ABORIGINAL RIGHTS RECOGNITION IN PUBLIC POLICY

A CANADIAN PERSPECTIVE

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INTRODUCTION

The underlying philosophy of Canada's current Indian Act has existed for nearly 250 years, born and nurtured in Canada's colonial past. How can this statute endure today as a product of 18th century colonialism? The attitudes and biases of elected leaders are a major barrier to aboriginal rights recognition in public policy.

In 1968, then Prime Minister Trudeau, speaking about aboriginal and treaty rights, introduced his government's proposal for dealing with the "Indian problem." In his speech, the Prime Minister proposed a set of solutions, saying that his government would recognize "forms of contract (e.g. treaties)" with aboriginal people. Denying the existence of aboriginal rights, he flatly said: "our answer is 'no.'" to aboriginal demands for aboriginal rights recognition and preservation.[1]

In 1975, I met with then British Columbia's Attorney General to discuss aboriginal economic development in northern BC. During our conversation he blurted, "Just because a bunch of Indians wandered up and down the Rocky Mountain Trench for a few hundred years doesn't mean they own it."[2]

Nine years later, at a nationally televised First Minister's conference on aboriginal matters in Canada, BC's Intergovernmental Affairs Minister challenged a young Inuit leader from northern Quebec, with, "Do you mean to say that because you people hunt these animals, you think you own them?" To which the witty leader replied, "You white people think differently. You put fences around animals. Now that I think about it, you even fence your vegetables (Smith 1993, 188)." He might have added, "You fence aboriginal people too --- within reserves and public policy."

Although we expect our leaders and policy makers to be open-minded about aboriginal issues, colonial attitudes about aboriginal people persist. Expecting such leaders to build public policy consistent with constitutionally entrenched aboriginal rights, as now acknowledged by the courts, often seems futile.

Although Canada has an international reputation as treating aboriginal people fairly, it may be undeserved. This paper compares public policy arising from various sources of legislation (e.g. the Indian Act, royal prerogative and the common law) to demonstrate why the struggle for aboriginal rights recognition in public policy has been difficult for Canada's aboriginal peoples.

The historical record on the issue is complex and detailed. Given the scope of the subject, I will be selective in my examples to illustrate how Canada and British Columbia (BC) generally favor legislation and policy that deny or erode aboriginal rights.

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[1] Cumming et al, 1980, 331-332, Appendix VI: Extracts from the Prime Minister's speech on the White Paper (see below), Vancouver BC, August 8th, 1969.
[2] Personal communication, Attorney General of BC, Victoria, BC (1975).

HISTORICAL OVERVIEW

Meaningful aboriginal rights recognition in public policy today is almost impenetrably mired in the events of Canada's colonial era: particularly, the Royal Proclamation of 1763 and ensuing Commissions of Inquiry into Indian Affairs (1828-1858). Although Canada officially gained internal self-government with Confederation in 1867, as regards Indian policy, Canada had yet to emerge from its colonial shadow. Historian Dr. John Leslie has concluded: "the central philosophical assumptions and policies of modern Canadian administration were shaped in the Canada's during the four decades prior to Confederation (Leslie 1985, 185)."

Indian allies were crucial to the British during the Seven Years War, which ended in 1763, and in the War of 1812. Unfortunately for aboriginal people, their strategic value declined immediately thereafter. Seeking to reduce the cost of Indian administration, and to deal with Indian economic and social conditions, the reports of six government commissions of inquiry between 1828 and 1867, 'created a corporate memory and were the main instruments of an early Indian policy review process in the four decades prior to Confederation (Leslie 1985, ii).' The Commissions of Inquiry set out a program for Indian advancement and civilization based on treaties, reserves, religious conversion and agricultural instruction. These early Commission reports,

> Created a corporate memory for the Indian department and established a policy framework for dealing with Native people and issues. The approach became entrenched, like the Department itself, and remained virtually unchanged and unchallenged until 1969, when the federal government issued its white paper on Indian policy (Leslie 1985, 185).

Although challenged in 1969, the 1876 Indian Act philosophy endures into the 21st Century.

This colonial perspective of aboriginal people shifted somewhat after the first and second World Wars as aboriginal veterans returned to Canada. Since 1945, events have led to a marked change in public attitude about aboriginal people. The growing appreciation since 1970 for human rights, aboriginal rights, and the social and economic plight of Canada's aboriginal people have led to renewed efforts by governments to deal with the Indian Act and to 'resolve the Indian problem.' None, thus far, have achieved the expectations of aboriginal people. The reasons are complex and we will examine why this is so.

PUBLIC POLICY

The sources of public policy in the English legal system include royal prerogative, the common law and statute[3] (Morse 1989, 52; see table below). Policy is 'a government plan of action designed to influence future decisions or actions.'[4] Generally, policy is legally

[3] Statute includes constitutional amendments and subordinate legislation. Also, Morse's fourth source of policy, "government practice," will not be discussed in this paper.
[4] Adapted, Funk and Wagnall's (1989, 773).

unenforceable. In this paper, public policy refers to the policies of the federal and provincial governments in Canada.

Royal Prerogative Common Law Statute or Legislation	⇒	Public Policy

Sources of Public Policy In the English Legal System

History shows that government legislation and policy more often erode or deny, rather than recognize, aboriginal rights. The fact that the courts are often the source of recognition further complicates the issue. Paradoxically, a victory in court has sometimes led to erosion or denial of rights through public policy, while a loss has sometimes led to a degree of rights recognition.

Governments recognize aboriginal rights only when forced somehow to do so, or when it is in their interest. The Canadian government has been purposely slow to recognize the special place of aboriginal people in the implementation of public policy initiatives. I will first look at the royal prerogative and its use to further British policy towards Indians.

ROYAL PREROGATIVE

The Royal Proclamation of1763

In1763, King George III exercised his royal prerogative with respect to the governing of British North America. The Royal Proclamation of 1763 included an important section, dealing with Indian people, that still has the force of law today. Its basic purpose appears to have been to set out a procedure "whereby only the Crown could purchase Indian lands, and then only in an open and public fashion (Giokas 1995, 17)":

> And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds … And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our special leave and Licence for the Purpose first obtained (Cummings et al 1980, 291-92).

John Giokas, who studied the Indian Act and its origin, described the Proclamation as a "model for settler/Indian relations that has endured to the present day." He identified three essential elements in the model:

- Centralized control of land cessions;
- [Supposed] long term guarantees to Indians on their lands and resources, especially harvesting rights; and
- To protect Indian autonomy and self-governing status (Giokas 1995, 17-18).

These elements appear in the Indian Act (1876), in subsequent legislation, and in public policy resulting from the legislation.

Opinion differs on the effect of the Proclamation on Indian sovereignty: some say, "that it had restricted legal effect on pre-existing tribal sovereign powers," while others say, "that it was effective to extinguish [tribal powers] in law (Giokas 1995, 18)." In any case, the Royal Proclamation continues to affect court decisions and influence policy makers.

THE COMMON LAW

The Courts

From the colonial period to 1967, aboriginal rights recognition in the courts was almost non-existent. Since 1967, the significant gains in aboriginal rights recognition have occurred because of court decisions. However, legal victories have generally not resulted in corresponding changes in public policy. Sometimes, the public policy result, if any, falls far short of the court victory. Sometimes legislation and policy erode the court victory.

Legislation and policy resulting from court decisions usually occurs after years of negotiations and benefits relatively few tribal groups, bands or aboriginal individuals. The Calder[5] decision and the federal comprehensive land claim policy that resulted from it is an example. The Nisga'a of Northwestern British Columbia filed their case in 1968, got a Supreme Court of Canada decision in 1973, and concluded their treaty with Canada and BC twenty-seven years later in 2000. In this time frame the governments have refused to acknowledge the Nisga'a claim; refused to negotiate; and then negotiated from a non-rights mandate.

Canada's aboriginal people have had great difficulty translating court victories into new legislation (e.g. self-government) and policies.

St. Catharine's Milling (1889)[6]

In this case, the province of Ontario challenged the federal government's right to grant a timber license to the St. Catharine's Milling and Lumber Company. As Morse wrote, "the province of Ontario could succeed in its claim if the Indian interest which had existed earlier in the land in question were an interest less than the full fee simple interest (Morse 1989, 57)." The province succeeded in its claim.

Morse noted that, "the key features of the St. Catharine's case are the fact that the Privy Council recognized the existence at law of an Indian interest in the land in question and attributed the interest solely to the provisions of the Royal Proclamation of 1763 (Morse 1989, 58)."

Although it addressed aboriginal rights, and affected the treaty negotiations process in Ontario, the case does not appear to have resulted in any public policy changes. In other

[5] Calder et al v. Attorney General of British Columbia (1973, Supreme Court of Canada).
[6] St. Catharine's Milling and Lumber Company v. The Queen (1889, Supreme Court of Canada).

words, the St. Catharine's Milling case had limited effect, if any, on the Indian Act, and did not lead to any apparent change in government policy towards Indians. As with subsequent legal precedents, the governments largely ignored it.

Calder et al v. Attorney General of British Columbia (1973)

Having fought since 1878 trying to convince successive governments to recognize and deal with their aboriginal title, the Nisga'a people sued the Attorney General of BC in 1969 for recognition of their rights to land. In January 1973, the Supreme Court of Canada was split:

> Three members of the Supreme Court of Canada agreed that the Nishgas had an existing aboriginal title derived from original occupancy and use; and "three held that whatever title the Nishgas may have had, had since been terminated (Morse 1989, 62, 72)."

As Morse said, "Although the [Nishga] claim was rejected by a bare majority of the Court, six of the seven judges supported the argument that aboriginal title was recognized by the common law of Canada (Morse 1989, 629)." Although initially viewed as a loss for the Nisga'a, aboriginal leaders and the late George Manuel hailed it as a great victory.

The Calder decision convinced Prime Minister Trudeau that the claims of aboriginal peoples to aboriginal title had merit. Within six months, the then Minister of Indian Affairs, Jean Chretien, issued his government's new Comprehensive Claims policy, which included the following:

> "This assurance and the present policy statement signify the Government's recognition and acceptance of its continuing responsibility under the British North America Act for ***Indians and lands reserved for Indians***. The Government sees its position in this regard as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, ***stands as a basic declaration of the Indian people's interests in land in this country*** … (Morse 1989, 630, emphasis added)."

Aboriginal leaders had gained an opportunity to effect change long desired by their predecessors, but questions arose:

- Would the federal government follow through?
- Would the Calder decision influence Indian Act policy, and the policies of other federal departments (e.g. Fisheries and Oceans, Health Canada)?
- What impact would the Calder decision have on provincial land claims policy, especially in British Columbia?

Time proved that inadequacies existed. The dilemma facing the government was described by Professor Morse: 'On one hand, the Department of Indian Affairs had to defend the federal government's authority and purse; on the other hand, its trust relationship under the BNA Act, s. 91 (24) required it to protect "Indians and lands reserved for Indians" (Morse1989, 637).'

Moreover, in 1973 when the Minister declared the government's policy was to "honor lawful obligations," no one knew what it meant. Today it seems to mean, "if in the opinion of a Justice lawyer, the government could lose a case [against] an Indian claimant … then the government has a 'lawful obligation' (Morse 1989, 637)." Morse said, "The whole [comprehensive claims] policy [of 1973] is 'general and undefined' and tends to be too legalistic to permit just and equitable settlements (ibid)."

Other aspects of the policy are confusing and contradictory:

- The research categories (e.g. four confusing types of claims: specific, comprehensive, expropriation without compensation, and 'claims of a different character')
- Research funding (e.g. yearly only, no litigation funding while negotiating, etc.)
- Access to documents (e.g. difficult access to uncensored band files held by government).

Overall, the 1973 comprehensive claims policy has been only marginally successful. For example, until 1992 the policy allowed for one tribal group per region (province or territory) to negotiate at a given time. Initially --- with at least twenty-five potential 'comprehensive land claims' in British Columbia,[7] and perhaps an equal number in three other non-treaty regions of Canada[8] --- aboriginal expectations were high that their claims would soon be resolved.

Progress has been remarkably slow. Between 1973 and the present, about a dozen comprehensive claims agreements have been concluded in Canada.[9] Moreover, while about fifty BC claimant groups have been engaged since 1992 in the BC Treaty Commission process, none seem likely to conclude in the foreseeable future.

Significant as Calder and the resulting claims policy seemed at the time, the thirty-year period since 1973 has seen an exceptional number of aboriginal title and rights court cases. The number and scope of the cases attests to the singular lack of success of the federal government claims policy.

Calder confirmed that while rights recognition in the courts could influence public policy, the disparity between public policy and the legal victory would remain large.

Delgamuukw v. Attorney General of British Columbia (1997)[10]

The Gitksan (neighbors of the Nisga'a) and Wet'suwet'en peoples filed a major title and rights action in the Supreme Court of BC in 1984.[11] The chiefs asked the Court for

[7] Some 200 First Nations, in about twenty-five tribal groupings (including the Nisga'a), reside in British Columbia. The 1973 policy limited negotiations to just one BC tribal group (the Nisga'a). The 1992 BC treaty process allows First Nations or tribal groups to negotiate.

[8] Northern Quebec, Northwest Territories, Yukon Territory.

[9] Cree-Naskapi Act; James Bay and Northern Quebec Act; Gwich'in Act; Nunavut Act; Inuvialuit Act; Committee for Original Peoples Entitlement (COPE); Yukon First Nations Acts (some Yukon First Nations have yet to conclude Final Agreements); Inuit Tapirisat of Canada; Nisga'a Act (Carswell 1999, iii-iv).

[10] Delgamuukw v. The Attorney General of British Columbia (1997) 3 S.C.R. 1010 (S.C.C.).

[11] The author was president of the Gitksan-Wet'suwet'en Tribal Council from 1981-87, and an expert witness at trial.

recognition of their interest in 58,000 square kilometers of land. The chiefs sought a court resolution, in part, because of the failure of the Comprehensive Claims policy:

- BC government policy denied the existence of aboriginal rights and title;[12]
- The Gitksan could not negotiate a settlement of their land claim, although Canada had accepted their claim as valid in 1977.[13]
- The federal and provincial governments were using the courts to erode the content of aboriginal rights and title;
- The 1983 First Minister's Conference[14] revealed that future FMC's would not necessarily result in the type of public policy desired by aboriginal people.[15]

The Delgamuukw trial began in May 1987 and concluded three years later in June 1990. Chief Justice Allan McEachern delivered his Supreme Court of BC decision in the spring of 1991. He ruled that aboriginal title in BC had been extinguished.

The Gitksan and Wetsuweten appealed McEachern's decision to the BC Court of Appeal, and the Supreme Court of Canada (SCC) decided the case in December 1997. The case is significant: first, for the nature of the rejection by McEachern's decision; and secondly, for the nature and extent of the constitutional right of aboriginal title recognized by the Court.

The rights and title roller coaster of losses and victories ridden by the Gitksan and Wetsuweten between 1991 and 1998 is well known. That the case significantly reversed at least one important BC government policy is not widely known.

Joseph Trutch, a 19th century BC lands commissioner, established and entrenched BC's colonial policy on aboriginal title and rights in the late 1860's. His legacy of denying the existence of aboriginal title and rights remained unaltered for 130 years.

Just days before Chief Justice McEachern handed down his decision in 1991 the British Columbia government announced it would participate in tripartite treaty negotiations with the Nisga'a Tribal Council and in the establishment of a BC Treaty Commission. This was not mere coincidence. Provincial government concern about Justice McEachern's impending judgment and mounting public opinion led to BC's policy reversal. Nine years later, on May 11, 2000, the Nisga'a signed a treaty with Canada and BC, the first BC tribal group to do so since Trutch's 1860's policy.[16]

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[12] At the time, the provincial government refused to negotiate with the Nisga'a. Thus, Gitksan/Wetsuweten negotiations, if any, could only have been with the federal government.

[13] Federal claims policy recognized just one British Columbia claimant, the Nisga'a, and federal negotiations with the Nisga'a were at best halfhearted.

[14] The First Ministers include the Prime Minister of Canada and the provincial and territorial premiers.

[15] Gitksan/Wetsuweten hopes for the FMC process were shattered. First, most First Ministers were obviously stonewalling aboriginal leaders on FMC agenda items; secondly, many lawyers advising the First Ministers were also opposing aboriginal people in the courts.

[16] Treaty 8 was an exception and mostly dealt with prairie tribal groups that extended into BC. BC did not participate in the negotiation of the Treaty 8 until the year 2000 when BC signed an adherence to Treaty 8 with the McLeod Lake First Nation.

Furthermore, the proliferation of court cases throughout the 1980's in BC, forced the senior governments to establish the British Columbia Treaty Commission (BCTC) in 1992 to negotiate settlements with BC's aboriginal nations. This 'made-in-BC' treaty process replaced the federal Comprehensive Claims policy in BC. It was significant because the provincial government participated.

Given the nature of the Delgamuukw court victory in 1997, we might have anticipated new public policy initiatives in several important new areas. The Court,

- Created two categories for analyzing the Crown's fiduciary duty:
  - The "form" the duty takes;[17]
  - The degree of scrutiny imposed;[18]

- Recognized three fundamental aspects of aboriginal title:
  - The right to exclusive use and occupation of land;[19]
  - The right to choose uses for the land-consultation and consent;[20]
  - The right to the economic component of the resources;[21]

- Strongly stated the Crown's duty to "negotiate in good faith."

The governments have utterly failed to produce clear policies on consultation, compensation and good faith negotiations based on the Chief Justice's guidelines in Delgamuukw. In fact, in post-Delgamuukw cases, the province has boldly sought to limit its duty to consult. It has denied it has any responsibility to compensate for issuing tenures on lend held by aboriginal title. It has denied it has any duty to negotiate, let alone to do so in good faith.[22]

Having briefly addressed the royal prerogative and the common law, we now look at some statutory provisions as another example of the government's failure to legislate real public policy directives for aboriginals.

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[17] The 'form' could be consultation, ensuring that there is as little infringement as possible, providing compensation, and so on (Imai 1999, 440).

[18] There can be a range of standards in government responses to the Aboriginal interest (e.g. an absolute priority for food fishing, as in Sparrow, or "take into account" the aboriginal interest, as in Gladstone (Imai 1999, 440).

[19] Infringing the right to exclusive use should be based on 'the less stringent test suggested in Gladstone (Imai 1999, 240).

[20] Addressing the right to choose through the form of consultation may satisfy the fiduciary duty. The degree of consultation would depend on the circumstances (Imai 1999, 441).

[21] The form of the fiduciary duty will have to address the economic component through "fair compensation" (Imai 1999, 441).

[22] See in particular Taku River Tlingit First Nation v. Ringstad et al (BC Court of Appeal, Jan. 31, 2002), which affirms that the government has fiduciary duties towards Aboriginal people when it is making decisions that will affect their way of life or Aboriginal rights. This decision finally puts an end to the position put forward by the BC Government against First Nations --- that the government has no legal obligations until there is a court decision declaring the existence of Aboriginal rights (Pape and Salter, Feb. 5, 2002).

STATUTE

Constitution Act 1867[23]

Section 91 of the Constitution Act, 1867 set out the legislative authority of the Senate and House of Commons to make laws for the "peace, order and good Government of Canada (Carswell 1999, 405)." The Act contained 29 classes of subjects, including part 24: "Indians, and Lands reserved for the Indians (Carswell 1999, 406)."

Indian leaders knew that the Imperial Crown intended to transfer Indian Affairs to the Province of Canada, and were generally opposed to it:

> The Imperial Gov't is unwilling to find us officers as formerly and withdraw wholly its protection we deem that there is sufficient intelligence in our midst to manage our own affairs (Giokas 1995, 32 after Thorburn).

Aboriginal leaders of the day had every reason to be concerned about the Constitution Act, 1867 for, as Giokas wrote:

> From this point on, the authorities entrusted with managing relations with the Indians of Canada could no longer be accurately described as disinterested or neutral. They were "local' in a political as well as in a geographic sense. In practice, this meant that their decisions came to reflect less the attempt to balance Aboriginal and non-Aboriginal interests that had characterized much of British Imperial management of Indian affairs ***than the direct or indirect acquisition of dominance over Indian nations to the direct benefit of the non-Indian settler society that would ultimately emerge in 1867.*** The British Parliamentary Select Committee on Aborigines in its 1837 report had predicted such a development and had advised against it, but Parliament had ignored the warning (Giokas 1995, 32 emphasis added).

Parliament combined their intentions, and all previous legislation, into the Indian Act, 1876.

Indian Act (1876)

Section 91 (24) of the Constitution Act, 1867 gave exclusive authority to the federal government to legislate for "Indians and lands reserved for Indians (Imai 1999, 311)." The government (faced by additional Indian nations coming under federal legislation with the addition of western provinces after 1870) consolidated all previous legislation in the 1876 Indian Act.

Indian policy was clear, as expressed by David Laird, Minister of the Interior, when introducing the 1876 Act in Parliament: "the Indians must either be treated as minors or as white men (Giokas 36)." The 1876 Annual Report of the Interior continued, "it is clearly our wisdom and our duty, through education and other means, to prepare [Indians] for a higher civilization by encouraging [them] to assume the privileges and responsibilities of full citizenship (Giokas 1995, 36-37)."

[23] An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for the purposes connected therewith (Carswell 1999, 405).

The legislation introduced 'protective assimilation' in the form of the reserve system of land tenure and elected band councils. Wayne Daugherty referred to the "paradox" of Canadian Indian policy: "On the one hand, it continued the protective or guardianship policy of the colonial period; on the other, it proposed to assimilate the Indian, hopefully on the basis of equality, into mainstream society (Daugherty 1980, 1)."

Indian Act (1951)

By the end of WW II, Parliament and Canada were becoming "human rights conscious (Giokas 1995, 55 after Blackamore)." Thus, the end of WW II marked growing public awareness of the nature of Indian life and conditions. Personnel changes occurred at the Indian Affairs Branch, with corresponding changes in internal policy. Thereafter, Branch officials began to place increased emphasis on cooperation and consultation with Indians.

In 1947, the government struck a Joint Senate/Commons Committee to examine eight topics (Giokas 1995, 55):

- Treaty rights and obligations
- Band membership
- Indian liability to pay taxes
- Voluntary and involuntary enfranchisement
- Indian eligibility to vote in federal elections
- Non-Indian encroachment on reserves
- The operation of Indian day and residential schools
- "Any other matter or thing pertaining to the social and economic status of Indians and their advancement which … should be incorporated in the revised Act."

The Joint Committee deliberated while aboriginal leaders throughout the country maintained "a consistent focus on fundamental questions of the political relationship between Indians and the federal government, such as respect for treaties and aboriginal rights and an end to the domination of reserve life by government and bureaucrats (Giokas 1995, 59)." Despite their good intentions, the Committee walked the familiar road of rights erosion; aboriginal people, seeking rights recognition, followed another.

Following extensive aboriginal submissions, the Indian Act of 1951 differed little from the Act of 1876, with its "principal novelty being a new definition of 'Indian' (Giokas 1995, 64 after Leslie)." Nine years later in 1960, however, Parliament did grant the federal franchise to Indians. Almost a century after Confederation, aboriginal people had finally won the right to vote.

Canada Act 1982

One day after my election as leader of the Gitksan and Wetsuweten peoples in November 1981, Nisga'a leader James Gosnell invited me to participate in a major gathering of aboriginal leaders in Ottawa. Our purpose was to convince the Prime Minister that Canada's aboriginal people had the right to participate in the imminent First Minister's constitutional conferences. We were successful.

It is probably the case that the most profound change in public policy in the history of Canada's aboriginal peoples was the inclusion of Sections 35 and 37 in the Constitution Act, 1982, and the constitutional protections it set off --- not all of which are fully realized.[24] Section 35 recognized that our rights existed (but did not define them), and defined aboriginals, as:

> 35(1) the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

Section 37 established a process by which we could entrench our aboriginal rights in the constitution:

> 37(1) a constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister within one year after this part comes into force.
>
> 37(2) The conference convened under Subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item (Morse, 1989, 85).

The April 1983 First Ministers Conference met with limited success, and even then, perhaps more so in process than substance. Given the outcome of the 1983 FMC, and recognizing the magnitude and complexity of the task, Prime Minister Trudeau scheduled three further FMC's (1984, 1985, 1987). Prime Minister Mulroney presided over a fifth FMC in 1992, with aboriginal leaders present and participating.

The importance of section 35 cannot be under-stated. Although it has not lead to major changes in public policy directly, it has forced governments to deal seriously with the concerns of aboriginal people. The governments have been reluctant to create public policy consistent with pre-1982 court decisions. Thus, section 35 has not only made it possible for the courts to decide post-1982 rights cases in favor of aboriginal people, it has created an important window of opportunity whereby the courts frequently instruct inflexible governments how to deal with aboriginal concerns (i.e. consultation, compensation, etc.).[25]

It is worthwhile listing the government's view of how section 35 has benefited aboriginal people:

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[24] Sections 15, 25 and 28 (Charter of Rights and Freedoms) of the Canada Act, 1982 also have important implications for aboriginal people.

[25] As in the Delgamuukw (1997), Luuxhon (1999), Taku River Tlingit (2002), and Haida (2002) cases with regard to the "duty to negotiate in good faith," and the "duty to consult."

- Aboriginal rights are legally enforceable rights recognized by Canadian common law, which have been recognized and affirmed by section 35.
- The rights arise from the customs, practices and traditions practiced by Aboriginal peoples before the arrival of the Europeans, including their prior use and occupation of land and resources.
- Section 35 rights are collective, in the sense that an aboriginal community holds the rights, even for rights commonly enjoyed by individuals (e.g. fishing rights).
- Treaty rights arise from solemn agreements between aboriginal peoples and the Crowns representatives. Treaties can be historic … or modern.
- Section 35 clarifies that rights created or recognized through modern land claims settlements are also protected as treaty rights.
- Section 35 marked a major change in the law, and since 1982, imposes an onerous burden on both provincial and federal governments to justify infringements of aboriginal and treaty rights.
- Where infringements can be justified (e.g. resource conservation, national interests), compensation may be required to affected aboriginal groups (Canada 2001, 3-4).

As the memorandum stated, "Many legal issues remain in evolution (e.g. scope and content of inherent right of self-government, identity of persons entitled to enjoy rights, calculation of compensation for infringement of rights, etc.).

The government of Canada itself recognizes, in its media and public relations information, that: 'Overall, the courts have moved towards a broader expression of Aboriginal rights, providing greater clarification on the nature of the government's relationship with aboriginal people (Canada 2001, 7)."

This statement is certainly true, as evidenced by the recent Taku River Tlingit case (see footnote # ? above) and another BC Court of Appeal case just decided, the Haida Nation case.[26] These court "clarifications" have yet to give rise to new public policy initiatives consistent with aboriginal expectations.

Meanwhile, the British Columbia government is being forced by the courts to address aboriginal concerns. With continued persistence, aboriginal people may eventually translate court victories and the protections afforded by section 35 of the Constitution Act, 1982 into meaningful public policy. Although that day has yet to arrive, the recent BC Court of Appeal decisions are using very strong language to tell the BC government it cannot continue to ignore Delgamuukw.

[26] Haida Nation v. BC and Weyerhauser (Feb. 2002). In a unanimous decision, the BCCA ruled in favor of the Haida Nation in their challenge to the legality of Tree-Farm Licence 39 (TFL), granted by the Province to Weyerhauser. The Court ruled that the replacement of this licence was done illegally, because the Haida Nation had not been consulted and their interests had not been accommodated. The court declared the Province owes an enforceable legal and equitable duty to accommodate the Haida title and rights … and that the obligation goes well beyond consultation. The Court ordered that a Supreme Court Judge supervise … negotiations accommodating the Haida interest and rights in respect of this TFL (Louise Mandell summary, Feb. 27, 2002).

Royal Commission on Aboriginal Peoples (RCAP)
Canada created this Royal Commission during a time of growing unrest amongst the aboriginal peoples of Canada in the early 1990's. It's purpose was to, "... help restore justice to the relationship between aboriginal and non-aboriginal people in Canada, and to propose practical solutions to stubborn problems …(RCAP Highlights 1996, ix)."

It was a massive, costly and time-consuming undertaking. The commissioners began work in 1991, and concluded Canada-wide hearings and consultations in 1995. RCAP "held 178 days of public hearings, visited 96 communities, consulted dozens of experts, commissioned scores of research studies, [and] reviewed numerous past inquiries and reports." The final report is five volumes. Their central conclusion is simply summarized as, "The main policy direction pursued for more than 150 years, first by colonial then by Canadian governments, has been wrong (RCAP Highlights 1996, x)."

RCAP based its more detailed summary and recommendations on the assumption that Canada can reverse its long-standing assimilation policy. The ink was barely dry on the Commission's report before Canada 'shelved' the more-substantive RCAP recommendations in favor of recommendations. Instead, Canada announced "Gathering Strength" in response to the RCAP report. Gathering Strength was touted to be,

- A medium-term plan leading to a longer term vision of stronger people, communities and economies;
- An early investment in healing and reconciliation [that will allow Canada] to begin tackling the tough issues of governance and accountability;
- Partnerships [between First Nations and Canada] leading to initiatives that contribute to the health and self-sufficiency of aboriginal communities (Canada 2001, 12).

The federal government seemed committed to "Reconciliation and resolution to bring closure to historic grievances (Canada 2001, 14)." Given the failure to implement the more substantive RCAP recommendations, aboriginal leaders questioned whether the political will existed for the government to create change where it mattered the most. There was no legislation and no new policy that recognized First Nations special place in Canada. RCAP was buried.

First Nations Governance Initiative, 2001
Many First Nations leaders resorted to operating outside the Indian Act to effect change. The problem with the present legislation was that:

- Band councils did not have clear legal authority necessary to run the community
- Band councils were legally accountable to the Minister, not Band members
- Leadership selection was outdated practically and legally[27]

[27] E.g. the Corbiere decision allows off-reserve band members to participate in band elections (Corbiere v. Canada, S.C.C. 1999).

As part of Gathering Strength, the Minister of Indian and Northern Affairs Canada announced in 2001 that he would hold extensive community meetings Canada-wide on three core subjects:

- Legal standing and authorities
- Accountability
- Leadership selection and voting rights

Sixty years of experience (since the 1969 White Paper) has proven that Canada's efforts to unilaterally change the Indian Act will meet with general opposition from aboriginal people. Most provincial and national aboriginal leaders want change on a nation-to-nation basis, not incrementally. When the Minister publicly announced his intention to address the above three issues, he met widespread opposition.

Notwithstanding the opposition, the Minister proceeded to hold community consultations between May and November 2001. It now seems this initiative will lead to what may amount to the first changes to the Indian Act since 1951. Although the process has been controversial, and the proposed changes are minor,[28] they may signal a turning point in Canada's relationship with aboriginal people, if not with regard to policy consistent with recent court decisions, at least with regard to the Indian Act.

A single statute defines the sorry history of the relationship between aboriginal people and the federal government: the Indian Act. Its underlying philosophy has not changed for 125 years. A second statute, the Canada Act 1982 provides a constitutional framework for change that has yet to be realized. Legislators have not had the courage or will to introduce legislation and policy consistent with the revised constitution, and aboriginal people, when confronted with legislative change (to amend the Indian Act, for example) have resisted.

SUMMARY

In the years leading up to, and following, the Royal Proclamation of 1763, the Crown created legislation and policy to advance the economic and colonial interests of England. When their military value as allies diminished, aboriginal people were deemed children and ignored. The fathers of Confederation firmly entrenched this colonial philosophy in the 1876 Indian Act. Features of this philosophy survive today in the 1951 Indian Act.

Although acknowledged in 1763 as having rights in international law, successive federal and provincial governments have worked to erode the title and rights of aboriginal people.

The challenge for Canada's aboriginal people has been to convince the governments that their rights must be given effect in legislation and policy. The onus has fallen to aboriginal people to assert their rights and to force legislators to recognize the special place of aboriginal people in Canada. Governments do not have the will to develop the

[28] Canada would amend the Indian Act, providing bands with: the legal authority to enter into contracts; accountability to their members (rather than the Minster); new leadership selection provisions.

appropriate legislation and policy to give meaningful effect to the land and self-government rights of aboriginal people. They are reluctant to act against public opinion.

The courts have had to tell reluctant governments that the rights entrenched in the Constitution must be recognized in policy. An editor writing about a recent BC Court of Appeal decision candidly said:

> [I]ts a wake-up call to those who think the province can magically return to the kind of prosperity realized under [former Premier] W.A.C. Bennett without first addressing the fundamental issue of aboriginal rights. That prosperity was achieved in an era when government could ignore First Nations that were inconvenient to the plans of industry and government….
>
> Court case after court case has affirmed that the proper resolution of First Nations grievances is through negotiation, not litigation and, in the interim, **government must consult with First Nations in forming policy governing resource use on lands in dispute…**
>
> None of us can move forward unless we begin to agree about what's to be done and how to achieve it.[29]

Canada is recognized internationally as being enlightened in its treatment of aboriginal people. But the reality is that Canada's public policies do not come close to recognizing the special place of aboriginal people in the Canadian social fabric. Nor do these policies acknowledge land and self-government rights.

The governments must move beyond denying aboriginal rights and title to a more enlightened position of inclusion and protection of aboriginal cultural values, economies and land entitlement. Concretely, this can only be implemented by a very major shift in government policy. Court victories and legislation point the way generally and legally but the changes must be implemented on the ground with clear, specific, legally relevant policy initiatives.

The constitutional and legal framework now exists for governments in Canada to implement the appropriate public policy that would allow an opportunity for aboriginal people to be self-reliant, self-governing entities in Canada. The government needs the political will to do it.

[29] Editor. "Haida claim emphasizes need for serious negotiations." Vancouver Sun, March 7, 2002, page A10 (emphasis added).

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