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Résumé de l'article

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Indian Nations : Not Minorities

Louise MANDELL *

À travers les légendes des peuples indiens, nous pouvons sentir l'étroite relation existant entre eux et leurs territoires.

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At one time there were no rivers for the fish to come in, and there was a man known by the name of "Omalth" (the raven) He was the man who knew the place to get water and he borrowed a sea-lion's bladder. Then he walked around where he thought would be a good place for the rivers to run and when he found a suitable place he would break the bladder and let some of the water run. This made all the rivers...

Man came into the world first as animals and birds and were turned into men and the things that those men did are what we are still doing today. In the old days these animals and birds had danced like the cedar bark dance and they acted a part so that all those who were looking on would understand what they were doing. Omalth had a dance called the "Sowheet" He was dressed in limbs and cedar brush and we still want to keep up this dance, these things happen, so we have been told, by our forefathers, before the flood, and after the flood these animals and birds were changed into men.

A man by the name of "Xwawnalalase" was asked by the Lord what he wanted to do. Did he want to be a big tree? He said "no". Did he want to be a rock? He said "no". Did he want to be a mountain. He said "No a piece of him might break off, fall down and hurt somebody". Then after thinking a long time he said he would like to be a river so that he might be useful to people in after days. So he was changed into the Nimkish River and that is the reason we call it Owalanta, and claim it was ours.

* Avocate.

After this a man by the name of "Numcokwistolis" was the first man that lived on a hill called "Awploue", when there was another man named "Dwunoo-sala", He was the thunderbird. He took off his feathers and let them blow up into the air again and left him as a man. There was another man named "Kwakwus", He was from a fish. Omath was the chief over all these and he gathered up all these feathers and tied them into bunches and gave them to his people. After that he got skins such as Martin, Mink, Coon, and Beaver, and he sewed them up to make blankets and he invited all his people and gave these things to the people that he invited and he distributed these cedar boards, paddles, Indian wedges, and mats after the fur was given away. He also found out that yellow cedar bark was good to make clothes, so he had his people get the yellow cedar bark and beat it with a club to make it soft and made dresses of it. That's why we use the cedar bark today, when we are given away.¹

This is a story of creation of the Kwakiutl people. For the many Indian Nations who inhabited Canada prior to the arrival of the Europeans, each Nation has similar stories marking the spiritual and eternal relationship of those peoples to their particular territories. By the time the European explorers arrived in Canada, the boundaries marking each Nation's territories had been in the process of definition for thousands of years. Within their territory, each Nation evolved with its distinct language, laws, history and spiritual practices. Laws were passed down orally by the elders from one generation to another, who ensured the younger ones became vested with the accumulated knowledge of the Nation's survival within the territory.

From the 14th century onwards, the European Nations began actively to explore the Americas. The political task of each Monarch was to secure rights to acquire the resources of the continent as against other European Nations. At the outset of exploration, each European Nation sought to create rights against each other through symbolic acts such as the erecting of crosses, flags, placing names in stone, or leaving the mark of the King on trees. This approach gave way to the European Nation sending settlers to gain possession of the land under the name of the Crown. At the same time the Crown issued to various individuals licences, charters and grants, to trade, claiming vast parts of the continent as exclusive trading areas reserved for the charter holder.²

Unable to find a way to equitably share the vast North American Continent, Britain and France concluded this chapter of history by waging a

1. Kwakiutl papers, private collection.

2. For example, see: The Virginia Charter of 1909 in THORPE, *Charters*, t. 7, p. 1850; GIBSON, *British Empire*, t. 4, p. 225, note 1; see also: *In the Matter of the Boundary between the Dominion of Canada and the Colony of Newfoundland in the Labrador Peninsula*, t. 8, p. 4094.

major war against one another culminating finally in the Treaty of Paris³ where, by it, France ceded to Britain all of her possessions claimed or possessed by France in North America.

A distinction emerged early in the colonizing efforts between the acceptable rules adhered to by European Nations to acquire rights as between themselves and the rules to acquire rights from the Indian Nations. In 1664 the King of England named a Royal Commission to visit the New England Colonies and to hear and determine Indian complaints. In determining rival claims to former Indian lands at Misquamucuck, the Commissioners concluded :

No doubt the country is theirs (the Indians) till they give it or sell it, though it be not improved.⁴

The conclusion that Indians were the rightful possessors of their territory until they consented to relinquish their interest to the Crown was adopted by the British Crown as official policy in its dealings with the Indian Nations. This stated policy was reflected in Crown Grants, Colonial Laws, and Royal Instructions spanning 100 years⁵.

A further policy and practice emerged of the British Crown to encourage a protectorate relationship between the Indian Nations and Britain. The Indians were oftentimes induced into a formal protectorate caused by the danger posed to them by Britain's war with France. This was the situation in 1701 when the Sachems of the Five Nations of the Iroquois met in conference at Albany and signed a deed in trust to the British Crown designating Iroquois territory around Lakes Ontario and Erie to the Crown, the land in question to be protected and defended by His Majesty for the use of the Iroquois⁶. Subsequently, the British required the Iroquois assistance in helping to defend this territory against the French. Were the French seizing this county with Indian consent? Hendrick, of the Upper Mohawks, denied that his people had sold lands to the French or given them permission to build forts. He remarked that both English and French are "quarrelling

3. *Treaty of Paris* of February 1763, SHORTT and DOUGHTY (eds.), *Documents Relating to the Constitutional History of Canada 1759-1791*, t. 1, p. 99-100.

4. SHURTLEFF (ed.), *Records of the Governor and Company of Massachusetts Bay*, t. 4, Part II, (1661-74), p. 211-213; dated 24 May 1665.

5. See for example, TRUMBULL and HOADLEY (eds.), *Public Records of the Colony of Connecticut*, t. 1, p. 402; t. 6, p. 13. SULLIVAN, FLICK et al. (eds.), *Papers of William Johnson*, t. 1, S. 28-30, dated 20 May 1755. LABAREE (ed.), *Royal Instructions to British Colonial Governors*, t. 2, nos 667, 669, 671, 672, p. 465-9.

6. O'CALLAGHAN (ed.), *Documents Relative to the Colonial History of the State of New York*, t. 5, p. 783-801.

about lands which belong to us and such a quarrel as this may end in our destruction⁷.” A written reply on the Iroquois speech was then drafted and after consideration was agreed upon by the Commissioners. The document described the portion of the Iroquois lands in question as follows :

You did put this land under the King, our father, he is now taking care to preserve it for you ; for this end, among others, he has directed us to meet you here, for although the land is under the King’s govern, yet the property or power of selling it to any of His Majesty’s subjects having authority from him, we always consider as vested in you.⁸

Such was the case at the famous Albany conference of 1754 convened by the British wherein Governor DeLacy was authorized by the Crown to reassure the Indians, in response to their complaints, that the British Crown has always considered the property of the soil to be vested in the Indian Nations themselves, and could be gained by the Crown only with Indian consent⁹.

Nevertheless frauds and abuses would continue ; Indian lands would be “purchased” by individuals for unfair prices or lands would be taken by settlers without Indian consent. Indian support for Britain in the war with France would weaken.

Consequently, key advisors to the British government recommended that British policy be incorporated into a solemn and binding Treaty with the Indian Nations. Sir William Johnson, responsible for diplomatic relations with the Indian Nations advised the British Crown that the Indian alliance could only be assured by incorporating Indian policy into :

A solemn public treaty to agree upon clear and fixed boundaries between our Settlements and their hunting grounds so that each party may know their own and be a mutual Protection to each other of their respective possessions.¹⁰

*The Articles of Capitulation of Quebec*¹¹, which ended the war, signed between Britain and France in 1760 in Section 40 pledged that the Indian allies would be protected in the lands they occupied :

The savages or Indian Allies of His Most Christian Majesty shall be maintained in the lands they inhabit, if they chose to remain there ; they shall not be molested on any pretense whatsoever, for having carried arms and served His Most Christian Majesty ; ...

7. *Id.*, t. 6, p. 870.

8. *Id.*, p. 872.

9. *Id.*, p. 853–892, dated 19 June — 11 June 1754.

11. *Supra*, note 3, p. 27.

Immediately following the Seven Years War, the Indian Nations looked to the British to remove their forts which had been placed in Indian territory with Indian consent. It was always understood that the forts were there to protect the English and the Indian people against the French. When the British did not remove their forts a strong Indian uprising took place. The Indian forces were led by Chief Pontiac, born the son of a Chief who rose as a prophet among the people urging the Indians to restore themselves to their ancient greatness and power by driving out the white man from their territory.

By the summer of 1763 seven of the ten British outposts had been destroyed by the Indians and reports of the Pontiac rebellion had reached England, the story published in the London Chronicle July 16th, 1763¹².

The British stood to be driven from a continent they had fought for a century against the French to control unless they established an acceptable agreement with the Indians. The Royal Proclamation issued in October of 1763 became the constitutional basis to establish a lasting peace between the Crown and the Indian Nations. There can be little doubt that the crystallization of the Royal Proclamation in October of 1763 was precipitated by the Indian uprising. The Board of Trade advised the Crown that the Proclamation should be issued now because of "the late complaints of the Indians, and the actual Disturbances in Consequence¹³."

The Royal Proclamation of 1763¹⁴ was the first constitutional instrument applicable to Canada and as such, attempted to do many things, including the convening of General Assemblies in the settled colonies. Part IV of the Proclamation dealt specifically with Indian-Crown relations. These provisions made explicit first principles, namely that Indian title to their territory was recognized and confirmed; that the alienation of Indian land was based upon Indian consent; that the Indian Nations were recognized as politically distinct sovereignties and not subjects of the Crown. However, as was stated by Chief Justice Marshall in *Johnson v. McIntosh*¹⁵, the sovereignty of the Indian Nations was necessarily limited by the fact that, by virtue of Britain's rights acquired by discovery and consummated by the Treaty of Paris, the Indian Nations could surrender their territories to the Crown only and to no other Crown or Person. The *quid pro quo* of the Indian's surrendering only to the Crown was that the Crown assumed fiduciary

12. PECKMAN, *Pontiac*, p. 178.

13. *Supra*, note 3, p. 151.

14. *Id.*, p. 163.

15. (1823) 8 Wheaton 543 (U.S.S.C.).

obligations to the Indians. Mr. Justice Dickson said in *Guerin v. The Queen*¹⁶:

The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title [...] An Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763.¹⁶

Operating within the framework of the Royal Proclamation Treaties were negotiated by various Indian Nations and the Crown:

Maritime Treaties	Fort William Henry	1693
	Portsmouth	1713
	Georgetown	1717
	Boston	1725
	Annapolis Royal	1728 no. 239
	St. Johns	1749
	Halifax	1752
	Miramich	1794
Fort Stanwix		1768
Treaty No's	1	1871
	2	1871
	3	1873
	4	1874
	5	1875
	6	1876
	7	1877
	8	1899
	9	1905
	10	1906
	11	1921
Robinson-Superior		1850
Robinson-Huron		1850
Manitoulin Island		1862

16. [1984] 2 S.C.R. 335, p. 376.

William Treaty	Chippewa	1923
	Mississigua	1923
	Kosampson	1850
	Sweng Wehung	1850
	Chilcowitch	1850
	Whyuomilth	1850
	Che-Ko-neim	1850
	Soke	1850
	Kaykyaaken	1850
	Cheaihaytsun	1850
	Queakar	1851
	Quakedlth	1851
	Sannich	1852
	Saanich	1852
	Saalequun	1854

As the colony of Canada was consolidated, each constitutional instrument provided for the protection and continuation of the aboriginal rights first recognized and confirmed in the Royal Proclamation and the treaty rights acquired thereafter¹⁷.

Given this broad constitutional framework, it is not surprising that the Indian Nations have always regarded themselves as distinct Nations recognized within the framework of Confederation, whose sovereign rights flow from their covenant with the Creator to live in harmony within their territories. In their relationship to Canada, rather than possessing minority rights, the Indian Nations have always understood that they are separate Nations who, in relationship to Canada, possess constitutional rights.

In summary, by 1763, the British settlers in Canada constituted a minority group with a total population of less than 100,000 located primarily along the shores of the St. Lawrence River and the coasts of Old Nova Scotia

17. The Royal Proclamation of 1763 as the first constitutional instrument set the pattern for Canada's development. Aboriginal title was recognized and a treaty-making process was confirmed to release land to the jurisdiction of the legislative assemblies. In the pre-Confederation constitutional enactments, a clause saved the operation of the Royal Proclamation, while consolidating the local legislatures. See: *The Quebec Act, 1771*, s. 3; *The Constitution Act, 1791*, s. 33; *The Union Act, 1840*, s. 46.

Aboriginal title was protected under the *Constitution Act, 1867* by s. 91(24) and 109. As territories joined Confederation, aboriginal title was recognized and confirmed; see: *Manitoba Act, 1870*, s. 31; *An Order of Her Majesty in Council admitting Rupert's Land and the Northern Western Territories into the Union, 1870*, clause 14; and *The Rupert's Land Act, 1870*, parag. 8; *The Terms of Union, 1870*, clause 13; *Natural Resource Transfer Acts, 1930*, clauses 11 & 13.

and Newfoundland¹⁸. Yet, that group possessed astonishing pretensions and proceeded to assert sovereignty and claim jurisdiction over 3,800,000 square miles, including lands to the west of the Rockies which had been relatively unexplored.

As Canada grew in population and in power, it began the process of reducing the recognition of rights and protection for the Indian Nations and unilaterally collapsed the constitutional partnership. The balance of the paper will illustrate some legal strategies used by Canada in the effort to reduce the Indian Nations from a constitutional partner to a group possessing minority rights.

In 1835, the British anti-slavery society established the Aborigines Protection Society. The Aborigines Protection Society was active on issues relating to Canada's treatment of the Canadian Indian population and lobbied that a Select Committee of the British House of Commons investigate the problems of indigenous peoples within the Empire, including Canada¹⁹. The report of the Select Committee was published in 1837 and in it, the Committee recommended that the administration of Indian Affairs could not and should not be entrusted to the local legislatures, therein being a conflict of interest²⁰. In keeping with the recommendations of the Select Committee, Britain assigned to the Federal Government under Section 91(24) of the *Constitution Act 1982* the administration of "Indians and lands reserved to Indians."

The precise scope of Section 91(24) has never been judicially determined, although recent authorities support the view that Section 91(24) imposed constitutional obligations on the Federal Government to protect aboriginal rights. In the case of the *Queen v. Secretary of State for Foreign and Commonwealth Affairs*, Lord Denning read the Royal Proclamation into that section:

... Save for that reference in section 91(24) the Act of 1867 was silent on Indian Affairs. Nothing was said about the title to property in the "lands reserved for the Indians", nor to the revenue therefrom, nor to the rights and obligations of the Crown or the Indians thenceforward in regard thereto. But I have no doubt that all concerned regarded the Royal Proclamation of 1763 as still of binding force. It was an unwritten provision which went without saying. It was binding on the legislatures of the Dominion and the provinces just as if there had been included in the Statute a sentence: "The aboriginal peoples of Canada shall

18. Dr. B. SLATTERY, *The Land Rights of Indigenous Canadian Peoples As Affected by the Crown's Acquisition of their Territories*, unpublished Ph.D. Thesis, 1979, p. 3.

19. D. SANDERS, "The Re-Emergence of Indigenous Questions in International Law", (1983) *Can. Human Rights Y.B.* 3, p. 13.

20. *Report of the Select Committee of the Aborigines*, 1837.

continue to have all their rights and freedoms as recognised the Royal Proclamation of 1763.²¹

In the case of *Guerin et al. v. The Queen*, the Supreme Court of Canada held that the Crown possessed fiduciary obligations to the Indian Bands and to their land which in certain circumstances would be enforceable by the Courts. Chief Justice Dickson said :

... I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.²²

Since 1867 the Federal Government has conveniently misunderstood its authority under Section 91(24) and assumed plenary powers to govern Indians and Indian land. The overriding goal of Canada has been to acquire the land and resources of the Indian Nations and as time progressed, while Indian Nations depended upon Section 91(24) for protection, Canada used that section to implement policies of assimilation as a means to the taking of more Indian lands and resources.

The policy of assimilation was implemented through the Indian Acts where traditional territory was reduced by Canadian law to small reserves set aside for the use and benefit of the Indians. The balance of the traditional territory was taken by the Province for the use of non-Indians who fenced land and harvested resources to the exclusion of the Indian Nations. Throughout this process, the Federal Government stood idly by. The position of silence was only once broken when the Federal Government disallowed the *B.C. Land Act of 1875* as being contrary to Indian rights²³. The Indian fishery, the mainstay of the survival of British Columbia Indians, became subject to regulation by the Federal Government who continues to prohibit Indians from exercising traditional fishing rights for food²⁴. Indian hunting practices were made subject to provincial laws, laws which ignore Indian reliance on the wildlife as part of a way of life²⁵. As Indians were denied use of traditional resources, they were forced to rely on the Indian

21. [1982] Q.B. 892, p. 913-914 (C.A.).

22. *Supra*, note 16, p. 384.

23. Report of the Honourable, the Minister of Justice, approved by His Excellency the Governor-General-in-Council on the 23rd January, 1875, in W.E. HODGINS, *Dominion and Provincial Legislation, 1867-1895*, Government Printing Bureau, Ottawa : 1869, p. 1024-29.

24. Hundreds of Indian fishermen are charged each year for food fishing in violation of the *B.C. Fishery General Regulations and Fisheries Act*.

25. *Dick v. R.*, S.C.C., unreported judgment October 31, 1985; (1982) 41 B.C.C.R. 173 (C.R.).

Act and welfare programs which made Indians dependent on non-Indian governments for education, health, reserve land and food.

Canada has urged the British and Canadian Courts to justify its expropriation of Indian lands without Indian consent. The leading case of *St. Catherines Milling v. The Queen*²⁶ was decided in the absence of Indian evidence or argument. Essentially, Canada has argued that the doctrine of discovery and the doctrine of continuity be applied to justify the expropriation of Tribal territory and the subjugation of the Indian Nations.

The doctrine of discovery was first articulated in the leading cases of the Supreme Court of the United States in the 1830's by Chief Justice Marshall²⁷. The doctrine assumes the legitimacy of imperialism and colonization and concludes that upon discovery of North America, Britain obtained the underlying right of the soil. The Crown must then acquire Indian title which, once done, would vest in the Crown a complete right and dominion over the territory acquired.

How then, may the Indian interest be acquired? Canada has urged that the doctrine of continuity be applied.

The doctrine of continuity is a very old and well applied doctrine in British common law which has been used to read out the rights of the colonized peoples in lands where the British Crown has wished to gain control. It states that in the case of a conquest or a cession, the rights of the original peoples, and their laws, will prevail, (should they be capable of definition by a colonial court), *until* the government established by the Crown chooses to change those laws through an Act of its own Parliaments. The Doctrine was articulated in the leading case of *Campbell v. Hall*²⁸ where Lord Mansfield stated that the laws of a conquered country continue in force until altered by the conquerer. The Doctrine compliments the rule of Parliamentary Supremacy.

In applying this doctrine to Canada, the Courts should first establish the legitimate basis upon which the Crown has acquired its sovereignty and rights, and conclude that there has been a conquest or cession with the Indian Nations. This enquiry has never been done by the Courts in its analysis of the rights of the Indian Nations of Canada. In fact upon careful analysis, the application of the doctrine of continuity flies in the face of law and history.

26. (1888) 14 A.C. 46 (P.C.).

27. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 240 (1823). *Worcester v. Georgia*, 31 U.S. (6 Pet.) 350 (1832).

28. (1774) Lofft 655; 92 E.R.

Since 1608, the common law and international law developed the rules under which the British Crown may acquire title to territory possessed by the indigenous peoples :

- a) *Conquest* : title may be acquired if the territory is inhabited and the British Crown successfully wins the territory by war. Conquest involves a formal document transferring the territory to the British Crown.
- b) *Cession* : title may be acquired if the territory is inhabited when the territory is yielded up to the Crown through formal treaties.
- c) *Settlement* : if the territory is uninhabited and vacant, or if they are sparsely populated by peoples without a political or legal order title may be acquired by planting and maintaining British settlements²⁹.

Considering the rules noted above, there is no basis to support the Crown's lawful acquisition of territory over which the Indian Nations have not concluded a treaty ; therefore there is no basis for the application of the doctrine of continuity. It is not possible on its face to declare the land vacant for the purposes of acquiring title by settlement since the Indian Nations had occupied their lands since time immemorial. The Courts have proceeded on the *assumption* that the Indian Nations were conquered. Yet this assumption cannot be supported by the history. As mentioned earlier, Britain's war was with France and the help of the Indian Nations had been decisive in the British victory. Indeed, the Royal Proclamation of 1763 confirms a settlement with the Indians, won by battle, that relationships between the Crown and the Indian Nations will not proceed on the basis of conquest but rather will be founded upon Indian consent.

Yet, beginning with the *St. Catherines Milling* case in 1887 and in all other cases which have followed, the Crown has assumed its lawful jurisdiction and then argued that aboriginal title or treaty rights may be extinguished without Indian consent by an Act of Parliament.

This argument was developed in the case of *Calder v. The Queen*³⁰. The Crown argued that if aboriginal title existed in British Columbia, it had been extinguished by Pre-Confederation Land Ordinances and Proclamations enacted by the colonial government which evidenced an intention by the Crown to take the land for itself. It is apparently unjust that the Ordinances at issue were enacted at a time long before the Indian Nations had any

29. D. SANDERS, *Opinion : International Law Aspects of the Effect on the Sami People of the Hydro-electric Project on the Alta River* : prepared and presented to the Norwegian Supreme Court, p. 4 to 10.

30. (1973) 34 D.L.R. (3d) 145 (S.C.C.).

representation in the Legislature or Parliament or indeed had any notice that the said laws, 100 years later, would be used to claim their land.

The Supreme Court of Canada divided on this point and the Crown is raising the argument anew in the cases of the *Meares Island*³¹ and *Gitskan We'Suwet'En's* cases which are to be tried in the fall of 1986. In the *Meares Island* case, the Province of British Columbia is seeking an affirmation of its title to give an ancient cedar forest to MacMillan Bloedell to clear cut log. Against the claim of MacMillan Bloedell and the Province is thousands of years of use by the Ahousaht and Clayoquot Bands. The culturally modified trees on the island signify generations of Indian use of the cedar for baskets, clothing, shelter, totem poles, medicine and canoes.

To the extent and as the opportunity arose, Canada used its political and parliamentary processes to pursue assimilation, while denying Canada's constitutional arrangements with the Indian Nations.

In 1947 *A Plan for Liquidating Canada's Indian Problem within 25 years*³² was presented to the Parliamentary Joint Committee. The objective was :

To abolish, gradually but rapidly, the separate political and social status of the Indians (and Eskimos); to enfranchise them and merge them into the rest of the population on the equal footing. The realization of this plan should :

- a) improve the Indians' social and economic position, now so depressed as to create "leprous" spots in many parts of the country ;
- b) abolish the permanent drain on the federal treasury of the millions of dollars spent on Indian administration ;
- c) fulfill the almost forgotten pledge of the government when it adopted the system of confining the Indians to special reserves.

The plan contemplated the appointment of a commission to "study the various Indian reservations throughout the Dominion and to advise on the best means of abolishing them, of enfranchising the inhabitants.

Although ultimately unsuccessful then in implementing such a plan, it was revived in 1969 by Mr. Trudeau and Mr. Chretien who formulated the *White Paper Policy*³³. The Policy called for the elimination of Indians and Indian lands. The main features were as follows :

- a) The Constitution would be amended, eliminating all references to Indians ;
- b) The Indian Act, which guarantees a number of specific rights, would be repealed ;

31. *MacMillan Bloedel Ltd. v. Mullen et al.*, [1985] 2 C.N.L.R., p. 26.

32. *A Plan for Liquidating Canada's Indian Problem within 25 Years*, 1947, A report to the Parliamentary Joint Committee.

33. *White Paper Policy*, 1969.

- c) The Department of Indian Affairs and its special budgetary appropriations for Indians would disappear ;
- d) Indian Reserves would lose their protected status ;
- e) Full jurisdictional powers over Indians would be transferred to the Provinces.

In a speech made by Mr. Trudeau regarding aboriginal and treaty rights in 1969, he explained the approach.

It's inconceivable, I think, that in a given society one section of the society have a treaty with the other section of the society. We must all be equal under the laws and we must not sign treaties amongst ourselves and many of these treaties indeed, would have less and less significance in the future anyhow, but things that in the past were covered by the treaties like things like so much twine or so much gun powder and which haven't been paid, this must be paid. But I don't think that we should encourage the Indians to feel that their treaties should last forever within Canada so that they be able to receive their twine or their gun powder. They should become Canadians as all other Canadians and if they are prosperous and wealthy and they will be paying taxes for the other Canadians who are not so prosperous and not so wealthy whether they be Indians or English Canadians or French or Maritimers and this is the only basis on which I see our society can develop as equals. But aboriginal rights, this really means saying "We were here before you came and you took the land from us and perhaps you cheated us by giving us some worthless things in return for vast expanses of land and we want to reopen this question. We want you to preserve our aboriginal rights and to restore him to us." And our answer — it may not be the right one and may not be one which is accepted but it will be up to all of you people to make your minds up and to choose for or against it and to discuss with the Indians — our answer is "NO".³⁴

The Federal Government officially shelved the *White Paper Policy* in 1973 following the decision in *Calder v. The Queen*^{34a}. Instead the Trudeau government announced its claims policy which promised negotiations to settle claims on behalf of those Nations who have not entered into Treaty with the Crown and where territory has not been "lawfully extinguished." From the Crown's point of view, lawful extinguishment included lands taken up for settlement by third parties. The starting point for all claims discussion would be the principle of extinguishment: The claim would be settled if the Indian Nations agreed that their aboriginal rights would be extinguished by the settlement. The Indian signatories would be "Canadian, of Indian ancestry"³⁵.

34. Prime Minister TRUDEAU, Remarks on Aboriginal and Treaty Rights, Excerpts from a Speech Given August 8th 1969, in Vancouver B.C.

34^a. *Supra*, note 30.

35. *In All Fairness*, Policy of the Federal Government to settle claims.

The patriation of the constitution provided an ideal moment for Canada to renew and restore its constitutional partnership with the Indian Nations and to protect the promises upon which the country was founded. Instead, Canada would entrench only those rights which they were politically forced to do and they were prepared to preclude Indian rights generally. This fact was demonstrated by the contents of successive drafts of the Canada Bill and the Charter of Rights where from draft to draft, the clause safeguarding aboriginal and treaty rights appeared and disappeared. The most dramatic gesture was in November 1981, when the Federal Government agreed to remove the aboriginal and treaty clause in exchange for a broader Provincial accord³⁶.

In the confidential document prepared after October 1980, entitled *Briefing Material on Canada's Native Peoples and the Constitution*³⁷, the Federal Government's position towards the Indian Nations and the Constitution was revealed. It was to deny to the Indians a position in the Constitutional renewal and promote formal discussions with the Indian Nations after patriation, knowing full well that to do so would pit the Indian Nations against ten hostile Provinces jealously guarding their jurisdiction. Canada feared that the Indian Nations would protest their exclusion from constitutional renewal by making visible their position as a disadvantaged minority :

There is likely to be a major effort by Canada's Native Peoples to win national and international support (especially at Westminster) for their stand against patriation. If the Native Peoples press forward with their plans and if they succeed in gaining support and sympathy abroad, Canada's image will suffer considerably. Because Canada's Native Peoples live as a rule, in conditions which are very different from those of most other Canadians — as sample statistics set out below attest — there would be serious questions asked about whether the Native Peoples enjoy basic rights in Canada :

- Indians have a life expectancy ten years less than the Canadian average ;
- Indians experience violent deaths at more than three times the national average ;
- approximately 60% of Indians in Canada receive social assistance ;
- only 32% of working-age Indians are employed ;
- less than 50% of Indian homes are properly serviced ;
- in Canada as a whole the prison population is about 9% Native, yet Native peoples make up only 3% of Canada's population. In 1977, there were 280 Indians in jail per 100,000 population, compared to 40, the national average.

Native leaders realize that entrenching their rights will be enormously difficult after patriation, especially since a majority of the provinces would have to

36. D. SANDERS, "Aboriginal peoples and the Constitution", 19 *Alberta L. Rev.* 410.

37. Confidential Cabinet Document dated November 1980.

agree to changes which might benefit Native Peoples at the expense of the provincial power. They therefore demand an entrenchment of Native rights *before* patriation.

There was good reason for Canada to prefer to keep buried the record of its treatment of the Indian Nations as a minority group. Under the umbrella of assimilation policies or racism, crucial Indian religious practices were banned by Canada, punishable by imprisonment, for a half a century³⁸. The practice of Indian religion was dealt a blow by the Supreme Court of Canada in the case of *Charlie and Jack v. The Queen*³⁹. The case involved Coast Salish hunters seeking deer to burn for a dead relative who had requested the meat in a visitation to a living relative. The burning is an ancient Coast Salish spiritual practice where specific foods are burned; and through the shaman, communication is conducted from the world of the living to the world of the dead. A shaman had directed the hunters to the place where the deer would be shot and the deer was killed according to the strict rules for the burning which would be conducted by the shaman when the raw deer meat had been produced. In spite of evidence from Elders, the Chief and the Shaman that the hunting was an integral part of the religious practice, and that raw deer meat was required for the burning according to Indian law, the Court defined religion as the ceremony of the burning itself, ruled that there was no evidence that the hunting was religious and outlawed the hunting.

Yet, it was not on the issue of minority rights that the Indian Nations mounted their protest during the patriation debate. The issue was Canada's efforts to disregard their constitutional position and thereby to force the Nations into acceptance of a position as a minority, however protected, within the Canadian federation.

During the constitution debate, Canada used its position as a recognized State to block all Indian efforts to place the issue of Canada's colonization and expropriation of Indian lands before an independent international body. This blocking of the issue has been a manifest tactic employed by Canada since the turn of the century.

In 1906, three Chiefs from British Columbia went to Britain to place their claims before His Majesty King Edward VII. In their petition they complained that the title to their land had never been extinguished; that white men had settled on their land against their wishes and that all appeals to the Canadian Government had proven useless.

38. *Indian Act*, R.S.C. 1927, c. 28, s. 140.

39. (1982) 5 W.W.R. 193 (B.C.C.A.); S.C.C., October 31, 1985, unreported.

In 1909, the Cowichan Indians appealed to the Imperial government to refer the question of the illegal expropriation of their lands to the Judicial Committee of the Privy Council for determination, relying as they did, on the Royal Proclamation of 1763. The matter was not referred to the Judicial Committee. Instead, a Joint Royal Commission on Indian Affairs in British Columbia was established by the Federal Government to examine the unresolved land questions. Although the scope of the Commission could have included the issue of aboriginal title, the Premier of British Columbia refused to discuss the question or support a reference of it by way of stated case to the courts. In 1913 the Nishga Indians further petitioned the King requesting that the question of aboriginal title be submitted to the Judicial Committee of the Privy Council. On June 20, 1914, the Federal Government passed an Order-in-Council agreeing to submit the Indian claims to the Exchequer Court of Canada with the right to appeal to the Privy Council, provided that the Indians agree in advance that if they were successful, their rights would be extinguished and they would accept the Royal Commission findings on the allotment of Reserves. The Indian Nations refused to accept these conditions.

The Royal Commission concluded its work with the reduction of Indian reserve land in British Columbia by 47,058 acres valued at \$1,522,704.00 and the addition of 87,292 acres of new reserves valued at \$444,853.00. The Executive Director of the Allied Tribes in refusing to consent to the Commission's conclusions, stated: "they took away good land and gave us bad land in exchange." Thus, in 1919 and 1926, the Allied Tribes of British Columbia continued to press for a reference to the Judicial Committee of the Privy Council. A special Joint Committee of the Senate and House of Commons was appointed to enquire into this Petition and held that as the Indians were not prepared to accept the reference to the Privy Council on the basis that they would agree to the extinguishment of their claims and accept the findings of the Reserve Commissioners "the matter should be regarded as finally closed."

The following year an amendment was passed to the Indian Act making it an offense punishable by imprisonment, to raise money to press for land claims. The law remained effective for a quarter of a century⁴⁰.

Meanwhile, with the creation of the League of Nations⁴¹, in 1922, Beskahah, a leader of the Six Nations Iroquois Confederacy, petitioned that body alleging a Canadian plan to take over the Six Nations reserve.

40. *Supra*, note 38, s. 141.

41. D. SANDERS, *supra*, note 19, p. 14.

Deskahah spent most of 1923 and 1924 in Geneva meeting diplomats and arguing the Iroquois case. The Governments of both the United Kingdom and Canada went to some length to prevent the questions from ever being discussed within the organs of the League. The Netherlands forwarded the Iroquois petition to the Secretary General, asking that it be communicated to the Counsel of the League. When that initiative had been successfully stalled, four League members, Ireland, Panama, Persia and Istonia revived the question by writing to the President of the Assembly asking that the Petition be communicated to the Assembly and seeking an advisory opinion from the Permanent Court of International Justice. The Opinion was to determine whether the Iroquios were a State and entitled to petition the League. In December of 1923, the Persian member of the League's Council asked that the Iroquois petition be put on the agenda of the Council. Each of those attempts to have the petition considered were stopped by diplomatic intervention. The Government of Canada prepared a reply to the Iroquois allegations, which was published in the official journal of the League. While Deskahah was still in Europe, the Canadian Government dissolved the traditional Council at the Six Nations reserve and established an elected Band Council system. This had the effect of depriving Deskahah of his right to speak for the Six Nations at least according to Canadian law.

In October 1981, 124 Chiefs representing themselves and their Bands joined as plaintiffs in an action lodged in the Chancery Division in London seeking a declaration that the Constitution could not be patriated without the consent of the Indians⁴².

An examination of some critical dates reflects the collaboration of the British and Canadian Governments and British Courts to block the case by passing the Canada Act before the case could be heard.

The request came to Britain December 9, 1981. The Writ was issued on December 10, 1981; the first day possible under law for the case to begin. The Statement of Claim was filed January 22, 1982. On February 25, 1982, an application was made by the Chiefs before His Honour Judge Vinelot seeking a speedy trial. The date of June 8, 1982, was set for the trial. On the first day of the second reading of the Canada Act, February 25, 1982, David Ennals, M.P., urged Parliament to await the decision of the Chiefs' case before passing the Act. On March 17, the Statement of Defence was filed by the the British Government. On March 29, the Canada Act was passed by the British Government. On March 31, the British Government served the Chiefs with a Notice of Motion to strike the case. On April 17, the Canada

42. *Chief Robert Manuel et al. v. A.-G. of England*, [1982] 3 C.N.L.R., p. 13.

Act was proclaimed by the Queen, and on April 20, the British Government brought the case to Court on an application to strike.

Before the passage of the Canada Act, the British Government would be forced to meet the argument that a proper interpretation of the Royal Proclamation, the Treaties, the BNA Act and the Statute of Westminster required Indian consent to the patriation of the Canada Act. Following the passage of the Canada Act, the British Government relied upon the argument that the Court could not look behind the Canada Act to determine the proper consent because the Act is passed by a Parliament possessing supreme powers. The Chiefs were faced with the draconian task of convincing a British Court that the doctrine of parliamentary supremacy had its limitations.

The motive of the British Government in proceeding in this fashion was the subject of a speech by David Ennals, M.P.

Last week Mr. Justice Vinelot ordered the British Government, who had been pleading for more time, to prepare their defence by March 16. The pressure is on the British Government in the same way as the British Government are putting great pressure on us to pass the legislation. Mr. Justice Vinelot said that the Indian case raised issues of great constitutional importance that must be clarified at the earliest moment. He noted that if the Indians succeeded, the Canada Bill would be declared unconstitutional and of no effect. He recognized the supremacy of Parliament but noted that it was the proper function of the courts to interpret that supremacy.⁴³

As expected under the circumstances, the Chiefs case was never heard on its merit.

It is significant that when Canada was pressing for recognition as an independent Nation in the conferences leading up to the passage of the *Statute of Westminster*⁴⁴, the Indian Nations had, by legislation, been precluded from any participation in the conferences or on any issue involving the advancement of land claims, on pain of imprisonment⁴⁵. Throughout the conferences, no mention was made of the Indian Nations. Yet, years later, with the patriation of the Constitution, Canada and Britain successfully argued before the British Courts that with the passage of the Statute of Westminster, the treaties concluded between the Imperial Crown and the Indian Nations devolved to Canada without Indian knowledge or consent. With the ruling that Britain's obligations had devolved to Canada⁴⁶,

43. British House of Commons Debates, February 25, 1982.

44. (1931) 22 George V, c. 4.

45. *Supra*, note 38, s. 141.

46. *Supra*, note 21, p. 892.

Britain acceded to Canada's request to patriate the Constitution over the objections of the Indian Nations.

The *Constitution Act 1982* protects existing aboriginal and treaty rights through Section 35. Section 25 shields those rights from the operation of the Charter of Rights. However, Canada has been arguing in the Courts that virtually no aboriginal and treaty rights are entrenched within Section 35 which have not already been abrogated by legislation prior to 1982 or which are not capable of abrogation. If any rights survive this judicial assault, those rights are forever protected by the ultimate goodwill of the Federal and Provincial Governments, who through the amending formula may diminish, abrogate, extinguish or otherwise change aboriginal and treaty rights in the Constitution without Indian consent. The Indian Nations are afforded a limited consultative status within the amending process by virtue of an amendment to Section 35 which provides that should Canada and the provinces plan to amend Sections 91(24) of the *Constitution Act 1982* or Section 35, a Constitutional Conference would be convened by the Federal and Provincial Governments, with Indian Nations invited to participate in that discussion. Similarly, Section 37 of the *Constitution Act* convenes a Constitutional conference between the Federal and Provincial Governments, with Indians invited to identify and define aboriginal and treaty rights to be entrenched in the Constitution. To date the Indian agenda for the Section 37 Conference, namely governing authority and land rights, has been refused by Canada as a "non-starter", ignored or deflected.

In summary, over the century, and now with the patriation of the *Constitution Act, 1982*, Canada has sought to domesticate the Indian Nations and to bring whatever rights those Nations may possess into a position of minority rights.

Recent cases illustrate the persistent protest by the Indian Nations of Canada's efforts.

Approximately a decade ago, the Norwegian Government announced its intention to construct the Alta Hydro Dam. The construction would flood the remaining territories used by the Sami Indian Nations for reindeer herding. After having participated in a decade of protest, hunger strikes and court cases, the Sami Nation had not succeeded in halting the construction. Nils Sombi, a reindeer herder, set off dynamite to propel industrial flares at the site of the construction of the project. This symbolic protest resulted for him in the loss of an arm and an eye and also in the Norwegian State laying criminal charges against him. He sought political asylum with the Indian Nations of Canada.

In a sacred potlatch, the Nuxalk Nation adopted him and his family. He has lived among the Nuxalk and other Indian Nations for two years. He was ultimately arrested in Lethbridge, Alberta, and a deportation hearing was conducted by Canada. For four days, Indian leaders, elders and social scientists advanced his case against deportation. The case demonstrated the inherent rights of the Nuxalk Nation to determine its membership, the exercise of those laws in adopting Nils Sombi, the harm done to the Nuxalk Nation and the Sami Nation by illegal and destructive colonization of both those Nations. The argument advanced was that as the Nuxalk Nation had never concluded treaty with the Crown, nor consented to Canada's jurisdiction to govern its people and its territory, it was up to the Nuxalk Nation and not to Canada to determine who will be a citizen of that Nation ; it was an aggressive act by Canada to seek to deport a citizen of the Nuxalk Nation against their will.

Although ultimately unsuccessful in preventing the deportation, the Nuxalk Nation, today, continues to exercise their inherent rights to determine their own membership having done so for generations. In challenging Canada in the case of Nils Sombi that Nation made visible nationally and internationally the continued efforts by Canada to colonize that Indian Nation against their will and to expropriate their lands and resources without consent or compensation.

In 1983, members of the Chilcotin and Ulkatcho Nations were stopped by the provincial wildlife officers for hunting. For those Indian Nations, hunting is central to the Indian way of life. People hunt year round for food ; they use the skins for clothing, to make drums. The practices of hunting are taught from generation to generation.

The trial of the hunters was scheduled to convene in Alexis Creek, British Columbia. The Chief's appeared in Court ; the accused did not. The Chiefs speaking through an interpreter in their Chilcotin language advised the Court that they, having been fully advised of the legal consequences of their actions, had advised the accused not to attend in Court. Rather the Chiefs were there to tell the Court that from their point of view the Canadian Court had no jurisdiction over their hunting rights. They had never concluded treaty with the Crown ; they did not accept the decisions of the Canadian Court that provincial Wildlife law may apply to Indians. They were putting the Court on notice that in the future their hunters would not be appearing in Court.

The position taken by the Chilcotin and Ulkatcho Chiefs demonstrates a growing determination and militancy on the part of the Indian Nations in the face of Canadian laws which have been used to abrogate or infringe upon

their rights. This militancy is reflected by the instructions of Indian Nations in their legal defence work. In 1977, the lawyers were instructed by those Chiefs to assist the membership in pleading not guilty. They perceived the gross injustice over the years as many of the Indian hunters and fishermen went before the Canadian Courts and pleaded guilty because they could not afford a lawyer or because they did not understand the legal system. The following year the Chiefs then instructed that the defence should be not guilty; however to be based upon an assertion of rights. The Courts did not and have not adequately responded to the recognition and protection of rights. At this time, the Indian Nations instructed the position that they do not recognize the Court's jurisdiction over them.

The Indian Nations wish to decolonize. They wish a fair and just settlement between themselves and Canada based upon recognition of their rights (and not the extinguishment of them) and based upon co-existence.

Following the second World War, Belgium advanced the case at the United Nations that "non-self-governing territories" included territories with Indian populations within a larger state. If correct, the United Nations would be available to assist in their decolonization. The application of international standards to the treatment of Indian populations was opposed and the General Assembly defeated Belgium's initiative⁴⁷. The Indian Nations will be assisted by the world community in refusing the racism of Canada's position that the Indian Nations should be regarded as a domestic issue and a minority within Canada. The position suggested by Belgium, if promoted, will assist the Indian Nations in marshalling support in the delicate process of their decolonization and the attainment of self-determination and peaceful co-existence within Canada.

47. D. SANDERS, *supra*, note 19.