every acre of Indian land returned raises a new battle cry from some quarters.

Empowered by a series of court decision and a 1988 Federal law, 140 Indian tribes across the country operate 150 gambling operations. Revenue has grown from $287 million in 1987 to more than $3.2 billion and is making some tribes rich. A typical example is the Michigan Ojibwa (Chippewa) in Sault Ste. Marie who opened a $5 million casino in 1985 with 250 slot machines, 36 blackjack tables, Keno and roulette games. This venture generates more than $1.2 million in profits a year for the 6,000 member tribe and provides employment for roughly 650 tribe members. The venture has reduced

reservation unemployment to 15 percent and yields 22 percent of the tribes $5.5 million annual budget. The newest tribe to catch the gambling bug is the Agua Caliente tribe outside Palm Springs, California. The tribe will build a $20 million casino with restaurants, stores, and entertainment facilities to establish a "little Las Vegas" in California.[51]

Because some American Indian tribes have been successful through the building of gaming establishments, Canadian Indian bands tend to look longingly at the United States as the land of Indian economic opportunity. Sadly, appearances are deceiving. The litany of woes of the American Indian has been recited many times: the highest infant mortality rate, the lowest life expectancy, the highest school dropout rate, the lowest per capita income, the highest unemployment, etc. The poorest county in the United States is the one encompassing the Pine Ridge Reservation of the Oglala Sioux in South Dakota, where 63 percent of the people live below the poverty line. And this is not an isolated case. Unemployment on the reservations in Montana is 56 percent, 68 percent in Wyoming, and 59 percent in Arizona. Many reservations are overpopulated and provide little opportunity for employment. Even with these terrible conditions, many Indians choose to remain on-reservation because they feel safe there. They do not have to pay state taxes; they receive subsidized housing; their medical needs are covered; their land is held in trust; they can survive on welfare; and there is a slim chance of eventually sharing in a large cash settlement from a lands claim.[52]

In actuality, the First Nations of Canada are in a better position than the American Indians. The American Indians constitute less than one percent of the total population which has no idea of the seriousness of the Indian plight.

Indians comprise about six percent of the total population of Canada and are very visible because of the current constitutional crisis. American Indians would receive about $5,000 per capita from thirteen Federal agencies if everything worked efficiently. But it does not. Only about ten percent of the money allocated to the Bureau of Indian Affairs actually reaches the Indians. On the other hand, all funds in Canada go through DIAND which delivers about $11,000 per capita to the on-reserve Indians. The land claims process is just beginning in Canada where the Indians stand to gain from both land return and cash settlements. The land claims process in the United States is all but finished and there is little hope of gain in this area.[53]

Finally, and most importantly, the opportunity for the First Nations of Canada to gain major concessions in the area of self-government is ripe. With both sides talking in terms of a third order of government, there is a good chance that the Indians of Canada will have true self-government before long. On the other hand, as long as Congress holds plenary authority over the Indians in the United States there is little hope that they will receive true self-government. Congress, at this point in its history, is in no mood to relinquish any power to the President, to the states, and especially to the Indians. As long as this remains the case, no amount of Bureau of Indian Affairs' propaganda will change the fact that the Indians in the United States have little power to shape their own destiny. The answer for the Canadian Indians is not the illusion of wealth possessed by a few tribes in America, but the reality of the potential awaiting them at the bargaining table at home. Once that potential is grasped, the American Indians will start looking longingly to Canada as the land of opportunity. The answer lies to the North, not to the South.

ENDNOTES

INTRODUCTION

1. Signed by a Joint Council of the National Indian Brotherhood on November 18, 1981. This declaration is one of the founding documents of the Assembly of First Nations and is available from their national headquarters office in Ottawa.

2. The actual breakdown, according to 1992 estimates, was 512,000 registered Indians, 32,000 Inuit, and 500,000 Métis and non-status Indians. The total was 1,044,000. It should be noted that 90 Indian bands refused to cooperate with the 1896 census and as a result the count may be short. Maclean's 105, No. 4 (March 16, 1992): 15. The Indian band would be called a tribe in the United States. It is the basic sub-unit of the First Nations and only superficially comparable to a municipality. The band has little formal relationship to the government of the province in which it is located. This is despite the fact that it is the provincial government that controls most of the powers over the area outside the boundaries of the reserve land. In addition, the band's relationship to the Federal government is through one of the lesser departments, the Department of Indian and Northern Affairs (DIAND). Adrian Tanner (ed), The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada (Newfoundland: Institute of Social and Economic Research at Memorial University, 1983), 20.

3. Government of Canada, Aboriginal Peoples, Self-Government, and Constitutional Reform (Ottawa: Minister of Supply and Services Canada, 1991), 3.

CHAPTER ONE

FROM FIRST CONTACT TO ASSIMILATION

1. Government of Canada, The Right of Aboriginal Self-Government and the Constitution: A Commentary by the Royal Commission on Aboriginal Peoples (Ottawa: Minister of Supply and Services Canada, 1992), 9 & 10.

2. Government of Canada, Aboriginal Peoples, Self-Government, and Constitutional Reform, 1-3. The Indians were said to be a "less evolved race," and thus incapable of developing a more civilized style of life as the Europeans had done. Bruce G. Trigger, "The Historians' Indian: Native Americans in Canadian Historical Writing from Charlevoix to the Present." Canadian Historical Review LXVII, No. 3 (September 1986): 320.

3. Department of Indian Affairs and Northern Development (DIAND), Indians and Inuit of Canada (Ottawa: Minister of Supply and Services Canada, 1990), 24. Keith J. Crowe, A History of Original Peoples of Northern Canada (Montreal: McGill-Queen's University Press, 1974 & revised 1991), 54 & 69.

4. Palmer E. Patterson II, The Canadian Indian: A History Since 1500 (Toronto: Collier-Macmillian Canada, Ltd., 1972), 34.

5. Ibid., 39. Trigger stated: "Canadian history, like that of the United States, had as its theme the achievements of Europeans; Native people, who were seen as possessing no history of their own, remained the concern of anthropologists." Trigger, "The Historians' Indian: Native Americans in Canadian Historical Writing from Charlevoix to the Present," 321 & 322.

6. Government of Canada, Aboriginal Peoples, Self-Government, and Constitutional Reform, 4. Patterson, The Canadian Indian: A History Since 1500, 39. The missionary did not start out as the villian. Often it was the missionary that established contact with the Natives in the interior and in other cases the missionaries served as intermediaries between government officials and the Indians. However, the responsibility for Indian education was left to the

missionaries who concentrated on Christian values and European culture. Removed and discouraged were Indian religious values and Indian culture. J. Rick Ponting and Roger Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada (Toronto: Butterworths, 1980), 19.

7. Patterson, The Canadian Indian: A History Since 1500, 40. Leo Driedger (ed), The Canadian Ethnic Mosaic: A Quest for Identity (Toronto: McClelland and Stewart, Ltd., 1978), 218.

8. Tanner, The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada, 15. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 23.

9. Mr Justice Hall made the comparison in his written opinion in the Calder case in 1973. (See footnote #7 in Chapter Four.)

10. Government of Canada, Revised Statues of Canada, 1985 (Ottawa: Queen's Printer for Canada, 1985), 5. Attorney Harry A. Slade asserted: "The policy evidenced by the Proclamation was plainly intended to protect the Indians in their exclusive use of their lands, and to establish the formal means by which their interest might be ceded to the Crown." Harry A. Slade, Aboriginal Title and Rights in British Columbia (Vancouver: Ratcliff and Company, 1990), 4. Government of Canada, The Right of Aboriginal Self-Government and the Constitution: A Commentary by the Royal Commission on Aboriginal Peoples, 11.

11. Ibid., 13. Government of Canada, Aboriginal Peoples, Self-Government, and Constitutional Reform, 4.

12. DIAND, The Canadian Indian (Ottawa: Minister of Supply and Services Canada, 1990), 60.. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 4.

13. DIAND, The Canadian Indian, 53. At first, lump sum cash payments were made for lands surrendered. Later the Crown provided annuities and other benefits for the Indian people who surrendered their land. Ibid.

14. Ponting & Gibbins, Out of Irrelevance: A Socio-Politicial Introduction to Indian Affairs in Canada, 4.

15. Trigger, "The Historians' Indian: Native Americans in Canadian Historical Writing from Charlevoix to the Present," 318. In Canada there was no predisposition to eliminate the indigenous population except through assimilation, to remake the Indians into white people with brown skins. There would be no wars to exterminate the Indians. Thomas R. Berger, A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992 (Vancouver: Douglas & McIntyre, 1991), 64.

16. The Colony of Upper Canada became the Province of Quebec and the Colony of Lower Canada became the Province of Ontario. Government of Canada, Aboriginal Peoples, Self-Government, and Constitutional Reform, 4. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 5. In the Robinson-Huron and Robinson-Superior Treaties of 1850, the Crown undertook to set aside reserves, and to grant annuities and other considerations for the benefit of the Indian people. DIAND, Outstanding Business: A Native Claims Policy (Ottawa: Minister of Supply and Services Canada, 1982), 9.

17. L.F.S. Upton, "The Origins of Canadian Indian Policy," Journal of Canadian Studies 8, No. 4 (November 1973): 59.

18. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 5. Two diametrically opposed ideas were implemented at the same time: Indians were settled close to responsible non-aboriginals in order to teach them the principles of agriculture; and Indians were kept away from other non-aboriginals until such time as they were ready for assimilation. Thus, some Indian settlements were located close to population centers in British North America while others were placed in very remote locations. Tanner, The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada, 16. Berger stated the obvious about the assimilation process: "Always, assuming our goal was not extermination by deadly force, our object has been to transform the Indians, to make them like ourselves. But if they become like ourselves, if they assimilate, they will no longer be Indians, and there will be no Indian languages, no Indian view of the world, no Indian political communities." Berger, A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992, xi.

19. DIAND, The Indian Act, Past and Present: A Manual on Registration and Entitlement Legislation (Ottawa: Minister of Supply and Services Canada, 1991), 7. DIAND, The Canadian Indian, 60. J.R. Miller, Sweet Promises: A Reader on Indian-White Relations in Canada (Toronto: University of Toronto Press, 1991), 129-130.

20. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 5 & 6.

21. Ibid., 6. DIAND, The Indian Act, Past and Present: A Manual on Registration and Entitlement Legislation, 7. Tanner, The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada, 16. J.R. Miller, Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada (Toronto: University of Toronto Press, 1989), 95-97.

22. Subsection 91 of the BNA states: "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislature of the provinces ..." The subsequent list included Item 24: "Indians, and Lands reserved for the Indians." Government of Canada, Revised Statutes of Canada, 1985, 24 & 25.

23. Continuing the broad 1850 definition of an Indian: "Firstly: All persons of Indian blood, reported to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and their descendants. Secondly: All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to a particular tribe, band or body of Indians interested in such lands or immoveable property and the descendants of all such persons. And, thirdly: All women lawfully married to any of the persons included in the several classes hereinbefore designed; the children issue of such marriages, and their descendants." DIAND, The Indian Act, Past and Present: A Manual on Registration and Entitlement Legislation, 8.

24. Ibid. DIAND, Changes to the Indian Act (Ottawa: Minister of Supply and Services Canada, 1986), 2. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 6. Also a part of the 1869 Act was a provision for establishing chiefs and second chiefs (councilors)

who were given responsibilities over local matters. Although elected office-holders (the white man's way) were preferred by the government, heredity chiefs were tolerated. What was not tolerated was allowing the Native population to chose their leaders by their own methods. Tanner, The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada, 16.

25. Government of Canada, The Right of Aboriginal Self-Government and the Constitution: A Commentary by the Royal Commission on Aboriginal Peoples, 13. Bruce W. Hodgins, Don Wright, and W.H. Heick, Federalism in Canada and Australia: The Early Years (Waterloo, Ontario: Wilfrid Laurier University Press, 1978), 141.

26. DIAND, Outstanding Business: A Native Claims Policy, 9. DIAND, The Canadian Indian, 57-58.

27. Government of Canada, Aboriginal Peoples, Self-Government, and Constitutional Reform, 4. The North-West Mounted Police (RCMP) were formed in 1873 to bring a federal presence to the prairies, chase away American traders, police the Indians and Métis, and symbolize the stability desired by white settlers. Hodgins et al, Federalism in Canada and Australia: The Early Years, 156.

28. Government of Canada, Aboriginal Peoples, Self-Government, and Constitutional Reform, 9. Peter S. Li (ed), Race and Ethnic Relations in Canada (Toronto: Oxford Unviersity Press, 1990), 13. DIAND, Information Sheet #2 (Ottawa: Indian and Northern Affairs Canada, 1991), 2. The cornerstone of the policy of the Indian Act was assimilation to which end education, Christianization, and settlement on reserves were the means. The fourth aspect of guardianship was to protect the Indian from the evils of the white society. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 7. Enfranchisement in this case meant equating citizenship with cultural characteristics. In other words, an Indian could only become a Canadian citizen if he looked and sounded white. Those who clung to Native traditions needed not apply. Ibid., 22. DIAND, The Canadian Indian, 61.

29. Patterson, The Canadian Indian: A History Since 1500, 31. Li, Race and Ethnic Relations in Canada, 99. Peter Li phrased it in the strongest possible language: "The new assimilationist policy was clear in one goal; there

must be a complete destruction of traditional Indian culture that would interfere with the burgeoning capitalistic economic system. This meant that any Indian behavior, values, or ideologies that were opposed to, antagonistic to, or did not promote capitalism had to be destroyed." Ibid., 98.

30. Tanner, The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada, 3. Li, Race and Ethnic Relations in Canada, 13. Carol Etkin, Advisor, Self-Government Sector, Ontario Region, DIAND, oral interview. Former Prime Minister John Diefenbaker wrote of this time: "Apart from a few incidents, the lawlessness the United States experienced from the time it started its Indian wars right through to 1900 did not exist on the Canadian Prairies because of the vigilance of the Mounted Police." John G. Diefenbaker, One Canada: Memoirs of the Right Honourable John G. Diefenbaker: The Crusading Years, 1895-1956 (Toronto: Macmilian of Canada, 1975), 30.

31. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 8-9.

32. DIAND, The Indian Act, Past and Present: A Manual on Registration and Entitlement Legislation, 10. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 12. Some of the missionary ideas about hygiene, sex, and God were fine in Europe where they were part of a whole way of life, but trying to fit them into Native ways caused many problems. Crowe, A History of Original Peoples of Northern Canada, 149. Between 1857 and 1920 only 250 individuals opted for full citizenship and loss of Indian status by means of enfranchisement. Miller, Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada, 190.

33. Crowe, A History of Original Peoples of Northern Canada, 17. Later writers would look back on this policy as equivalent to cultural genocide. Ibid., 18. While the policy of enfranchisement was still voluntary at this point, in the mid-twenties and again in 1933 a policy of compulsary enfranchisement was implemented by the Conservative government. Ibid., 12. DIAND, The Indian Act, Past and Present: A Manual on Registration and Entitlement Legislation, 10. Native people believed that industrial advance affects the complex links between the Aboriginal people and their past, between generations, and between them and their culture. Berger, A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992, 36

34. Alan B. Anderson and James S. Frideres, Ethnicity in Canada: Theoretical Perspectives (Toronto: Butterworths, 1981), 136-137. Daniel Kubat and David Thornton, A Statistical Profile of Canadian Society (Toronto: McGraw-Hill Ryerson Limited, 1974), 22. Miller, Sweet Promises: A Reader on Indian-White Relations in Canada, 136.

35. Government of Canada, The Right of Aboriginal Self-Government and the Constitution: A Commentary by the Royal Commission on Aboriginal Peoples, 12. Government of Canada, Aboriginal Peoples, Self-Government, and Constitutional Reform, 5. Crowe, A History of Original Peoples of Northern Canada, 13-15. "Inuit" translates as "our people." Despite the 1939 ruling little was done for the Inuit until long after World War II because it was felt that little was being done for the Indians under the Indian Act and to add the Inuit would only exacerbate the problem. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 13.

36. Li, Race and Ethnic Relations in Canada, 99.

37. Patterson, The Canadian Indian: A History Since 1500, 40.

38. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 18.

39. House of Commons Debates, 1951, 755.

40. Ibid., 714. Harris later stated: "Our policy should be to extend self-government to all the reserves as soon as possible ... This would give the band councils on the reserves greater powers than are now held and exercised by municipal authorities." The actual bill produced none of these verbose promises. Ibid., 1352.

41. House of Commons Debates, 1951, 732.

42. House of Commons Debates, 1950, 3938.

43. House of Commons Debates, 1951, 1352.

44. Ibid., 717.

45. Ibid., 721.

46. Ibid., 723 & 752.

47. Ibid., 755. Miller, Sweet Promises: A Reader on Indian-White Relations in Canada, 140-141.

48. Tanner, The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada, 208. House of Commons, Indian Act of 1951 (Ottawa: Printer to the King's Most Excellent Majesty, 1951), 133-136. The Indian Register established by the 1951 Indian Act recorded names and events, such as births, deaths and marriages of individuals registered with a band. House of Commons, Report to Parliament: Implementation of the 1985 Changes to the Indian Act (Ottawa: Minister of Supply and Services Canada, 1987), 7.

CHAPTER TWO

FROM PATERNALISM TO CONFRONTATION

1. The one notable exception was the Michael Band who chose as a group to be enfranchised. This occurred on March 31, 1958 and thereafter the band ceased to exist. Government of Canada, Aboriginal Peoples, Self-Government, and Constitutional Reform, 39.

2. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 17.

3. Ibid., 15 & 17. DIAND responsibility was defined as follows: "Support the economic development of Indian and Inuit communities, including the development of natural resources on their lands; negotiate community-based arrangements to enhance decision-making and authority for Indian communities; support constitution discussions on Aboriginal issues; negotiate settlements of Aboriginal claims; and administer lands and resources in the North." DIAND,

Annual Report of Department of Indian Affairs and Northern Development: 1990-1991 (Ottawa: Minister of Supply and Services Canada, 1991), 4.

4. Maclean's 82, No. 7 (July 1969): 1. Miller, Sweet Promises: A Reader on Indian-White Relations in Canada, 393-400.

5. Sally M. Weaver, "The Joint Cabinet/National Indian Brotherhood Committee: A Unique Experiment in Pressure Group Relations," Canadian Public Administration 25, No. 2 (Summer 1982): 212-214.

6. J.L. Finlay and D.N. Sprague, The Structure of Canadian History (Scarborough, Ontario: Prentice-Hall Canada Inc., 1984), 440-441 & 510-511.

7. House of Commons, Statement of the Government of Canada on Indian Policy, 1969 (Ottawa: Queen's Printer for Canada, 1969), 5.

8. Tanner, The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada, 217. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 26.

9. House of Commons, Statement of the Government of Canada on Indian Policy, 1969, 11.

10. A.A. MacDonald and J. Elliott, Community Resources: Dimensions of Alienation and Social Change on Indian Reserves (Antigonish: St. Xavier University, 1970), Appendix 8.

11. Maclean's 82, No. 12 (December 1969): 19-22. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 27.

12. Ibid. Tanner, The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada, 218-219. Said David Courchene, President of the Manitoba Indian Brotherhood: "Your government recently announced their new Indian policy, their grand design for Indian emancipation, for Indian assimilation. This new policy was not developed with Indian participation, cooperation or consideration. It is a white man's paper to Indians, conceived in

isolation and as far as Indians are concerned aborted at birth." The Canadian Forum LIV, No. 639 (April 1974): 10.

13. Tanner, The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada, 218 & 219. Harold Cardinal charged that the new Indian policy was: "...a thinly disquised programme of extermination through assimilation." He went on to say: "We will be certain that the federal government is merely attempting to abandon its responsibilities. Provincial governments have no obligations to fulfil our treaties. They never signed treaties with the Indians ... This new government policy merely represents a disguised move to abrogate all our treaty rights." Harold Cardinal, The Unjust Society: The Tragedy of Canada's Indians (Edmonton: Hurtig, 1969), 30 & 31. Cardinal, age 24, was the President of the Indian Association of Alberta which had 26,012 members. Sarcasm was Cardinal's most lethal weapon. "Do white people want us continually to rely on welfare for a bare existence? Do they want us to live in squalor so that we can continue to fulfill the psychological needs of white do-gooders who feel they are glorifying God by sending us secondhand clothes?" Maclean's 82, No. 12 (December 1969): 19-22.

14. Tanner, The Politics of Indianness: Case Studies of Native Ethnoploitics in Canada, 220 & 221.

15. Ibid., 218 & 220. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 29. Weaver, "The Joint Cabinet/National Indian Brotherhood Committee: A Unique Experience in Pressure Group Relations," 226.

16. Driedger, The Canadian Ethnic Mosaic: A Quest for Identity, 221 & 223. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 25.

17. Weaver, "The Joint Cabinet/National Indian Brotherhood Committee: A Unique Experience in Pressure Group Relations," 220. As a result of much publicity, the Indians produced public support which, in turn, brought pressure to bear on government officials, who responded by granting a few concessions and the unrest quieted down. Tanner, The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada, 23. A month earlier (August 30) 200 young Indians had occupied the Indian Affairs building

in Ottawa for a day without incident. The Canadian Forum LIV, No. 639 (April 1974): 10.

18. William Lumsdon, Special Projects Officer for the Ontario Regional Office of DIAND stated that the association leaders could not deal directly in all matters because they had to constantly go back to the individual communities to gather input. Oral interview. Weaver, "The Joint Cabinet/National Brotherhood Committee: A Unique Experience in Pressure Group Relations," 228 & 233. Miller, Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada, 231-238.

19. Since Canada's Constitution was a Statute of Great Britain, every time it needed to be amended the amendment had to be enacted by Westminster. Because Canada was an equal with Britain there was no reason to continue this tedious process.

20. Michael Woodward and Bruce George, "The Canadian Indian Lobby of Westminster: 1979-1982," Journal of Canadian Studies 18, No. 3 (Fall 1983): 139. David Milne, The Canadian Constitution: The Players and the Issues in the Process that Has Led from Patriation to Meech Lake to an Uncertain Future (Toronto: James Lorimer & Company, Publisher, 1991), 183 & 190. Westminster saw Native rights as an internal Canadian matter in which they did not want to trespass. Ibid., 183. Earl H. Fry, Canadian Government and Politics in Comparative Perspective (New York: University Press of America, 1984), 84.

21. Ibid., 54-62 & 177. Milne stated: "Ever since the accord had been announced, Native peoples had expresseed disgust at the deletion of their treaty rights from the Constitutional package." Ibid., 177. One major change brought about by the Charter was that whereas Parliament was formerly supreme, the courts could now have the last word by ruling that legislation passed either federally or by the provinces violated the Charter and thus was unconstitutional. Marjorie Bowker, Canada's Constitutional Crisis: Making Sense of It All (Edmonton: Lone Pine Publishing, 1991), 22.

22. Government of Canada, Revised Statutes of Canada, 1985, 9 & 11-12. Section 25: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or degrogate from any Aboriginal, treaty or other rights or freedoms that pertained to the Aboriginal

peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that may be acquired by the Aboriginal peoples of Canada by way of land claims settlements." Section 35 (1): "The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed." (2) "In the Act, 'Aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada." Ibid. Aboriginal representation at the First Ministers Conferences would come from the National Indian Brotherhood (later replaced by the Assembly of First Nations), Inuit Tapirisat of Canada, and Native Council of Canada (representing non-status Indians). Simon McInnes, "The Inuit and the Constitutional Process: 1978-1981," Journal of Canadian Studies 16, No. 2 (Summer 1981): 57.

23. Milne, The Canadian Constitution: The Players and the Issues in the Process that Has Led from Patriation to Meech Lake to an Uncertain Future, 189.

24. Ibid., 190-191. Audrey D.Doerr, "Paths to Self-Determination: Partnership with First Nations," (A paper by the Ontario Regional Director-General of DIAND delivered for the conference on "Doing Business with First Nations--April 23, 1992), 8. A new paragraph 25 (b) was substituted for the old 25 (b). It read: "(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired." Subsections 35 (3) and 35 (4) were added. They read: "(3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so aquired. (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." Government of Canada, Revised Statutes of Canada, 1985, 9 & 11.

25. Government of Canada, The Right of Aboriginal Self-Government and the Constitution: A Commentary by the Royal Commission on Aboriginal Peoples, 4.

26. Driedger, The Canadian Ethnic Mosaic: A Quest for Identity, 230. William Lumsdon, oral interview.

27. DIAND, The Indian Act, Past and Present: A Manual on Registration and Entitlement Legislation, 1.

28. Milne, The Canadian Constitution: The Players and the Issues in the Process that Has Led from Patriation to Meech Lake to an Uncertain Future, 200-205.

29. Maclean's 102, No. 12 (March 20, 1989): 18-21. Recently former Prime Minister Trudeau shocked the nation with an essay, published in Maclean's, in which he accused Quebec of blackmailing the nation for the past 22 years. "It has become clear that all the demands made of Canada by the Quebec Nationalist can be summed up in just one: Keep giving us new powers and the money to exercise them, or we'll leave." Trudeau urged his fellow Canadians to vote no on the Referendum and call Quebec's bluff. Maclean's 105, No. 39 (September 28, 1992): 22-24.

30. Maclean's 102, No. 38 (September 18, 1989): 21-23 and 103, No. 20 (May 14, 1990): 14-15. Moses Okimaw, Legal Advisor, AFN, oral interview.

31. Maclean's 103, No. 11 (March 12, 1990): 19. William Lumsdon, oral interview.

32. Maclean's 103, No. 25 (June 18, 1990): 16-17.

33. Perry Billingsley, Advisor in the Constitution Directorate, Self-Government Sector, DIAND, believed that if Meech Lake had been approved the First Nations would not have the clout that they do today. Oral interview. William Lumsdon and Carol Etkin (Advisor, Self-Government Sector, Ontario Regional Office of DIAND) expressed similar views. Oral interviews. Pauline Comeau, "The Man Who Said No," The Canadian Forum LXVIV, No. 791 (July/August 1990): 7-11.

34. Maclean's 103, No. 26 (June 25, 1990): 10-12. The New Brunswick legislature also failed to act, but did so because the Accord was hung up in the Manitoba legislature. If it had passed in Manitoba then New Brunswick was committed to act in the affirmative. Ibid. Bowker, Canada's Constitutional Crisis: Making Sense of It All, 31.

35. Maclean's 103, No. 27 (July 2, 1990): 28-29 & No. 29 (July 16, 1990): 13. William Lumsdon, oral interview. Bowker, Canada's

Constitutional Crisis: Making Sense of It All, 32. Prime Minister Mulroney deemed it more expedient politically to blame Clyde Wells rather than Elijah Harper for this defeat of Meech lake. Ibid.

36. House of Commons, Fifth Report of the Standing Committee on Aboriginal Affairs: The Summer of 1990 (Ottawa: Minister of Supply and Services Canada, 1991), 1 & 8-9. Maclean's 103, No. 30 (July 23, 1990): 16-18. House of Commons Debates, 1990, 13273.

37. Maclean's 103, No. 36 (September 3, 1990): 16-18.

38. Maclean's 103, No. 37 (September 10, 1990): 16-18.

CHAPTER THREE

BILL C-31: GOOD INTENTIONS, POOR FORETHOUGHT

1. House of Commons Debates, 1990, 13318-13319. Mulroney also stated: "It is no myth that Native leaders have too often been treated insensitively, unfairly and often times illegally since the days that the first Europeans set foot on this continent. Canadian history records that Indian decency was too often met with cynicism and that Indian generosity was too often repaid with exploitation." Ibid. William Lumsdon believes that it was a mistake not to grant Citizenship to the Indian from the very beginning. Perhaps many of the problems of today would have been erased by that action. Oral interview.

2. Audrey D. Doerr, "Paths to Self-Determination: Partnership with First Nations," 3.

3. DIAND, The Indian Act, Past and Present: A Manual on Registration and Entitlement Legislation, 1. House of Commons, Report to Parliament: Implementation of the 1985 Changes to the Indian Act, 6. DIAND, You Wanted to Know: An Information Guide for Registered Indians (Ottawa: Minister of Supply and Services, 1990), 5.

4. House of Commons, Bill C-31: An Act to Amend the Indian Act (Ottawa: Minister of Supply and Services, 1985), 4-7. The effects of Bill C-31 were that women would be treated equally with men; children would be treated equally whether they were natural, adopted or illegitimate; a woman could not lose status through marriage; and Indian status would be restored to those who lost it through discrimination or enfranchisement. DIAND, Information Sheet #2, 3. This aspect of Bill C-31 resulted from Aboriginal women going to the United Nations and getting Canada officially censured for violating international conventions against discrimination. Carol Etkin, oral interview.

5. House of Commons, Report to Parliament: Implementation of the 1985 Changes to the Indian Act, 3.

6. Ibid., 4. All financial figures given in this paper are listed in Canadian Dollars.

7. Ibid. By 1990 DIAND had received 75,761 applications representing 133,134 individuals seeking registration. 73,554 people were approved for registration and 21,301 applicants were denied registration. DIAND, Impacts of the 1985 Amendments to the Indian Act(Bill C-31): Government Programs (Ottawa: Minister of Supply and Services Canada, 1990), 5-10.

8. Ibid, i & ii. Perry Billingsley noted that the census of Indians was notoriously low because many bands failed to participate. Oral interview. In 1960, the life expectancy of status Indians was 60 years; by 1990 it had risen to 70 years. In 1960, the infant mortality rate was 82 per thousand live births; by 1990 it had dropped to 13. House of Commons Debates, 1990, 13319.

9. DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Government Programs, 20. House of Commons, Report to Parliament: Implementation of the 1985 Changes to the Indian Act, 12.

10. DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Government Programs, 20, 22, & 70. The First Nations have long held that it should be up to them to decide who is and who is not a member. Bill C-31 did not give them the right to expel members. Assembly of First Nations (AFN), Handbook to Indian Self-Government in Canada (Ottawa: Assembly of First Nations, 1984), 5.

11. DIAND, Impacts of the 1985 Amendment to the Indian Act (Bill C-31): Government Programs, ii & 40.

12. Ibid., 42 & 43. The capital subsidy for new houses ranged between $19,080 and $46,260 per unit, depending upon the reserves' location and economic circumstances. The average renovation outlay was $6,000. Ibid., 42. The standard of existing housing on-reserve was quite primative. About two-fifths of the Indian dwellings on reserve did not have central heating. DIAND, 1986 Census Highlights on Registered Indians: Annotated Tables (Ottawa: Minister of Supply and Services Canada, 1989), 30.

13. DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Government Programs, 23, 25, & 42. DIAND, Information Sheet #6.

14. DIAND, Annual Report of Department of Indian Affairs and Northern Development: 1990-1991, 10-13 & 30.

15. DIAND, Highlights of Aboriginal Conditions 1981-2001: Part III, Economic Conitions (Ottawa: Minister of Supply and Services Canada, 1990), 1 & 5. DIAND, 1986 Census Highlights on Registered Indians: Annotated Tables, 16.

16. House of Commons Debates, 1990, 13319. DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Government Programs, 73.

17. DIAND, 1986 Census Highlights on Registered Indians: Annotated Tables, vii. DIAND, Highlights of Aboriginal Conditions 1981-2001: Part III, Economic Conditions, 1. N.H. Lithwick, An Overview of Registered Indian Conditions in Canada (Ottawa: Lithwick Rothman Schiff Associates Ltd. for DIAND, 1986), xiii-xvi.

18. DIAND, Highlights of Aboriginal Conditions 1981-2001: Part III, Economic Conditions, 11 & 21. DIAND, Information Sheet #4, 4-5.

19. Ibid., 22. DIAND, 1986 Census Highlights on Registered Indians: Annotated Tables, vii.

20. Ibid., 10. DIAND, You Wanted to Know: An Information Guide for Registered Indians, 6. William Lumsdon, oral interview.

21. DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Summary Report (Ottawa: Minister of Supply and Services Canada, 1990), 14 & 15.

22. DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Bands and Communities Studies (Ottawa: Minister of Supply and Services Canada, 1990), 15. Linda MacDonald of the Yukon Native Women's Association stated: "Bill C-31 has not lived up to the expectations of our people but rather, as predicted, has created a new class of citizen and continues to discriminate against and assimilate our people. The problems of this newly created bureaucracy merely reaffirmed in our minds that we as First Nations citizens must determine our own membership." DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Aboriginal Inquiry, 5.

23. DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Bands and Communities Studies, 18.

24. Ibid., 20. George Holem of Prince George B.C. declared: "I would like to go on record as saying that Bill C-31 is nothing more than another vehicle in which to divide and conquer the Native people and the indigenous people of Canada." DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Aboriginal Inquiry, 5. Nellie Carlson of the Indian Rights for Indian Women in Alberta complained: "Women who had enfranchised themselves have to apply for reinstatement to this band. They are not automatically returned to the Band List. They are not automatic band members, which I think is not fair." Ibid., 20.

25. DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Bands and Communities Studies, 21.

26. Ibid., 22. Because of the prejudice experienced, some of the registrants reported that they would prefer to form new bands on their own. They would then be able to establish membership rules that more fit their circumstances. Ibid., 19.

27. DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Aboriginal Inquiry, 22.

28. Ibid., vii. Some registrants believed that: "there was a house somewhere out there with their name on it." When they found this to be untrue, they were even more shocked to learned that they would be placed on a long waiting list. Diand, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Bands and Communities Studies, 26.

29. Ibid., 15. The study reported concerns that the number of new registrants was grossly understated which had the potential for a major impact on the housing demand. There were problems in acquiring funding for new housing, in building enough housing units, in determining a priority for assigning housing, and in being fair to both old status and new status Indians. Ibid., 34. Dave Pop of the Soda Creek Band noted another problem: "Lifelong band members have to put in their application for housing and wait as long as eight years for their name to reach a level in the priority listing. ... Bill C-31 members, on the other hand, can jump to the head of the lineup as a result of the special C-31 housing program." DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Aboriginal Inquiry, 39.

30. Diand, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Summary Report, 24. DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Bands and Communities Studies, 16 & 17. It should be emphasized that there are many full-blooded Indians who have never existed on "paper" or whose records have long ago been destroyed by fire. DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Aboriginal Inquiry, 9.

31. DIAND demanded that Colleen MacMillan of Prince Edward Island furnish the following: her own long-form birth certificate; her mother's long-form birth certificate; her maternal grandparents' birth, marriage, and death certificates; and proof of her grandparents' band affiliation and status number. Since her grandparents were born more than a century ago in the Yukon, MacMillan wondered whether most Canadians could come up with such documents. DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Aboriginal Inquiry, 8.

32. Ibid., ii. Since 1985, a full-blooded status Indian woman who bears a child out of wedlock must prove that the father was a status Indian to register the child. If the father cannot be found the child was registered under section 6 (2) and thus could not transmit status to his or her own children. Ibid., 13.

33. Ibid., 1. Chief Ronald Michel of the Peter Ballantyne Band filled in some details: "...we have added several hundred new members ... and there will probably be a total of 800 or more new members in the next two years. All these additional new members create many strains on our underdeveloped programs, funding and underdeveloped resources, and we also have problems meeting the extra demand placed on our programs because of very tight funding arrangements from DIAND." Ibid., 34 & 35. The government did not anticipate the vast number of Aboriginal people that came forward to apply for reinstatement. At the same time, the Government of Canada was also not forthcoming in explaining or informing Bill C-31 registrants of the limitations imposed by DIAND policies on access to benefits and services. The government let that burden and blame fall on the tribal councils. Ibid., 2.

34. DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Aboriginal Inquiry, 3.

35. Ibid., 6.

36. Ibid.

37. Ibid., 25. Moses Okimaw, oral interview.

38. Ibid., 37.

CHAPTER FOUR

FROM WARDSHIP TO A THIRD ORDER OF GOVERNMENT

1. AFN, First Nations and the Constitution: Discussion Paper (Ottawa: Assembly of First Nations, November 21, 1991), 5. House of Commons, Fifth Report of the Standing Committee on Aboriginal Affairs: The Summer of 1990, 3.

2. Tanner, The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada, 210.

3. Government of Canada, Aboriginal Peoples, Self-Government, and Constitutional Reform, 10. DIAND, Indian Band Bylaw Handbook (Ottawa: Minister of Supply and Services Canada, 1991), 1-3.

4. Bradford W. Morse (ed), Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada (Ottawa: Carleton University Press, 1991), 61-75.

5. Ibid., 61-75 & 114.

6. House of Commons, Indian Self-Government in Canada: Report of the Special Committee (Presented by Keith Penner) (Ottawa: Queen's Printer for Canada, 1983), 41.

7. Ibid., 43. Mr. Justice Hall said of the Royal Proculamation in the Calder Case: "This Proclamation was an Executive Order having the force and effect of an Act of Parliament and was described ... as the 'Indian Bill of Rights.' Its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire." Ibid., 44.

8. Ibid., 44. It was important to get the inherent right to self-government inserted into the Constitution because the Indian placed a great importance on documents. Carol Etkin oral interview. Also the inherent right differs from a delegated right since a delegated one is presumably retractable. Delegated authority (that "given" by the government) would be subject to the

will of the government and lacks the protection of that which comes from the recognition of a continuing right which exists independently of the government. Duncan Cameron and Mariam Smith (eds), Constitutional Politics: The Canadian Forum Book on the Federal Constitutional Proposals, 1991-1992 (Toronto: James Lorimer and Company, Publishers, 1992), 139-140.

9. Menno Boldt and J. Anthony Long, "Concepts of Indian Government Among Prairie Native Indian University Studies," Journal of Canadian Studies 19, No. 1 (Spring 1984): 167. Inuit Tapirisat of Canada, Constitutional Position Paper, Inuit in Canada: Striving for Equality (Ottawa: Inuit Tapirisat of Canada, February 6, 1992), 2.

10. Menno Boldt and J. Anthony Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians," Canadian Journal of Political Science XVII, No. 3 (September 1984): 547-549. Thomas Flanagan, "The Sovereignity and Nationhood of Canadian Indians: A Comment on Boldt and Long," Canadian Journal of Political Science XVIII, No. 2 (June 1985): 372. The Inuit believe that: "Sovereign lawmaking powers in Canada cannot be divided exclusively between the Federal and provincial levels of government, with other governmental bodies exercising only those powers and authorities delegated to them by the senior levels of government." Inuit Tapirisat of Canada, Constitutional Position Paper, Inuit in Canada: Striving for Equality, 2. AFN, Our Land, Our Heritage, Our Government, and Our Future (Ottawa: Assembly of First Nations, September 1990), 2.

11. House of Commons, Indian Self-Government in Canada: Report of the Special Committee, 44. William Lumsdon, Oral interview.

12. R. MacGregor Dawson and W.F. Dawson, Democratic Government in Canada (Toronto: University of Toronto Press, 1949 -- Fifth Edition, 1989), 9. Bowker, Canada's Constitutional Crisis: Making Sense of It All, 12-13.

13. Government of Canada, Revised Statutes of Canada, 1985, 24-27.

14. William Lumsdon, oral interview. Roman Franco, Senior Advisor, Tripartite Relations, Ontario Regional Office DIAND, oral interview. Franco stated that there was a sense that the groups or bands believe that they can do a better job of negotiating than the AFN. Ibid. Boldt & Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians," 538. Boldt and Long believed in 1984 that the Indian leaders needed to develop a model of self-government that would be acceptable to the Federal government and still not compromise the Aboriginal traditional values. 500 individual band agreements were beyond their thinking. Ibid. See Keith Penner's essay in Menno Boldt and J. Anthony Long (eds), Governments in Conflict?: Provinces and Indian Nations in Canada (Toronto: University of Toronto Press, 1988), 31-37.

15. AFN, First Nations and the Constitution: Discussion Paper, 8-11. Boldt & Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians," 552. William Lumsdon, oral interview.

16. Moses Okimaw, oral interview. Carol Etkin, oral interview.

17. Boldt & Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians," 552..

18. Menno Boldt and J. Anthony Long, "A Reply to Flanagan's Comments: 'The Sovereignity and Nationhood of Canadian Indians: A Comment on Boldt and Long'," Canadian Journal of Political Science XIX, No. 1 (March 1986): 153.

19. William Lumsdon, oral interview. Roman Franco, oral interview. Prototype arrangements are being explored for the Six Nations to have their own police force. If it works it could be used by other large communities who could afford it. Ibid. Chesley Anderson, Constitutional Advisor to the Inuit Tapirisat of Canada, related a story about some young people of Labrador from poor areas who deliberately get caught shoplifting so that they can winter in jail. Oral interview. Frank Cassidy (ed), Aboriginal Self-Determination: Proceedings of a Conference held September 30-October 3, 1990 at University of Toronto (Lantzville, British Columbia: Oolichan Books, 1991),137-138.

20. Li, Race and Ethnic Relations in Canada, 107-108.

21. DIAND, Annual Report of Department of Indian Affairs and Northern Development: 1990-1991, 11. Tanner, The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada, 25. William Lumsdon, oral interview.

22. Government of Canada, Revised Statutes of Canada, 1985, 12. AFN, Our Land, Our Heritage, Our Government, and Our Future, 3. "Entrenchment implies that the Federal and provential governments will recongnize something new and not something pre-existing." AFN, Sharing Canada's Future: An Analysis from a First Nations Perspective (Ottawa: Assembly of First Nations, October 1991).

23. Government of Canada, Aboriginal Peoples, Self-Government, and Constitutional Reform, 14.

24. Li, Race and Ethnic Relations in Canada, 8. DIAND, Information Sheet #3, 1 & 2. William Lumsdon, oral interview. According to the Inuit: "The word 'inherit' is also consistent with the notion of 'pre-existing' rights and therefore, with 'Aboriginal' rights. The right of Aboriginal peoples to self-government is both an Aboriginal and a human right." Inuit Tapirisat of Canada, Constitutional Position Paper, Inuit in Canada: Striving for Equality, 3. The Federal government took a "contingent right" approach which meant that the content of self-government had to be defined by agreements with both the Federal and provincial governments before it could be entrenched in the Constitution. The Aboriginal people rejected this proposal because it presupposed that the new right would be created by the Constitution rather than one that pre-existed the Constitution. Government of Canada, The Right of Aboriginal Self-Government and the Constitution: A Commentary by the Royal Commission on Aboriginal Peoples, 4 & 5.

25. Ibid., 7.

26. DIAND, Information Sheet #3, 3 Government of Canada, Aboriginal Peoples, Self-Government, and Constitutional Reform, 10.

27. Government of Canada, Royal Commission on Aboriginal Peoples Attempts to Smooth the Path to Constitutional Reform (News Release) (Ottawa: Minister of Supply and Service Canada, February 13, 1992).

28. Ibid.

29. Government of Canada, The Right of Aboriginal Self-Government and the Constitution: A Commentary by the Royal Commission on Aboriginal Peoples, 18. The term "inherent" indicated that the right did not consist of something "granted" by the Federal government. It was a part of the living culture and traditions of the Aboriginal peoples and as such might take different forms with different First Nations. Ibid., 19.

30. Ibid., 20 & 21.

31. Cassidy, Aboriginal Self-Determination, 11.

32. Ibid., 155-156 & 162.

33. Perry Billingsley, oral interview. William Lunsdon, oral interview. DIAND, Ontario Fact Sheet (Toronto: Minister of Supply and Services Canada, 1990), 1-3.

34. Doerr, "Paths to Self-Determination: Partnership with First Nations," 1.

35. Government of Ontario, Statement of Political Relationship with First Nations of Ontario (Toronto: Minister of Native Affairs, June 6, 1991), 1-2.

36. House of Commons, Indian Self-Government in Canada: Report of the Special Committee, 53-68. Some bands have less than 100 members while others number in the thousands. The smaller bands will certainly have to join together to make this process work. William Lumsdon, oral interview. Bowker, Canada's Constitutional Crisis: Making Sense of It All, 94-96. AFN, Handbook to Indian Self-Government in Canada, 6-11. Boldt & Long, Governments in Conflict?: Provinces and Indian Nations in Canada, 102-108.

37. DIAND, Information Sheet #20. Li, Race and Ethnic Relations in Canada, 105. Carol Etkin, oral interview. William Lumsdon, oral interview. Audrey Doerr saw community-based self-government negotiations as: "a continuum towards legal recognition and economic and political empowerment of Indian government." Doerr, "Paths to Self-Determination: Partnership with First Nations," 16.

38. Government of Ontario, Statement of Political Relationship with First Nations of Ontario, 4-5. William Lumsdon, oral interview. John Donnelly, Associate Regional Director General, Ontario Region, DIAND, oral interview. The Indian Commission of Ontario oversees the process by chairing the meetings between representatives of the various bands, representatives from DIAND (usually from Toronto regional office) and representatives from Ontario Minister of Indian Affairs. For an explanation of the tripartite process see Indian Commission of Ontario, Report to the Indian Commission of Ontario: October 1, 1985-March 31, 1987 (Toronto: Indian Commission of Ontario, 1987), 14-29.

39. DIAND, Ontario Fact Sheet, 2. DIAND, Annual Report of Department of Indian Affairs and Northern Development: 1990-1991, 54. Devolution would increase the scope of direct funding to First Nations and decrease the size of DIAND bureaucracy along with a reduction of overhead costs. Doerr, "Paths to Self-Determination: Partnership with First Nations," 19. Carol Etkin, oral interview. Freedom from the Indian Act is essential to enable the bands to accomplish what they wanted to accomplish. William Lumsdon, oral interview. DIAND, Information Sheet #35.

40. Chesley Anderson, oral interview. Moses Okimaw, oral interview. DIAND, Information Sheet #14. Crowe, A History of Original Peoples of Northern Canada, 219. Matthew Coon-Come, Grand Chief of the Grand Council of the Crees (of Quebec) stated: "We negotiated the James Bay and Northern Quebec Agreement because we did not have a choice. Through the agreement, which we signed under the duress of losing our lands and our way of life, ..." Cassidy, Aboriginal Self-Determination, 115.

41. DIAND, Information Sheet #11. Maclean's 104, No. 32 (August 21, 1991): 10-12. DIAND, The James Bay and Northern Quebec Agreement, and The Northeastern Quebec Agreement: Annual Report 1991 (Ottawa: Minister of Supply and Services Canada, 1992), 7. David C. Hawkes

(ed), Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles (Ottawa: Carleton University Press, 1991), 173-178.

42. DIAND, Information Sheets #11 & #14. Maclean's 103, No. 21 (May 21, 1990): 55-58. DIAND, The James Bay and Northern Quebec Agreement, and The Northeastern Quebec Agreement: Annual Report 1991, 8-10 & 19-25. Hawkes, Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles, 179-186.

43. Carol E. Etkin, "The Sechelt Indian Band: An Analysis of a New Form of Native Self-Government," The Canadian Journal Of Native Studies VIII, No. 1 (1988): 78. DIAND, Information Sheet #20. Maclean's 105, No. 11 (March 16, 1992): 20.

44. Etkin, "The Sechelt Indian Band: An Analysis of a New Form of Native Self-Government," 81.

45. Ibid., 84 & 102-103.

46. House of Commons, Bill C-93: An Act Relating to Self-Government for the Sechelt Indian Band (Ottawa: Minister of Supply and Services Canada, 1986). Hawkes, Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles, 297-310. William Lumsdon noted that under the Indian Act businesses found it difficult to enforce contacts with the Indians since their status under law was questionable. Sechelt would not have that problem because they were free from the Indian Act. Oral interview.

47. William Lumsdon, oral interview. Carol Etkin, oral interview. Etkin outlined seven essential subjects to be covered in the framework agreement: legal status and capacity; structure and precedures of government; membership and citizenship; lands and resources; Indian Act application (parts of Act to be kept or rejected); financial arrangement; and implementation plan. Ibid.

48. William Lumsdon, oral interview. Non-native lawyers have little or no understanding of the needs and cultures of Aboriginal peoples. Cameron & Smith, Constitutional Politics: The Canadian Forum Book on the Federal Constitutional Proposal, 1991-1992, 140.

49. Ibid. Moses Okimaw, oral interview. Brian Bergman, Associate Editor of Maclean's, oral interview.

50. DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Aboriginal Inquiry, 60.

51. Carol Etkin, oral interview.

52. Perry Billingsley, oral interview. Doerr, "Paths to Self-Determination: Partnership with First Nations," 14. See also Government of Canada, Canadian Aboriginal Economic Development Strategy: Status Report (Ottawa: Minister of Supply and Services Canada, March 31, 1991).

53. John Donnelly, oral interview. Perry Billingsley observed that some of the smaller communities were going to have to join together to simplify the delivery system. Oral interview. William Lumsdon, oral interview. Professor Richard Simeon (University of Toronto) stated: "We must realize that despite fears of complicating our Federal system through creating a 'Third Order of Government,' Aboriginal self-government is fundamentally consistent with the larger values of community and democracy. Cassidy, Aboriginal Self-Determination, 107. See House of Commons recommendations from Report of the Special Joint Committee on a Renewed Canada (Ottawa: Minister of Supply and Services Canada, February 28, 1992), 28-33.

54. AFN, First Nations and the Constitution: Discussion Paper, 3.

CHAPTER FIVE

FROM RESERVES TO A THIRD ORDER OF LAND

1. Testimony quoted in House of Commons, Indian Self-Government in Canada: Report of the Special Committee, 107.

2. Ibid., 105. Government of Canada, Aboriginal Peoples, Self-Government, and Constitutional Reform, 16. Boldt & Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians," 541-547. Bowker, Canada's Constitutional Crisis: Making Sense of It All, 92.

3. Li, Race and Ethnic Relations in Canada, 105. DIAND, Outstanding Business: A Native Claims Policy, 9. Ponting & Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada, 23.

4. Frank Cassidy (ed), Reaching Just Settlements: Land Claims in British Columbia: Proceedings of a Conference held February 21-22, 1990 at University of Victoria (Lantzville, British Columbia: Oolichan Books, 1991), 17. Li, Race and Ethnic Relations in Canada, 105. AFN, Our Land, Our Heritage, Our Government, and Our Future, 7.

5. House of Commons, Indian Act of 1951, Section 2(o).

6. Morse, Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada, 57, 89, & 96.

7. House of Commons, Indian Self-Government in Canada: Report of the Special Committee, 107. The Kitsumkalun Band described how it had lost half its reserve to rights of way and leases. Ibid.

8. House of Commons, Indian Act of 1951, Section 53. The issue of acquiring new land arose out of the Bill C-31 controversy. As Chief Ronald Michel of the Peter Ballantyne Band stated: "...when our reserves were created the reserve area was fixed, and there was no policy to compensate for the additional population that is a result of Bill C-31, or any other population increase. Since 1985, the Federal government has refused to negotiate for additional reserve lands for the Bill C-31 members." DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Aboriginal Inquiry, 52.

9. DIAND, You Want to Know: An Information Guide for Registered Indians, 10. DIAND, Comprehensive Land Claims Policy (Ottawa: Minister of Supply and Services Canada, 1986), 5. According to the Comprehensive Claims Policy: "It is the fulfillment of the treaty process through the conclusion of land claims agreements with Aboriginal groups that

continue to use and occupy traditional lands and whose Aboriginal title has not been dealt with by treaty or superseded by law." Ibid., 6. For the Indian view of the land claims policy see AFN, AFN's Critique of the Federal Government Land Claims Policies (Ottawa: Assembly of First Nations, August 1990).

10. DIAND, Outstanding Business: A Native Claims Policy, 13. Specific claims arose because some Indians maintained that the government had reneged on some of its promises under treaty, or the funds kept for the land had been misappropriated, or that reserve land had been disposed of without permission of the band. Ibid., 11-13.

11. AFN, First Nations Submission on Claims (Ottawa: Assembly of First Nations, December 1990). Li, Race and Ethnic Relations in Canada, 107.

12. Ibid., 106. DIAND, Information Sheet #1. DIAND, Comprehensive Land Claims Policy, 6. Moses Okimaw, oral interview. DIAND, Information Sheet #9.

13. Chesley Anderson, oral interview. DIAND, Comprehensive Land Claims Policy, 24-25. AFN, Doublespeak of the 90's: A Comparison of Federal Government and First Nations Perceptions of Land Claims Process (Ottawa: Assembly of First Nations, August 1990), 6.

14. House of Commons, Indian Self-Government in Canada: Report of the Special Committee, 108-109.

15. DIAND, Comprehensive Land Claims Policy, 6. Government of Canada, Revised Statutes of Canada, 1985, 11.

16. DIAND, Outstanding Business: A Native Claims Policy, 3.

17. DIAND, Comprehensive Land Claims Policy, 9-11.

18. Ibid., 13.

19. Ibid., 14. Gurston Dacks, "Northern Native Claims: Will Ottawa Default?" The Canadian Forum LVIII, No. 687 (March 1979): 6-10. Moses Okimaw, oral interview. For a comprehensive study of First Nation

Plans for resource development see AFN, Long Term Planning for Resource Development--Implications for First Nations (Ottawa: Assembly of First Nations, August 1991).

20. DIAND, Comprehensive Land Claims Policy, 14.

21. Li, Race and Ethnic Relations in Canada, 107. DIAND, Outstanding Business: A Native Claims Policy, 15. The First Nations' view is that treaty interpretation is a matter for discussion between the parties to the treaties. The Indians further believe that Canada has been unilaterally interpreting the treaties in order to undermine their intent and effect. AFN, What Are The Treaties? (Ottawa: Assembly of First Nations, April 21, 1989), 2.

22. John Donnelly, oral interview. Moses Okimaw, oral interview. Government of Canada, Supreme Court of Canada Reports Service, (Toronto: Butterworths, 1990), 9446-9448. The Court noted the political significance: "It is clear that section 35(1) of the Constitution Act, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of Aboriginal rights. ... Section 35(1), at the least, provided a solid constitutional base upon which subsequent negotiations can take place. It also affords Aboriginal people constitutional protection against provincial legislative power." Ibid., 9448.

23. Government of Canada, The Right of Aboriginal Self-Government and the Constitution: A Commentary by the Royal Commission on Aboriginal Peoples, 14. Bruce H. Wildsmith, Sparrow Analysis (Ottawa: Assembly of First Nations, 1991), 1-3. Slade, Aboriginal Title and Rights in British Columbia, 10.

24. Ibid. Cassidy, Reaching Just Settlements: Land Claims in British Columbia, 5 & 23. According to Attorney Jack Woodward: "The Supreme Court of Canada, in various ways, has been indicating that when the correct case comes to Ottawa, there is a very strong possibility that the existence of Aboriginal title in British Columbia will be sustained. Ibid., 38.

25. Joseph Trutch is quoted in Berger, A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992, 143. Cassidy, Reaching Just Settlements: Land Claims in British Columbia, 28-31. DIAND, The Canadian Indian, 91.

26. Trutch is again quoted in Berger, A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992, 144.

27. David Mackay is quoted in Berger, A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992, 146. Cassidy, Reaching Just Settlements: Land Claims in British Columbia, 5. Premier William Smithe of British Columbia told the Indian delegates: "When the whites first came among you, you were little better than the wild beasts of the field." Ibid., 32. George Watts echoed the sentiment of the chiefs when he declared: "I live on the land that my great-great-great-great-grandfather lived on. You are not going to move me off that land. You are not going to give me that land. So we have to get rid of this concept that this is a land claim. It isn't a land claim, it's a settlement; a settlement of two difficult jurisdictions." Ibid 22.

28. That prohibition was not repealed until 1951. Cassidy, Reaching Just Settlements: Land Claims in British Columbia, 148-154.

29. DIAND, Annual Report of Department of Indian Affairs and Northern Development: 1990-1991, 1. House of Commons Debates, 1990, 13320. Cassidy, Reaching Just Settlements: Land Claims in British Columbia, xi, xii, 6, & 38. DIAND, Information Sheet #36.

30. Cassidy, Reaching Just Settlements: Land Claims in British Columbia, 23. Maclean's 105, No. 11 (March 16, 1992): 17.

31. Cassidy, Reaching Just Settlements: Land Claims in British Columbia, 36-37.

32. Ibid., 60. Slade, Aboriginal Title and Rights in British Columbia, 7.

33. Lynda Martin, Assistant Director of Claims Registration for the Department of Self-Government in the British Columbia Ministry of Aboriginal Affairs, oral interview.

34. Ibid. Prime Minister Mulroney suggested that the Nisga'a land claim went back to the meeting in 1887 and added: "The determination of successive Nisga'a leaders has not flagged, and is personified, today, by Chief Alvin McKay." Government of Canada, Notes for an Address by Prime Minister Brian Mulroney to the First Nations Congress in Victoria, British Columbia (Ottawa: Minister of Supply and Services Canada, April 23, 1991).

35. Lynda Martin, oral interview.

36. Ibid.

37. Ibid. Cassidy, Reaching Just Settlements: Land Claims in British Columbia, 86 & 23. Chesley Anderson said: "People in the south listen more to economics than they do to civil rights." Oral interview. Des Kennedy, "Belonging to the Land: Meaning of Meares Island," The Canadian Forum LXV, No. 750 (June/July 1985): 8-17.

38. Crowe, A History of Original Peoples of Northern Canada, 223-225. Li, Race and Ethnic Relations in Canada, 106. House of Commons Debates, 1990, 13320. Prime Minister Mulroney stated that this will make the northern Natives the largest land-owners in North America. Ibid. Maclean's 103, No. 12 (April 23, 1990): 18. DIAND, Information Sheet #10.

39. Michael S. Whittington and Glen Williams (eds), Canadian Politics in the 1980's (Toronto: Methuen of Toronto, 1984), 162 & 59. DIAND, Indians and Inuit of Canada, 14. Inuit Tapirisat of Canada, Constitutional Position Paper, Inuit in Canada: Striving for Equality, 1.

40. Whittington & Williams, Canadian Politics in the 1980's, 62-63. There was also resentment over the loss to parks, pipelines, mines, and highways which cut across traditional hunting and fishing areas. Ibid., 73. DIAND, Information Sheet #16.

41. Ibid., 58. Government of Canada, Aboriginal Peoples, Self-Government, and Constitutional Reform, 12. The current legislative assembly of the Northwest Territories has 8 Inuit, 6 Dene, and 10 non-native members. The Executive Council is composed of 2 Inuit and 2 Dene. The Nunuvat government will not be that much different. Chesley Anderson, oral interview. Maclean's 105, No. 18 (May 4, 1992): 20-21. Whittington & Williams, Canadian Politics in the 1980's, 67. Inuit Tapirisat of Canada, Constitutional Position Paper, Inuit in Canada: Striving for Equality, 5-12. DIAND, Information Sheet #8.

42. DIAND, Annual Report of Department of Indian Affairs and Northern Development: 1990-1991, 32.

CHAPTER SIX

FROM HOPELESSNESS TO A GLIMMER OF HOPE

1. Patterson, The Canadian Indian: A History Since 1500, 4 & 5. The myth which suggests that the French and English are founding peoples of Canada is an insult to the Indian people. John E.Moss, "Native Proposals for Constitutional Reform," Journal of Canadian Studies 15, No. 4 (Winter 1890-1981): 86.

2. Government of Canada, Notes for an Address by Prime Minister Brian Mulroney to First Nations Congress in Victoria, British Columbia, 1 & 2.

3. House of Commons Debates, 1990, 133276. See also AFN, Assembly of First Nations Submission to the Senate Committee on Aboriginal Affairs (Ottawa: Assembly of First Nations, August 2, 1990), 6.

4. Quoted in House of Commons, Fifth Report of the Standing Committee on Aboriginal Affairs: The Summer of 1990, ix.

5. House of Commons Debates, 1990, 13304.

6. Ibid., 13305.

7. Ibid., 13306. One of the features that distinguishes Indian culture is its egalitarianism. This "sharing" ethic is transposed into the political context through the right of all members of a community to express their views and to have an influence on the decisions that affect them. Wittington & Williams, Canadian Politics in the 1980's, 63.

8. Wittington & Williams described Indian leadership as follows: "The Native concept of leadership is both diffuse and functional. It is diffuse because Native communities follow different leaders for different kinds of community activities. There are often totally different power structures in a traditional Native community, depending upon whether the decisions to be taken involved hunting, war, spiritual matters, settlement of internal disputes or punishment of wrongdoers. Native leadership is functional because the choice of leader in any given situation depends upon who is best suited to lead in that particular circumstances. ... These leaders are not elected in the sense that democratic politics defines elections, but rather they come to lead automatically, through a sort of community consensus that they are the people most able to do so. Thus it is that sometimes even the most well-meaning attempts of white people to give the Natives the best of our political institutions have met with only marginal acceptance." Wittington & Williams, Canadian Politics in the 1980's, 63.

9. House of Commons Debates, 1990, 13309-13314.

10. Maclean's 105, No. 11 (March 16, 1992): 14.

11. Moses Okimaw, oral interview.

12. DIAND, Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Aboriginal Inquiry, 28.

13. Maclean's 104, No. 7 (February 18, 1991): 20-21.

14. Ibid., 22-23.

15. The Globe and Mail of Toronto (July 8, 1992): A2. Maclean's 105, No. 23 (June 8, 1992): 12-14.

16. Ibid.

17. The Globe and Mail (July 10, 1992): A2 & A4. The Globe and Mail (July 11, 1992): A2 & A4. Maclean's 105 No. 29 (July 20, 1992): 12-16.

18. Maclean's 105, No. 29 (July 20, 1992): 12-16. The Globe and Mail (July 16, 1992): A1-3.

19. The Globe and Mail (July 9, 1992): A4. Maclean's 105 No. 29 (July 20, 1992): 12-16. Ovide Mercredi was Elijah Harper's key advisor in the summer of 1990 and he was elected to head the Assembly of First Nations in June 1991. AFN, Ovide William Mercredi (Press Release Biography) (Ottawa: Assembly of First Nations, June 1991).

20. Ovide Mercredi speech taped recorded by author on July 15, 1992.

21. Conversation overheard by author at AFN rally on Parliament Hill on July 15, 1992. Moses Okimaw agreed with the newsmen's assessment of Mulroney's position. Oral interview. See also AFN, Backgrounder on the Current Crisis in Fisrt Nations-Canada Relations (Ottawa: Assembly of First Nations, 1990).

22. The Globe and Mail (October 3, 1992): A6-8. Maclean's 105 No. 35 (August 31, 1992): 14-18. Government of Canada, Your Guide to Canada's Proposed Constitutional Changes (Ottawa: Minister of Supply and Services Canada, 1992), 4.

23. The Globe and Mail (October 3, 1992): A6-8. Government of Canada, Your Guide to Canada's Proposed Constitutional Changes.

24. Maclean's 105 No. 35 (August 31, 1992): 19-20. Maclean's 105 No. 36 (September 7, 1992): 12-14.

25. Maclean's 106, No. 44 (November 2, 1992): 12-17.

26. The Economist 325, No. 7783 (October 31, 1992): 41. CNN World News (October 27, 1992). Maclean's 106, No. 44 (November 2, 1992): 13.

27. The Gazette, Montreal (October 10, 1992): A11 and (October 13, 1992): A1 & A2.

28. Tanner, The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada, 28.

29. Li, Race and Ethnic Relations in Canada, 112-113.

APPENDIX

THE AMERICAN EXPERIENCE

1. H. Barry Holt and Gary Forrester, Digest of American Indian Law: Cases and Chronology (Littleton, Colorado: Fred B. Rothman & Co., 1990), 1. Bureau of Indian Affairs (BIA), Federal Indian Policies: From the Colonial Period through the Early 1970's (Washington: U.S. Government Printing Office, 1974), 18.

2. Holt & Forrester, Digest of American Indian Law, 2. The concept of an Indian state reappeared many times in United States history, but was never carried through. BIA, Federal Indian Policies, 4. Berger, A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992, 69.

3. Theodore J. Lowi and Benjamin Ginsberg, American Government: Freedom and Power (New York: W.W. Norton & Company, 1990), A-10.

4. Holt & Forrester, Digest of American Indian Law, 2.

5. Wilcomb E. Washburn, The American Indian and the United States: A Documentary History--Volume III (New York: Random House,

1973), 2144-2150. See also United States Government, Statutes at Large Vol. I, (U. S. Government Printing Office), 51-53.

6. Lowi & Ginsberg, American Government: Freedom and Power, A-16 & A-20.

7. Washburn, The American Indian and the United States: A Documentary History--Volume III, 2151-2163, 2172-2182. U.S. Government, Statutes at Large Vol. I, 137-138; Vol. II, 139-147; Vol. IV, 729-735. The Indians of both Canada and the United States look to the Royal Proclamation as a foundation document in their relationship with the Federal government.

8. Holt & Forrester, Digest of American Indian Law, 3. M. Annette Jaimes (ed), The State of Native America: Genocide, Colonization, and Resistance (Boston: South End Press, 1992), 18.

9. Washburn, The American Indian and the United States: A Documentary History--Vol III, 2169-2171. U.S. Government, Statutes at Large Vol. IV, 411-412. Indian territory was carved out of the Louisiana Purchase by Thomas Jefferson with the hope that the removal of Indian groups from heavily settled eastern regions would contribute to their advancement. BIA, Federal Indian Policies, 4-5.

10. Wilcomb E. Washburn, The American Indian and the United States: A Documentary History--Volume IV (New York: Random House, 1973), 2554-2602. Francis Paul Prucha (ed), Documents of United States Indian Policy (Lincoln, Nebraska: University of Nebraska Press, 1975--revised in 1990), 58-59.

11. Washburn, The American Indian and the United States: A Documentary History--Volume IV, 2554-2602. Marshall stated that almost every white-held title would have been clouded had the standards of International Law been applied. See Johnson v. McIntosh [8 Wheat 543 (1823)]. The opinion also held that: "though the Indians are acknowledged to have an unquestionable, and therefore, unquestioned right to the lands they occupy, until that right shall be extinquished by a voluntary cession to our government; ..." Ibid.

12. DIAND, Information Sheet #37, 6. Jaimes, The State of Native America, 18.

13. Washburn, The American Indian and the United States: A Documentary History--Volume IV, 2603-2648.

14. Prucha, Documents of United States Indian Policy, 60-61. Berger, A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992, 81. J.W. Peltason, Understanding the Constitution (New York: Harcourt Brace Jovanovich, Publishers, Twelfth Edition-1991), 78.

15. San Francisco Chronicle (November 26, 1992): A-34.

16. Berger, A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992, 71.

17. BIA, Federal Indian Policies, 6. Jaimes, The State of Native America, 91.

18. Holt & Forrester, Digest of American Indian Law, 4. Jaimes, The State of Native America, 90.

19. Washburn, The American Indian and the United States: A Documentary History--Volume III, 2183-2185. U.S. Government, Statutes at Large Vol. XVI, 544-5. Holt & Forrester, Digest of American Indian Law, 4.

20. Washburn, The American Indian and the United States: A Documentary History--Volume IV, 2655-2666. Washburn, The American Indian and the United States: A Documentary History--Volume III, 2186-2187. U.S. Government, Statutes at Large Vol. XXIII, 385.

21. Washburn, The American Indian and the United States: A Documentary History--Volume IV, 2667-2685.

22. Berger, A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992, 100.

23. Washburn, The American Indian and the United States: A Documentary History--Volume III, 2188-2193. U.S. Government, Statutes at

Large Vol. XXIV, 388-391. Holt & Forrester, Digest of American Indian Law, 5. BIA, Federal Indian Policies, 7.

24. Washburn, The American Indian and the United States: A Documentary History--Volume IV, 2705-2721. Jaimes, The State of Native America, 19. BIA, Federal Indian Policies, 7.

25. Washburn, The American Indian and the United States: A Documentary History--Volume III, 2209. As a further insult some Indians had to appear before a "Competency Commission" to determine whether or not the Indian was competent enough to transact his own business as the average white man. BIA, Federal Indian Policies, 7. See also House Resolution 6355, 68th Congress, 1st Session. The Act began: "Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States." Ibid.

26. Jaimes, The State of Native America, 69. Washburn, The American Indian and the United States: A Documentary History--Volume III, 2210-2217. U.S. Government, Statutes at Large Vol. XLVIII, 984. Felix S. Cohen, Handbook of Federal Indian Law (Albuquerque: University of New Mexico Press), 247.

27. BIA, Tribal Claims Against the United States (Washington: U.S. Government Printing Office, 1977), 1-2. Washburn, The American Indian and the United States: A Documentary History--Volume III, 2218-2227. U.S. Government, Statutes at Large Vol. LV, 1049-1055. In 1980, $105 million was transfered from the Treasury Department to the Department of the Interior to invest for the Sioux. However, the Indians tried to block completion of the deal because they wanted the land rather than the money. Theodore W. Taylor, American Indian Policy (Mt. Airy, Maryland: Lomond Publications. Inc., 1983), 54. A law was enacted in 1973 which required the Secretary of the Interior, after consultation with the Indians involved, to prepare and present a plan to both Houses of Congress that sets out the purposes for which the award money are to be used (housing, sanitation, employment, education, or investment). Ibid.

28. BIA/United Effort Trust, Indian Claims (Washington: The Institute for the Development of Indian Law and the American Indian Law Center, 1980), 2. Nancy Oestreich Lurie, "The Indian Claims Commission" The Annals of The American Academy of Political and Social Science 436 (March 1978): 103.

29. BIA, Federal Indian Policies, 10.

30. Holt & Forrester, Digest of American Indian Law, 7. Washburn, The American Indian and the United States: A Documentary History--Volume III, 2228-2231. U.S. Government, Statutes at Large Vol. LXVII, 588-590. BIA, Federal Indian Policies, 9-10.

31. Washburn, The American Indian and the United States: A Documentary History--Vol III, 2232-2245. U.S. Government, Statutes at Large Vol. LXVIII, 250-251, 718-723. The Menominees had to submit to termination in order to secure the funds due them as a result of their claims settlement. BIA, Indian Claims, 2. Termination seemed to be the logical conclusion to the process of assimilation by the BIA. The Indians did not need to be consulted because the policy was believed to be in their best interest. Raymond V. Butler, "The Bureau of Indian Affairs: Activities Since 1945" The Annals of the American Academy of Political and Social Science 436 (March 1978): 51.

32. Martin L. Gross, The Government Racket: Washington Waste from A to Z (New York: Bantam Books, 1992), 107-109. Indian land is owned in three ways: outright by the tribe, by a number of tribal people collectively, or by individual Indians. Since Indians cannot buy or sell their land without permission of BIA, land is also "held in trust" by the government and thus protected from unscrupulous whites. For the terminated tribes this protection was removed. Ibid.

33. Washburn, The American Indian and the United States: A Documentary History--Volume IV, 2752-2762.

34. Holt & Forrester, Digest of American Indian Law, 7. Berger, A Long and Terrible Shadow: White Values, Native Rights in the Americas 1492-1992, 82-83.

35. Washburn, The American Indian and the United States: A Documentary History--Volume IV, 2726-2729. By the 1980s the maximum feasible level of water due to the Indians along the Colorado River was computed as totaling approximately 45.9 million acre-feet per year, or about four times the total annual flow of the river. Jaimes, The State of Native America, 199. BIA, Indian Claims, 2. In Arizona v. San Carlos Apache Tribe [436 U.S. 545 (1983)] the Supreme Court gave state courts jurisdiction in all water rights cases. This has made them more difficult to win since state courts tend to be more parochial in nature. J. Anthony Long and Menno Boldt (eds), Governments in Conflict?: Provinces and Indian Nations in Canada (Toronto: University of Toronto Press, 1988), 204.

36. Washburn, The American Indian and the United States: A Documentary History--Volume III, 2246-2260. U.S. Government, Statutes at Large LXXXII, 73.

37. BIA, New Policy of Self-Determination Without Termination Set Forth by President Richard M. Nixon (Washington: U.S. Government Printing Office, 1974), 2. The new role of the BIA was to be a service and support organization to encourage and assist tribes to assume management of program operations. BIA, Federal Indain Policies, 13.

38. BIA, New Policy of Self-Determination Without Termination Set Fourth by President Richard M. Nixon, 2-4. BIA, Federal Indian Policies, 13. Butler, "The Bureau of Indian Affairs: Activities Since 1945," 59.

39. Holt & Forrester, Digest of American Indian Law, 9. Taylor, American Indian Policy, 17. The 64,000 Native population of Alaska is over 15 percent of the total population. Ibid., 21.

40. Washburn, The American Indian and the United States: A Documentary History--Volume IV, 3018-3026. The doctrine of pre-emption set up jurisdictional barriers around the reservation that exclude the operation of state law. Long & Boldt, Governments in Conflict?: Provinces and Indian Nations in Canada,199-200.

41. U.S. Government, Federal Indian Policies, 14. Alan L. Sorkin, "The Economic Basis of Indian Life" The Annals of the American Acedemy of Political and Social Science 436 (March 1978): 2.

42. BIA, Management of This Nation's Indian Fish, Wildlife and Outdoor Recreation Resources (Washington: U.S. Government Printing Office, 1987), 1-3.

43. BIA, Address on American Indian Policy Delivered by Ronald Reagan (Washington: U.S. Government Printing Office, 1983), 1-3.

44. BIA/United Effort Trust, Tribal Government (Washington: The Institute for the Development of Indian Law and the American Indian Law Center, 1980), 1. United States Government, United States Commission on Civil Rights (Washington: U.S. Government Printing Office, 1973), 7-8.

45. BIA/United Effort Trust, Aborogation of Indian Treaties (Washington: The Institute for the Development of Indian Law and the American Indian Law Center, 1980), 1-2. The Bureau of Indian Affairs was created as a part of the War Department in 1824 and transferred to the Department of the Interior in 1849. Its mission is to act as the principal agent of the U.S. in carrying on the government-to-government relationship that exists between the U.S. and Federally-recognized Indian tribes; and, to carry out the responsibilities the U.S. has as trustees for property it holds in trust for Federally-recognized tribes. U.S. Government, U.S. Government Manual (Washington: U.S. Government Printing Office, 1985), 350.

46. BIA/United Efforts Trust, Federal/Indian Relationship (Washington: The Institute for the Development of Indian Law and the American Indian Law Center, 1980), 2.

47. Long & Boldt, Governments in Conflict?: Provinces and Indian Nations in Canada, 197. See also Rosebud Sioux Tribe v. Kneip (1977) and Escondido Mutual Water Co. v. La Jolla Bands (1984).

48. Long and Boldt, Governments in Conflict?: Provinces and Indian Nations in Canada, 197-198. The courts do not question the competance of state governments to govern but they have through these rulings questioned the capacity of Indian governments to govern fairly and impartially. It might be harsh to suggest it, but racism might be a factor in some of these decisions. Ibid., 196. See also Moe v. Confederated Salish and Kootenai Tribes (1976),

Oliphant v. Suquamish Tribe (1978), United States v. Wheeler (1978), and Brendale v. Confederated Tribes and Bands of Yakima Indian Nation (1989).

49. Long & Boldt, Governments in Conflict?: Provinces and Indian Nations in Canada, 196. See United States v. Kagama [118 U.S. 375 (1886)].

50. Time 140, No. 19 (November 9, 1992): 52-54. San Jose Mercury News (November 26, 1992): 4B.

51. Maclean's 105, No. 11 (March 16, 1992): 18. San Jose Mercury News (November 18, 1992): 3B.

52. Time 140, No. 19 (November 9, 1992): 52-54. Taylor, American Indian Policy, 3.

53. San Jose Mercury News (July 24, 1992): 7B.

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