SUBMISSIONS
TO THE
RUSSELL TRIBUNAL

Presented by the
Union of B.C. Indian Chiefs

November 1980

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I. The Sacred Trust of Civilization

In the 18th Century, the international law principle of the sacred trust of civilization was developed. In the League of Nations this principle was manifested in the Mandate System, whereby the Mandatory powers were said to administer colonial territory "in trust for the people under their control."[1]

However, the principle of the sacred trust of civilization did not have its origins in the League of Nations and the Mandate System. The principle can be traced at least to the era of Francisco de Vitoria[2] (16th Century) during the Spanish colonization of the New World. Most importantly the principle is an expression of the obligation of conquering powers to treat indigenous peoples in a way which promotes their well-being and self-determination.

The Berlin Conference held in 1884-85 is testimony to the tacit agreement of the European powers to this sacred trust.

In November 1884 the European powers, including Great Britain assembled in Berlin for a Conference to discuss problems relating to the affairs of the African continent. The purpose was to avoid inter-European anarchy in the exploration of Africa.

In the course of discussions it was made clear that the normal title of acquisition of territory by European

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[1]The European-African confrontation, Charles Henry Alexandrowicz; A. W. Sijthoff, Leiden, 1973.

2"De Indis," "De Jure Belli", Classics of International Law (E. Nys ed., Oceana Publications, New York: 1964)

powers was the bilateral treaty and not discovery or unilateral occupation. Africa was not to be presumed territorium nullius, but a country ruled by a complex of political entities which were governed by sovereign rulers and chiefs.

Debates at this conference concerned various conceptions in international law, the classic one being the rule of law of nations, according to which freedom of consent to the transfer of territory from the original inhabitants to the new rulers was to be done with consent. This consent was sacrosanct.

As was stated by John Kasson, the U. S. delegate:

> "Modern international law steadily follows the road which leads to the recognition of the right of native races ... to dispose freely of themselves and of their hereditary soil ... a principle looking to the voluntary consent of the natives of whose country possession was taken (by treaty) in all cases when they may not have provoked the act of aggression."[2]

While this declaration was ultimately not ratified by the Britain Conference, the principle of voluntary consent was "at least tacitly accepted by the conference."[3]

These statements concerning modern international law and aboriginal peoples did not apply to Africa alone. Indeed Indian law "originated, and can still be most clearly grasped, as a branch of international law".[1] Forty-seven years prior to the Berlin Conference, in 1837, a Select Committee was appointed by the House of Commons to consider the measures to be adopted with regard to the Native

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[1]The European-African Confrontation, Charles Henry Alexandrowicz; A. W. Sijthoff, Leiden, 1973.

[2]Alexandrowicz, page 47.

[3]"Treaty making in Africa" in Georgraphical Journal, January, 1893.

[4]Cohen, "The Spanish Origins of Indian Rights in the Law of the United States," (1942) Geo. L. J. 1, at page 17.

inhabitants of countries where British settlements are made. The Select Committee's report was published June 26, 1837. On the basis of national interest, even in its narrowest sense, and on the basis of a high moral order, no encroachments on the territory or disregard of the rights of the aboriginal inhabitants of countries, including what is now Canada, was to be allowed. General regulations were set out in the report. The protection of the aborigines was considered a duty

> "peculiarly belonging and appropriate to the executive government, as administered either in this country (Great Britain) or by the Governors of their respective colonies. This is not a trust which could conveniently be confided to the local legislatures."

The obvious conflict of interest between the claims of the Native tribes and the local legislatures was acknowledged, and "whatever may be legislative system of any colony, we therefore advise that, as far as possible, the aborigines be withdrawn from its control." No law which affected the original inhabitants would take effect against them unless expressly sanctioned by the Queen. Any acquisition of property from the original inhabitants by Her Majesty's subjects was declared illegal and void. The report also commented on the inherent inequality in the bargaining positions, with respect to treaties, between the Crown and the native tribes.

Turning to the International covenants in the United Nations, we again find numerous references to the sacred obligation of nations, references, we submit, which enshrine the trust which existed prior to British colonization in Canada.

In the Charter of the United Nations (recognized by both Canada and Great Britain) Chapter XI has a "Declaration Regarding Non-Self Governing Territories". This chapter recognizes that the members of the United Nations:

> "Accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present charter, the well-being" of the inhabitants of territories whose people have not yet attained a full measure of self government:
>
> (a) to assure, with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement, their just treatment and their protection against abuses;
>
> (b) to develop self government, to take due account of the political aspirations of the peoples and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of development."

Similar provisions are contained in Chapter XII, which establishes the international trusteeship system. While Canada is not a trust territory, being a member of the United Nations, nevertheless there is a recognition of the common principles of international law involved in the trusteeship system.

The Universal Declaration of Human Rights (adopted by both the United Kingdom and Canada) Article 17 states:

> (2) No one shall be arbitrarily deprived of his property.

The Declaration on the Granting of Independence to Colonial Countries and Peoples was adopted by the United Nations General Assembly in resolution 1514 (XV) December 14, 1960. The United Kingdom is conspicuous

as having abstained from the voting on this declaration.

This declaration affirms:

> "The peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law."

Therefore, it is declared that:

> "2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

Further, the repressive measures of all kinds directed against dependent peoples shall cease. There is a recognition of the territorial integrity of the peoples whose self-determination is recognized.

The International Covenant on Economics, Social and Cultural Rights in Article 1 also confirms that all people have the right of self-determination. The ability of all people to freely dispose of their wealth and resources is also confirmed. Canada and the United Kingdom have ratified this covenant as of May 19, 1976.

Article XII states:

> "that the populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national law and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations. When in such case removal of those populations is necessary as an exceptional measure, they shall be provided with lands occupied by them, suitable to provide for their present needs and future development."

It is informative that the Canadian representative at the Conference objected to the competence of the Organization to consider these questions, and abstained on the final vote.

In 1957, the International Labour Organization adopted a convention concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries.[1] Article XI of the convention states:

> "the right of ownership, collective or individual, of the members of the population concerned over the lands which those populations traditionally occupy shall be recognized."

In the South-West African Cases, Ethiopia and Liberia commenced an action against South Africa for breach of obligations connected with its mandatory powers. The International Court of Justice dismissed their claim on the basis of "locus standi", but in doing so, the court recognized the sacred trust of civilization.

> "The sacred trust, it is said, is a 'sacred trust of civilization'. Hence, all civilized nations have an interest in seeing that it is carried out. An interest, no doubt; but in order that this interest may take on a specifically legal character, the sacred trust itself must be or become something more than a moral or humanitarian ideal..."[2]

In our submission, it is impossible to maintain, in light of the international commitments outlined above, that the Mandate System is the only judicial expression of the sacred trust of civilization.

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[1] International Labour Conference, Record of Proceedings, 40th Cession (Geneva 1957)

[2] (1966) ICJ Rep. 6;65 (1) AJIL 149

It is submitted that the sacred trust was incorporated into and elaborated by Great Britain's colonial policies towards the Indians in the country now called Canada. The Royal Proclamation of 1763, the treaty-making, the special relationship between the Indians and the British Crown are all manifestations of a pre-existing sacred trust. This trust continues to bind Britain in its obligations to the Indians. As a member of the international community, Canada is also bound to conduct its affairs in keeping with the trust.

International law has for its ultimate function the preservation of the rights of the inhabitants of one political community against the encroachments of another political community.[1] The key is equity. All treaty arrangements and settlements proceed on the basis of equitable assumptions.

British Law gives the sovereign broad powers of conducting international affairs, including making treaties. This is done through the instrument of a Royal Proclamation. The Crown is subject to international law in exercising this prerogative.

We will review the nature of the relationship between Britain and the Indians, as it has developed and as it exists today. The thread which connects this relationship which extends over three centuries is the sacred trust. We will show that there have been betrayals of the trust in the past; however, the final betrayal which cannot be broken is the attempt by the Canadian government to obtain from Britain a patriation of the Canadian constitution in extinguishment of Indian rights and status.

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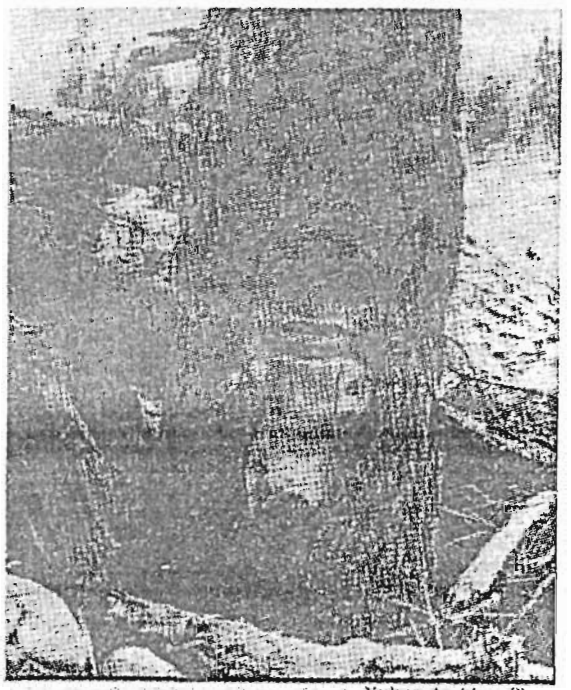
[1] Cohen, "The Spanish Origins of Indian Rights in the Law of the United States," (1942) Geo. L. J. 1 at p. 17

We were the richest people in the world, we didn't have a penny in our pocket, but we were the richest people in the world. We had everything: we had game, we had fish, we had everything. Everything was just natural, that's what we're fighting about.

Sam Mitchell, Fountain Band



Yukon Archives Photo

TLINGET TREE CARVING indicating tribal land area.

The foundation of our peoples to the land is the foundation of our sense of identity.

It is on the land that we recover a sense of who we are,

ii.

What are the Obligations ?

Great Britain began to explore the land known as Canada and to strengthen her empire through the riches of the country. To create settlements in Canada she had to reach agreement with the Indian Nations who claimed the land and resources as the original inhabitants. In so doing she created obligations to the Indian Nations.

We summarize at the outset the fundamental obligations which Great Britian undertook toward the Indian Nations in order that British settlement could occur in Canada. The obligations are contained in numerous Royal Instruments and directions. The obligations are:

(a) That title to Indian land would only be extinguished, by consent;

(b) That title would be ceded through a fair and open process; once title was ceded, the parties agreed that the obligations would continue to bind them forever.

(c) That, in dealing with the Indian Nations in Canada, The Royal Majesty agreed to continue to treat Indian Nations as protected people with collective national status, amounting in modern terms, to a recognition to the right to self-determination.

(d) That the Treaties, entered into between the Royal Majesties and Indian Nations are legally binding agreements with consequences in international law.

We will fully elaborate the events and documents which demonstrate these obligations.

(a) Indian Lands, unceded, are reserved for Indians and are not available for this disposition

This solemn undertaking by the Royal Majesty has been continuously referred to and reconfirmed in laws spanning over 200 years.

In the Articles of Capitulation of Quebec 1759 between Great Britain and France, Great Britain pledged in Section 40 of the Articles that the Indian allies would be protected in lands which they occupy.

Article 40

> The savages or Indian Allies of His Most Christian Majesty, shall be maintained in the lands they inhabit, if they choose to remain there; they shall not be molested on any pretense whatsoever, for having carried arms, and served His Most Christian Majesty; they shall have, as well the French, liberty of religion and they shall keep their missionarys. The actual Vicars General, and the Bishop, when the Episopal See shall be filled, shall have leave to send to them new missionarys when they shall judge it necessary. - "Granted, except the last article, which has 'been already refused.'"

British Policy was formally codified and set out in the Royal Proclamation of October 7, 1763, which provided:

> 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 Protaction, 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; We do therefore, with the Advice of Our Privy Council, declare it to be Our Royal Will and Pleasure, that no Governor or Commander in Chief in any of Our Colonies of *Quebec*, *East Florida*, or *West Florida*, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also, that no Governor or Commander in Chief in any of Our other Colonies or Plantations in *America*, do presume, for the present and until Our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the *Atlantick* Ocean from the West and North-West, or upon any Lands whatever, which not having been ceded to or purchased by Us as aforesaid, are reserved to the said *Indians* or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under Our Sovereignty, Protection, and Dominion, for the Use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West, as aforesaid; 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 especial Leave and Licence for that Purpose first obtained.

And We do further strictly enjoin and require all Persons whatever, who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

And whereas great Frauds and Abuses have been committed in the purchasing Lands of the *Indians*, to the great Prejudice of Our interests, and to the great Dissatisfaction of the said *Indians;* in order therefore to prevent such Irregularities for the future, and to the End that the *Indians* may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent; We do with the Advice of Our Privy Council, strictly enjoin and require that no private Person do presume to make any Purchase from the said *Indians* of any Lands reserved to the said *Indians*, within those Parts of Our Colonies where We have thought proper to allow Settlements; but that if, at any Time, any of the said *Indians* should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some Publick Meeting or Assembly of the said *Indians* to be held for that Purpose by the Governor or Commander in Chief of our Colonies respectively, within which they shall lie; and in Case they shall lie within the Limits of any Proprietary Government, they shall be purchased only for the Use and in the Name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose: And We do by the Advice of Our Privy Council, declare and enjoin, that the Trade with the said *Indians* shall be free and open to all Our Subjects whatever; provided that every Person, who may incline to trade with the said *Indians*, to[1] take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of Our Colonies respectively, where such Person shall reside; and also give Security to observe such Regulations as We shall at any Time think fit, by Ourselves, or by Our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the Said Trade; And We do hereby authorize, enjoin, and require the Governors Commanders in Chief of all Our Colonies respectively, as well those under Our immediate Government as Those under the Government and Direction of Proprietaries to grant such Licence, without Fee or Reward, taking especial care to insert therein a Condition, that such Licence shall be void, and the Security forfeited, in case the Person to whom the same is granted, shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.

The Royal Proclamation of 1763 was presented to the Indian Nations by the Royal Majesty in the form of a binding offer to protect Indian lands (as defined in the Royal Proclamation) and to protect the Nations generally. This offer of protection became formally binding on Britain as it was accepted and relied upon by the Indian Nations. We submit that these binding obligations were consistent with to the obligations assumed by Britain under the Sacred trust of civilization.

One clear reflection of these representations made to the Indian Nations by Great Britain is found in a document entitled "To the Chiefs and Warriors, defeated by the confederated Indian Nations of the Ottawas, Chippeways, Potowatamies, Hurons, Shawanese, Delawares, Turturs, and the Six Nations" Montreal, March 10, 1771. Her Majesty the Queen convened Indian Nations in response to political pressure by the Indian people claiming that Indian territory was being settled without first being ceded. The speech of His Excellency Lord Dorchester answers Indian assertions:

Brothers – You have told me, there were people who say, that the King your Father when he made peace with the United States, gave away your Lands to them. –

Brothers I cannot think, the Government of the United States would hold that Language; it must come from ill informed individuals –

Brothers

You well know, that no man can give, what is not his own.

When the King made peace and gave independance to the United States, he made a Treaty in which he marked out a line between them and him; this implies no more than that Beyond this line he would not extend his interference. -

Brothers

The Posts would have been given up long since according to the Treaty, had the terms of it been complied with on the part of the States, but they were not; the King therefore remains in possession of the Posts, and will continue to hold them, untill all differences between him and the States shall be settled. But Brothers, this line, which the King then marked out between him and the States even supposing the Treaty had taken effect, could never have prejudiced your rights. -

Brothers

The Kings rights with respect to your territory were against the Nations of Europe, these he resigned to the States. But the King never had any rights against you. but to such parts of the Country as had been fairly ceded by yourselves with your own free consent by Public convention and sale. How then can it be said that he give away your Lands?

So careful was the King of your interests, so fully sensible of your rights, that he would not suffer even his own people to

buy

buy your land, without being sure of your free consent, and of ample justice being done you. He therefore ordered his Superintendent General, Sir William Johnson, the father of your friend, to be present at all treaties between you and his colonial Government to see that you were fairly dealt with, Bargains with private individuals were forbid, and considered as void. -

Brothers — The King has not forgot your friendship, he never forgets his friends. —

Brothers — You desire the Kings protection, you desire his power and influence may be exerted to procure you peace and to secure your rights. —

39

Brothers — You expect my assistance and that you will be relieved in your distress. -

Brothers — When the Western people of the States had made an inroad into your Country, and burnt the Shawanese Towns, of which I was informed not long after my last arrival in this country, I made known your fathers sentiments with respect to you, and pointed out the line of conduct to be observed by me and all under my command towards you. -

Brothers -- Here is Prince Edward, son of our King, who is just arrived with a chosen band of his Warriors, to protect this Country. I leave him Second in Command of all the Kings Forces in Canada and he will also take care of You. —

Brothers, — It would give me great pleasure while I am in England, to hear that peace is established in your Country upon a just and solid foundation and that you live in comfort and security with your families sowing your fields, and following your hunts, to our mutual advantage. —

While the terms of the Royal Proclamation became a binding obligation to Indian Nations, Great Britian also incorporated the terms into the laws governing her non-Indian subjects. In fact, the Royal Proclamation was honored both in the letter and the spirit of the terms by the Imperial administration over Indian Affairs up to the year 1867.

The Proclamation was embodied in Imperial Instructions to the British Governors of the Colonies. For example the Instructions to James Murry Esquire December 7 1763, the Captain General and Governor in Chief over the Province of Quebec and America reflect terms which are repeated often in Royal Instructions:

60. And whereas the Province of Quebec is in
60-62 part inhabited and possessed by several
Nations and Tribes of Indians, with whom
it is both necessary and expedient to
cultivate and maintain a strict Friendship
and good Correspondence, so that they may be
induced by Degrees, not only to be good
Neighbours to Our Subjects, but likewise them-
selves to become good Subjects to Us; You
are therefore, as soon as you conveniently can,
to appoint a proper Person or Persons to
assemble, and treat with the said Indians,
promising and assuring them of Protection
and Friendship on Our part, and delivering
them

them such Presents, as shall be sent to you
for that purpose.

61. And you are to inform yourself with the
greatest Exactness of the Number, Nature and
Disposition of the several Bodies or Tribes
of Indians, of the manner of their Lives, and
the Rules and Constitutions, by which they are
governed or regulated. And You are upon
no Account to molest or disturb them in
the Possession of such Parts of the said
Province, as they at present occupy or possess;
but to use the best means You can for
conciliating their Affections, and uniting
them to Our Government, reporting to Us,
by Our Commissioners for Trade and Plan-
tations, whatever Information you can collect
with respect to these People, and the whole
of your Proceedings with them.

62. Whereas We have, by Our Proclamation dated the seventh day of October in the third year of Our Reign, strictly forbid, on pain of Our Displeasure, all Our Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands reserved to the several Nations of Indians, with whom We are connected, and who live under Our Protection, without Our especial Leave for that Purpose first obtained; It is Our express Will and Pleasure, that you take the most effectual Care that Our Royal Directions herein be punctually complied with, and

and that the Trade with such of the said Indians as depend upon your Government be carried on in the Manner, and under the Regulations prescribed in Our said Proclamation.

50.

50. And whereas nothing can more effectually tend to the speedy settling Our said Colony, the Security of the Property of Our Subjects, and the Advancement of Our Revenue, than the disposing of such Lands as are Our Property upon Reasonable Terms, and the establishing a regular and proper Method of proceeding with respect to the passing of Grants of such Land; It is therefore Our Will and Pleasure, that all and every Person and Persons, who shall apply to You for any Grant or Grants of Land, shall, previous to their obtaining the same, make it appear before You in Council, that they are in a Condition to cultivate and improve the same, by settling thereon, in Proportion to the Quantity of Acres desired, a sufficient Number of white Persons and Negroes; And in case You shall, upon a Consideration of the Circumstances of the Person or Persons applying for such Grants, think it advisable

to

to pass the same, in such Case You are to cause a Warrant to be drawn up, directed to the Surveyor General, or other proper Officers, impowering him or them to make a faithful and exact Survey of the Lands so petitioned for, and to return the said Warrant within six Months at furthest from the Date thereof, with a Plott or Description of the Lands so surveyed thereunto annexed; Provided that You do take Care, that before any such Warrant is issued, as aforesaid, a Docquet thereof be entered in the Auditors and Registers Office: And when the Warrant shall be returned by the said Surveyor, or other proper Officer, the Grant shall be made out in due Form, and the Terms and Conditions required by these Our Instructions be particularly and expressly mentioned in the respective Grants. And it is Our Will and Pleasure, that the said Grants shall be registered within six Months from the Date thereof in the Register's Office there, and a Docquet thereof be also entered in Our Auditors Office there, in case such Establishment shall take Place in Our said Province, or that, in Default thereof, such Grant shall be void; Copies of all which Entries shall be returned regularly, by the proper Officer, to Our Commissioners of Our Treasury and to Our Commissioners for Trade and Plantations, within six Months from the Date thereof.

51.

As well as instructing Her Majesty's officers, Minutes of Decision of the Executive Counsel enforced the law embodied in the Royal Proclamation. For example, the Council Chamber in the Castle of St. Louis in the City of Quebec on Monday the 26th day of December 1866, ordered and proclaimed as follows:

> Whereas advices have been received that several unprovoked violences and furthers have been committed upon the Indians under his Majestys Protection in the Countrys adjoining to His Majestys provinces in North America, and that Settlements have been made in the said Countrys beyond the Limits prescribed by his Majestys Royal proclamation of 1763, in the grounds therein allotted to the Indians: whereby the said Indians have been greatly and justly discontented: His Excellency The Lieutenant Governor and Council of this province do hereby Strictly enjoin and command all the Inhabitants of the same to avoid every occasion of giving the Indians offence, and to treat them as Freinds & Brothers intitled to His Majestys Royal protection, & if any of the said Inhabitants have made any Settlements on the Indian grounds, to abandon them without delay, under pain in case of Failure herein, of being prosecuted as Disturbers of the peace of the province with the utmost rigour of the Law

Legislative acts concerning the relationship between Indians and non-Indian were brought in line with the Royal Proclamation. In an Ordinance to prevent the selling of strong liquor to the Indians in the Province of Quebec, SLC1777, Chapter VII (17GEO III) it states:

No person to settle in any Indian country or village without a licence. Under a penalty of £10 for the 1st offence and £20 for the 2d.

III. From and after the publication of this Ordinance, it shall not be lawful for any person to settle in any Indian village or in any Indian country within this Province, without a Licence in writing from the Governor, Lieutenant Governor, or Commander-in-Chief of the Province for the time being, under a penalty of Ten pounds for the first offence, and Twenty pounds for the second, and every other subsequent offence.

The wording of Section III echoes Part 4 of the Royal Proclamation which states that in order to enter into Indian territory for the purpose of trading, non-Indians had to obtain a licence from the Crown.

In an Act to explain and amend "an Act to ordinance for promoting the Inland navigation and to promote the trade to Western Canada 31GEOIII Cap. 1, (1791) it states:

Proviso.

How the trade may be restrained.

4. Provided always, nevertheless, and be it enacted, etc., that it shall and may be lawful for His Excellency the Governor or Commander-in-Chief, for the time being, by and with the advice and consent of His Majesty's Council, to restrain the trade and commerce to any part or place of the said western countries and inland territories, and regulate the same with any of the Indian tribes or nations, or other inhabitants thereof,

and likewise to restrain and regulate the sale and distribution of spirituous liquors, in all forts and garrisons, and other places where Indians resort, and of arms, ammunition and other warlike or naval stores, when and so often as the public safety and peace may require, declaring the same from time to time by proclamation under the Great Seal.

The ordinance of 1777, not to affect persons employed in the inland commerce or those settling on the waste lands of the Crown.

6. And whereas, it is made penal to settle in the Indian villages without license, by an Act or Ordinance, etc. (17 *Geo. 3. cap. 7*), be it further enacted, etc., that nothing in the said Act shall be deemed to affect such as are lawfully employed in the inland commerce, or such as resort to this Province, with the intention *bona fide* of settling the waste lands of the Crown, and who are in the course to conform to the regulations by the Government for that purpose made and established, and shall so declare upon oath, when thereunto required, or to any other His Majesty's liege subjects, but to such only as, not being His Majesty's subjects, shall arrive at any port, post or place where any Magistrate may reside, and shall not within twenty-four hours thereafter, take the oath of allegiance to the British Crown, being required, and shall refuse to take the oath in this clause first aforementioned; such defaulter shall incur a penalty of £10, and may be committed and proceeded against as concerned in illicit trade.

Once again Part 4 of the Royal Proclamation is echoed.

Various reports and letters from Her Majesty's servants in Canada reflect the progress of disposing of Indian land. From J.G. Simcoe to Henry Dundas March 10, 1792 we find Mr. Simcoe reporting:

I have therefore to sollicit from you in such mode as you shall deem proper an Explanation upon this Subject.—and I am very anxious for your directions by the very earliest opportunity in Consequence of it appearing to me to be of infinite importance to the Prosperity of The Colony of Upper Canada to purchase a tract of Land from the Indians of which I shall subjoin a more particular description.

In accomplishing this purchase, of whose advantages The Civil Government of Upper Canada must naturally be The best Judge & certainly responsible to His Majesty's Ministers for the propriety of the Act, it does not appear to me to be proper or usual that such Civil Government should be subordinate to the *Officer* who shall Command in Chief His Majesty's Forces in America, but that directions should be issued by its own Authority to the Superintendent General of Indian Affairs to carry into Execution The Orders agreeable to the General Spirit of his Instructions, and in the customary manner of his own department.

The Land I allude to is situated on a Carrying Place from Sturgeon Bay[1] into another part of the Lake Huron to avoid the doubling of a dangerous Point in Lake Huron. I am very sorry that the distance I am from Upper Canada & in truth the very little information that any traders can give except on those particular points in which they are interested, prevent me from offering a more decisive opinion upon The Situation in That Country, but I have met with nothing but what confirms me in The propriety of The plans which I have heretofore submitted to you.

I do myself the Honor of enclosing to you a Sketch of part of Upper Canada by which you will see where the Indian Title is extinct by British purchases & where it exists in its original possessors.

The Land which I wish to purchase to form in all views a most desirable Settlement is distinctly coloured.

I conceive that the present Summer will afford a proper opportunity for The accomplishment of This purchase as a number of Indians will necessarily be assembled to receive Their customary presents & will be fully acquainted that the new Government of Upper Canada will not suffer any encroachment to be made upon The Land which they have not sold. but which will be preserved for their comfort & satisfaction, a reservation that in my Judgment will be highly advantageous to Upper Canada. I have also marked the Lands which have been promised to Brant & other Indians. They have been surveyed for That purpose & I have given him assurances that it will be the earliest Object of my care to fulfill Lord Dorchester's intentions in that respect. I conceive it to be particularly important that one of the first Acts of my Administration will be the Trial of two Indians connected with this Chief on a charge of Murder.

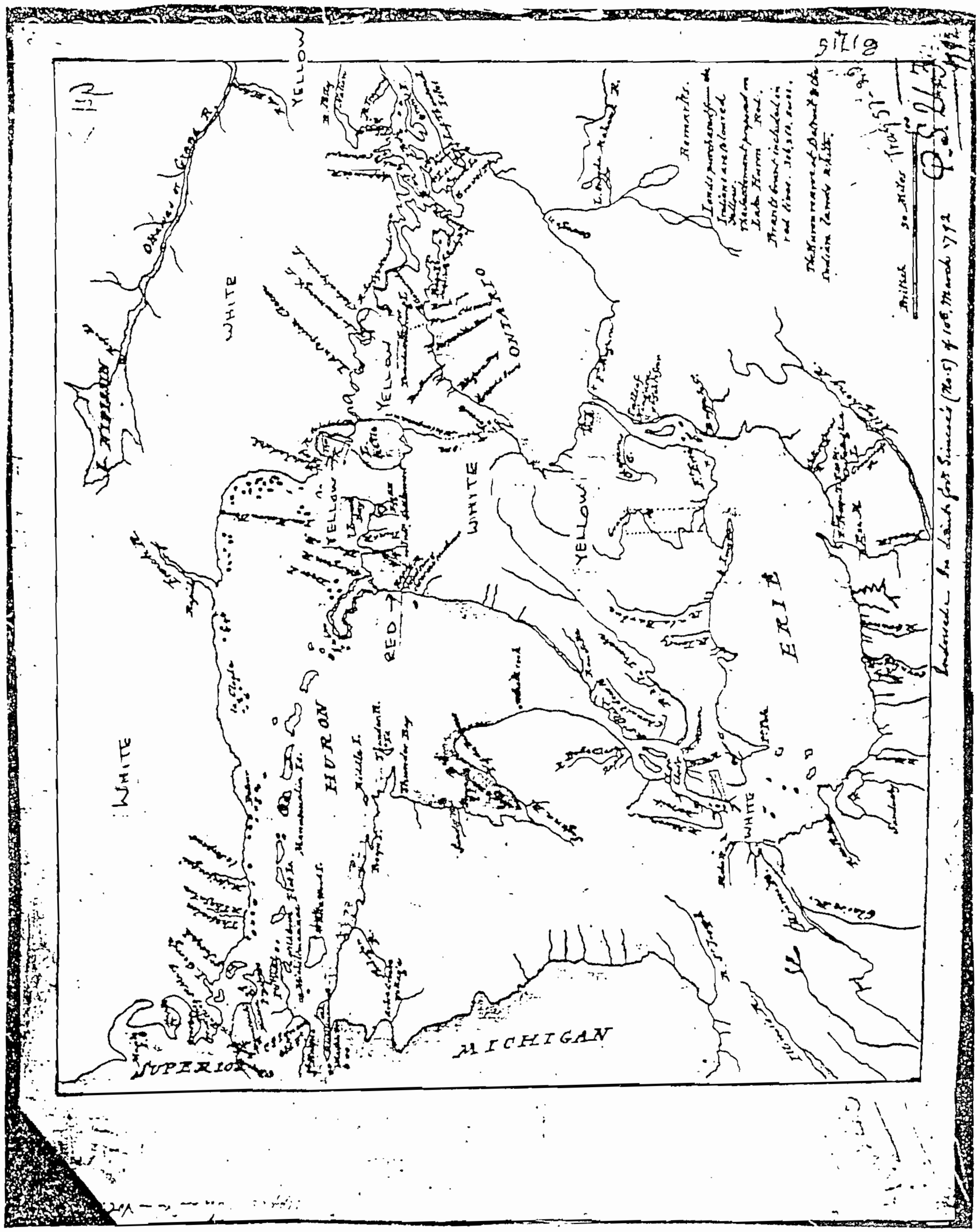
I do myself the honor of enclosing a Copy of Sir John Johnson's Commission together with the Extract to which I allude.

I have the honor to be with the utmost respect,
Sir,
Your most Obedient and faithful Servt.
J. G. Simcoe.

To the Rt. Honble. Henry Dundas,
one of his Majesty's principal Secretaries of State, &c.
Whitehall.

Endorsed:—Quebec, 10th March, 1792. Lieut. Govr. Simcoe (No. 5). R. 18 May. (Three inclosures.)

The map which accompanied his letter showed how far the purchase of Indian lands had progressed.


SUPERIOR
MICHIGAN
HURON
ERIE
ONTARIO
WHITE
YELLOW
RED
Remarks.
British 20 Miles

Kosampson	April 1850
Sweng Whung	April 1850
Chilcowitch	April 1850
Whyuomilth	April 1850
Che-Ko-neim	April 1850
Soke	May 1850
Kaykyaaken	May 1850
Cheaihaytsun	May 1850
Queakar	Feb. 1851
Quakedlth	Feb. 1851
Sannich	Feb. 1852
Saanich	Feb. 1852
Saalequun	Dec. 1854

As a result of the Crown's obligation to protect unceded Indian lands while settling those areas which had been ceded, two distinct catagories of land laws developed in the Dominion of Canada.

One strain saved Indian title to their lands pursuant to the provisions of the Royal Proclamation of 1763. The other strain provided for the disposition of lands properly ceded. This pattern is present in every major Constitutional Act prior to and including 1867.[1]

[1]The Quebec Act of 1774 Section 3 saves the Royal Proclamation as a valid law while Sections 8 and 9 deal with disposition of lands. Similarly the Constitutional Act of 1791 provides in Section 33 a saving provision permitting the full force and operation of the Royal Proclamation of 1763, while section 36, Section 41 to 43 sets up provisions respecting the settlement of the land already ceded. In the Union Act 1840 Section 66 specifically saves the operation of the Royal Proclamation while Sections 42, 45, 46, 52, 53, 54, 55 and 57 act to administer rights over lands ceded.

The letter from J.G. Simcoe refers to a process of acquiring land from the Indian by cession. In fact many Treaties of cession had been entered into prior to 1763, reflecting British policy which was ultimately embodied in the Royal Proclamation. After 1763, other Treaties were negotiated with the Indian Nations, again in keeping with the Royal Proclamation. These are set out below.

Martimes Treaties		of 1693	Fort William Henry
		of 1713	Portsmouth
		of 1717	Georgetown
		of 1725	Boston
	of 1728	No 239	Annapolis Royal
		of 1749	St. Johns
		of 1752	Halifax
		of 1794	Miramich

Fort Stanwix 1768

Treaty No.	1	Aug. 3, 1871
	2	Aug. 2, 1871
	3	Oct. 3, 1873
	4	Sept. 15, 1874
	5	Sept. 20, 1875
	6	Aug. 23, Aug. 28, Sept. 9, 1876
	7	Sept. 22, 1877
	8	June 21, 1899
	9	July 1905
	10	Aug. 1906
	11	June 1921

Robinson - Superior Sept. 7, 1850

Robinson - Huron Sept. 9, 1850

Manitoulin Island Oct. 1862

William Treaty - Chippewa Oct. 1923
- Mississagua Nov. 1923

At different times disputes would arise over lands which were wanted for settlement by non-Indians but which were unceded in Upper Canada. The Executive Council (which in present day terms is the Ontario Court of Appeal) had the authority to hear such petitions and determine the questions of law.

One decision of the Executive Council was recorded in the Minutes of Uecosi, December 1, 1766.

> "The petition of Marie Joseph Philebot being read praying for a grant of 20,000 acres of Land in pursuance of His Majestys order in Council dated 18th, June, 1766, directed to the Governor and Commander in chief of this province ordering them to make such grant under the Conditions and Restrictions therein expressed, and praying that those Lands may be assigned at Restigouche, and that he may be relieved of certain conditions mentioned in his Majestys said order. The Committee have taken the same into consideration and are of Opinion the Lands so prayed to be assigned are, or are claimed to be the property of the Indians, and usch by His Majestys express command as set forth in his proclamation in 1763, not within their power to grant; the Committee are further of Opinion that they are restrained by His Majestys said order from granting Lands but upon the Conditions therein contained...".

The decision in the petition of Marie Philebot is consistent with later trends in the law. Between 1763 and 1840 white settlers petitioned the government for grants of land, and in every case where the petition related to unceded lands the petitioners were advised that those lands were "not within the gift of the Crown" or were "not available for disposition" since they had not yet been surrendered by the Indians. On occasion the Lands Boards referred such petitions to the Executive Council for rulings. The Executive Council, with the Lieutenant Governor and the Chief Justices amongst its members, invariably ruled that the Crown had no authority under the law to deal with unsurrendered Indian lands.

In a line of Ontario Cases, Indian land rights and Government grants conflicted because of confusion over the exact description of lands surrendered under a Treaty. Briefly, in 1784 a Treaty was made in Ontario by the Indians surrendering land within an area which was described as contained within a line drawn to intersect with a river. Grants were made within the territory which was supposedly surrendered . When the settlers wanted to take possesion, it was discovered that the line, did not intersect with the river. The Government approached the Indians who agreed in 1792 to a fresh treaty incorporating a proper description. This description cut down the amount of territory ceded and disputes arose as to whether the previous grants were valid. It was held that grants within the area confirmed by the Indians as surrendered were valid. However, the Executive Council ruled that grants made in the area not properly surrendered were void.[1]

In connection with a different but contemperaneous situation, Captain Joseph Brant was advised in 1792 by the Surveyor General, upon the direction of the Lieutenant Governor, that no settlement could take place and no grants could legally be made without a treaty with the Indians ceding the land.

Thus it is clear that between 1763 and 1840 Indian title was carefully protected under British law. There is no evidence to indicate that the Indian interest was in any way altered between 1840 and 1867. In 1867 legislative control over Indian's affairs was transferred to the Parliament of the Dominion of Canada by Section 91(24) of the B.N.A. Act (U.K.) which provided that Canada (and not any of the Provinces) would have jurisdiction over "Indians and Lands Reserved for Indians".

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[1]See decision of Executive Council, 1793

iii.

The Existence of the Royal Proclamation in Law Today

The Act further provided by Section 109 that the Provinces would retain the "lands, mines, minerals and royalties" but "subject to any trusts existing in respect thereof and to any interest other than that of the Provinces in same".

The Judicial committee of the Privy Council has determined that the Indian title to the use and enjoyment of the unsurrendered lands is a "interest other than that of the Province".
Attorney General for Quebec v. Attorney General for Canada (the Starr Chrome Case) (1921) 1AC. 401(PC)

Thus the British North America Act of 1867 did not change the effect of the Royal Proclamation on Indian title. In fact the provisions of the Royal Proclamations were reflected in the British North America Act through the vehicles of Section 91(24) and Section 109. The obligations pre-existing the Royal Proclamation as embodied in that Instrument and subsequent Treaties are trust responsibilities reflected in Section 109.

The Existance of The Royal Proclamation in Law Today

Throughout the years from 1763 to the present the Royal Proclamation continues to have the force of law of Canada. We repeal that it is our position that the Royal Proclamation is not the source of Indian Rights in Canada, but is an embodiment of pre-existing rights.

The contentious Statutes which some argue have nullified the effect of the Royal Proclamation are the Colonial Laws Validity Act of 1868 the Statute of Westminster, 1931 and the amendment to the BNA Act, 1949. Section 1 of the Colonial Laws Validity Act defined colonial laws, as including:

> "Laws made for any colony either by such legislature as aforesaid or by Her Majesty in Council."

Through the operation of Section 2, British Acts of Parliament having in the colonies the force of statute override local law. The Royal Proclamation has the force of statute and therefore survived the Colonial Law Validity Act. (King v. Lady McMaster (1926) Ex. C.R. 68.)

Thus between 1868 and 1931, as a matter of law, the Royal Proclamation was not repealed nor could the Proclamation be repealed by local legislation, unless authorized by an Imperial Act.

The Statute of Westminster was then passed in 1931. It made federal legislation override conflicting law in the United Kingdom and future Acts of the United Kingdom were no longer applicable in Canada. The only exception to that general rule is found in section 7 which exempts the British North America Acts 1867 to 1930 from being amendable by the federal government of Canada. The Parliament of the United Kingdom alone has Supreme power over those Acts. In our submission the Royal Proclamation is not affected by this Statute on the basis of three alternative arguments.

Firstly, the complete obligations of the Crown as set out in the Royal Proclamation and the Treaties were not delegated to the Federal Government in 1867 or subsequently. Only legislative and administrative power, to be exercised in accordance with the principles of the Proclamation, were transferred. The substance of the Proclamation did not come within federal amending power.

Secondly, the B.N.A. Act in Section 91 (24) and Section 109, unalterable by the Statute of Westminster, incorporates the Royal Proclamation in its fullest sense.

Thirdly, in respect to Treaties, it is submitted that the Royal proclamation could not be unilaterally assigned by the Crown to the Federal Government. As this would require the consent of the Indian Nations who agreed to cede their rights in exchange for the fulfillment of the obligations. With respect to non-treaty areas, the Crown has never shown its intention to leave unfulfilled the tenets of its Royal Proclamation. These obligations are to be fulfilled in the future.

In the 1949 amendment to the BNA Act the Imperial Parliament gave the Parliament of Canada the power to amend the Constitution of Canada under Section 91 (1):

> "except as regards matters coming within the classes of subjects by this Act as signed exclusively to the Legislatures of the Province or as regards rights and privileges by this or any other Constitutional Act granted or secured to the legislature or the Government of a Province..."(emphasis added)

In our submission this power does not enable the Federal Government, at present, to amend or alter the rights enshrined in the Royal Proclamation. In addition to repeating arguments one and two above, we further submit that the structure of the BNA Act divides jurisdiction between the federal government (S. 91) and the provincial government (S. 92). It is settled law in Canada that all jurisdiction in Canada is divided between the two levels of government and is contained within its classes of subjects enumerated in the Act. In other words, the powers conferred in the BNA Act are plenary. At the present time it is not within the legislative competence of the Federal Government to abolish its Indian interest as expressed in Section 91 (24) because, unlike the other enumerated subject matters, the jurisdiction over Indians is a delegated one and a delegate cannot eliminate the subject matter of its duty.

Accordingly, at the present time Great Britain holds the final legislative authority to confer jurisdiction on the Federal Government to amend or alter the Royal Proclamation. While this may have consequences in international law the federal government is asking Britain to do just that in its patriation proposal.

Alternatively, it is our submission that the Royal Crown placed the future disposal of the property rights of the Indian Nations in its sole and absolute control and this control has survived all local laws and constitutional.

> East Indian Company v. Syed Ally (1827 Moo Ind. App. 555 P.C.)
>
> Singh v. Secretary of State, (1874) LR2 Ind. App. 38 P.C.
>
> Secretry of State v. Rajbai, (1915) LR42 Ind. App. 229 P.C.

Britain must expressly confer these power of disposal on the Federal Government, which it hasn't done.

b) Title to Indian Land will be extinguished by consent and through a fair and open process. Once title was ceded, the parties agreed that the obligations would continue to bind them forever.

Great Britain's duties concerning the procedure to be followed in extinguishing Indian titles is clearly spelled out in the Royal Proclamation, in representations made at treaty making and in international law.

The Royal Proclamation 1763 set forth the rule,

> We do with the Advice of Our Privy Council, strictly enjoin and require that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Part of Our Colonies where We have thought proper to allow Settlements; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some Publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of our Colonies respectively, within which they shall lie;

The proclamation procedure was generally followed in the treaty making process and has been incorporated in the Indian Act provisions dealing with surrendered land.

Great Britain's obligations to protect the agreements reached was well represented by Alexander Morris, Lieutenant-General, October 14, 1873 in reporting on the Northest Angle Treaties:

> "We apologized for the number of questions put me, which occupy the space of some hours and then the principle spokesmen, Mawedopenais, came forward and drew off his gloves and spoke as follows:
>
> > 'Now you see me stand before you all. What has been done here today, has been done openly before the Great Spirit, and before the nation, and I hope that I may never hear anyone say that this treaty has been done secretly. And now, in closing this Council, I take off my glove, and I'm giving you my hand, I deliver over my birthright, and land, and in taking your hand I hold fast all the promises you have made, and I hope that they will last as long as the sune goes round, and the waters flow, as you have said.'
>
> To which I replied as follows:
>
> > 'I accept your hand, and with it the land, and will keep all my promises, in the firm belief that the treaty now to be signed will bind the red man and the white man together as friends forever.'"

(c) That in dealing with the Indian Nations in Canada, the Royal Majesties agreed to continue to treat Indian Nations as protected people with collective national status, amounting in modern terms to a recognition of the right to self-determination.

We will later cite examples of the representations commonly made to the Indian Nations by the Treaty Commissioners as to their authority from the Royal Majesty. Suffice it at this point to deal with the corresponding British recognition of the Indian sovereignty.

With respect to Treaty No. 3 (October 3, 1873) the Lieutenant Governor Alexander Morris met the Indians who were bearing a banner and the Union Jack. A dance was performed in his honour, and the pipe of peace was smoked. The treaty making process was prolonged in this instance because there were a number of Indian Nations present, and the leadership appeared to be divided. The Lieutenant Governor reported:

> "I then told them that I had known all along they were not united as they had said; that they ought not to allow a few Chiefs to prevent a treaty, and that I wished to treat with them as a Nation and not with separate bands as they would otherwise compel me to do."[1]

After the Indians met in Council, their representative Chief ultimately came to terms with the representatives of the Queen.

The numbered treaties 1 to 7 were transmitted by Lieutenant Governor Morris to the Right Honourable Earl of Dufferin in 1880. After reproducing the texts of the treaties and the negotiations he deals with the administration of the Treaties:

> "I remark in the first place that the provisions of these treaties must be carried out with the upmost good faith and the nicest exactness. The Indians of Canada have...an abiding confidence in the government of the Queen, or the Great Mother, as they style her. This must not, at all hazards, be shaken. It can be easily and fully maintained."[2]

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[1]Ibid, at page 49.

[2]Ibid, page 285.

With respect to the Chiefs and Councillors he said:

> "They should be strongly impressed with the belief that they are officers of the Crown, and that it is their duty to see that the Indians of their tribes obey the provisions of the treaties."[1]

And after citing one case in point he states:

> "This case affords an illustration of the value of the recognition of the Chiefs of the various Bands and shows of how much advantage, it is to the crown to possess so large a number of Indian officials duly recognized as such, and who can be inspired with a proper sense of their responsiblity to the Government and to their Bands, as well as to others.
>
> Through these treaties the various Indian Nations ceded territory from Lake Superior to the foot of the Rocky Mountains, saving reservations for their own use, and the right of the Indians to hunt the ceded territory and to fish in the waters thereof, excepting such portions of the territory as passed from the crown into the occupation of individuals or otherwise."

An example of the commissioners wanting to be sure the chiefs acted in a representative capacity is found in the letter from Adams Archives, Lower Fort Gary, July 29, 1871 concerning the Treaties of Stone Fort and Manitoba:

> "At the time of the treaty with the Earl of Selkirk certain Indian signed as Chiefs and representatives of their people. Some of the Indians now deny that these men ever were Chiefs or had authority to sign the treaty. With a view therefore to avoid a reoccurrence of such question we ask the Indians as a first step to agree among themselves in selecting their Chiefs and then to present them to us and have their names and authority amended."

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[1] Ibid, page 286.

Within the terms of the Treaties, the Indian's collective rights were recognized and protected. For example, within Treaty 8, made June 21, 1899 the terms provided that the Indians have collective rights

a) to pursue their usual vocations of hunting, trapping and fishing subject to certain restrictions

b) to hold their reserve land in common for the Indian people of the band, and only through a collective may reserve land be surrendered

c) to education:

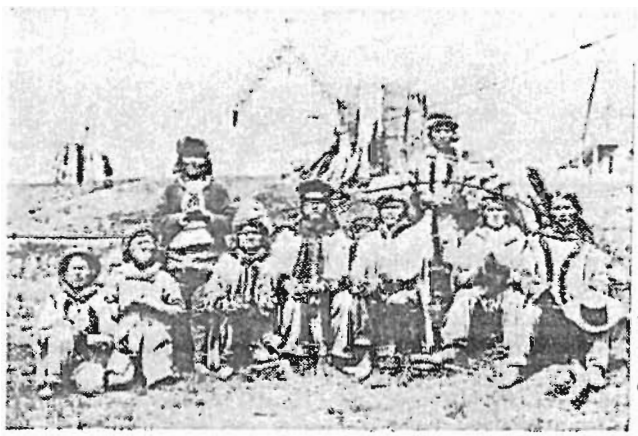
In the treaties the Indian Nation's Government and governing authority were fully recognized. Treaty 8, for example, includes the recognition both in the preamble and also within clauses contained.

> AND WHEREAS, the Indians of the said tract, duly convened in council at the respective points named hereunder, and being requested by Her Majesty's Commissioners to name certain Chiefs and Headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several Chiefs and Headmen who have subscribed hereto.
>
> Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless there be some exceptional reason, to be paid only to heads of families for those belonging thereto.
>
> FURTHER, Her Majesty agrees that each Chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year, and every third year thereafter, each Chief and Headman shall receive a suitable suit of clothing.

The treaties clearly created a bi-lateral political and legal relationship between two sovereign nations. As such, an obligation is locked into law and continue to bind the Crown to respect and perpetuate the self-determination of the sovereignity of the Indian Nations.

Chiefs of the Wolf Crest of Git-lah-damaks
circa 1890

We have had in the past, and still have today, our own unique forms of self government. Each Nation in this land has developed a governing system in unison with its peoples, their lands, the animals and all other living things.



Chiefs of Tribes, (B.C.,c.1870)

Indian Government is not a new idea or concept. It was the strength of Indian Government prior to contact that helped us survive for thousands of years.

It was the gradual destruction if Indian Government through the colonial approach of divide and rule which weakened our Indian Governments.

Today we are just now waking up the realization that we never gave up our right to govern ourselves.

Philip Paul, Tsartlip Band

d) That the treaties entered into between the Royal Majesties and the Indian Nations are legally binding agreements which have consequences in international law.

It is our submission that the treaties concluded by the Royal Majesties with the Indian Nations in Canada conform to the most important indicia of treaties in international law. The trend in the early American jurisprudence on the subject fully supports this view. We refer in particular to Worcester v. Georgia (6 Pet. 515, 1893). There the Court was considering the language used in the treaties similar to those concluded with the Indian Nations in Canada:

> "The words 'treaty' and 'nation' are words of our own language, selected in our diplimatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense."

Other language was used in cases decided in the same era. For example, in Cherokee Nation v. Georgia (5 Pet. 1, 1831) the Court stated that the Indian's relationship to the United States "resembles that of a ward to his guardian." However, this was by way of analogy, and it was clear to the Court that the form and content of the treaties complied with international law.

As the treaties continued to be litigated in the courts, confusion developed as to the exact status of treaties. Some would deny entirely that the treaties have any international standing, and would argue that the treaties may be violated by the Sovereign power, or rescinded entirely. Against this view there is the absolute statement that treaties with Indian Nations have exactly the same status as treaties between two foreign and sovereign states.

It is our submission that the treaties must be reviewed in the light of developing international law, and the return of that law to the classical principles of the sacred trust of civilization. In this respect, it cannot be denied that the treaties do have wide and important consequences in international law. As to the American jurisprudence which subsequently denied the international status of the treaties, it must be remembered that in 1871 legislation was enacted in the Indian Appropriation Act which stated:

> "Hereafter no Indian Nation or Tribe within the territory of the United States shall be acknowledged or recognized as independent nation, tribe or power with whom the United States may contract by treaty ... "[1]

distinguishing the American situation with that in Canada.

The propositions which can be derived from a review of all of the treaties (attached as Appendix 1) are as follows:

1. In all instances the contracting parties were recognized as sovereign entities, being the Indian Nations on the one hand and the Crown in right of Britain on the other. At all times the Indian Nations dealt with the King or Queen of the United Kingdom as representing a sovereign power and did not deal with local governments. The treaties were considered binding on all members of the nations.

2. The Crown was concerned about establishing the authority of the leaders of the Indian Nations to enter into these treaties, assuring itself that these leaders had the representative capacity as head of their nations to deal with another sovereign.

3. The treaties were real treaties as opposed to personal treaties, and dealt with international law matters such as sovereignty. As such, the Treaties continued to go with and bind the land and any subsequent occupier of the land.

   (a) The treaties cannot be relegated to the level of private law contracts since they did not transfer private rights except as part of the public law transaction. To maintain otherwise would be to consider North America as a terra nullius to which Britain was capable of applying its own system of law. This would also ignore the integrity and sophistication of the system of law and territory holding of the Indian Nations in Canada which has been illustrated above.

   (b) Insofar as private law transactions were contained in separate contracts, they were included in the body of a treaty which had a dual purpose of transferring sovereignty and private rights, i.e., sovereign rights were transferred to Britain as well as a piece of land in private law. (Sometimes, there were stipulations that the transfer of sovereignty would not affect the private law rights of the Indians over territory which they traditionally occupied such as guarantees "to the inhabitants of the continued and unmolested enjoyment of such lands and other property as they now possess.")

4. Often times the preservation of the customary legal system was guaranteed.

5. Reference in the treaties to the preservation of property rights must strengthen the conviction that transfer of sovereign rights meant a transaction within the realm of international law. As was stated in Ahmadu Tijani v. Secretary of S. Nigeria (1921 2AC 399) regarding its cession of Lajos to Great Britain:

> "There was a cession to the British Crown, along with the sovereignty of the radical or ultimate title to the land ... this cession appears to have been made on the footing that the rights of property of inhabitants would be fully respected. This principle is a usual one under British policy and law when such occupations take place ... any chance of sovereignty is not be be presumed as meant to disturb the right of private owners; in the general terms of a session are prima facie to be constructed accordingly."

6. The treaties are evidence of the adoption by Great Britain of international law concepts of dealing equitably with the original inhabitants of a country, as reflected in the Royal Proclamation of 1763.

iv.

Where do the obligations to the Indain Nations rest at Law ?

IV. Where do the obligations to the Indian Nations rest at law?

Although the United Kingdom shifted some of its responsibilities for fulfilling the obligations to the Indian Nations, the question remains: What obligations, if any, stay with the United Kingdom? Inspite of the fact that Great Britain conferred the administration of her obligations to Indian Nations on the Federal Government of Canada, and inspite of the fact that Great Britain conferred local self-government over the Dominion of Canada, it is our submission that substantial obligations to the Indian Nations remain in Britain.

From the earliest English settlements in Indian territory in Canada, the Indian Nations entered into agreements with the Royal Majesty and not with the local governments. We have shown that it was the Royal Majesty's representatives who took the promise of the Royal Proclamation to Indian Nations.

In negotiating each and every Treaty with Indian Nations, the Majesty's agents represented that the Royal Majesty entered into firm and binding promises. Excerpts from documents and letters reporting on the treaty-making repeatedly and overwhelmingly prove this point.

In negotiating Treaties 1 and 2 in Stone Fort and Manitoba Post, Lieutenant-Governor Archibald, after the Indians were assembled, stated that in the previous year he had met with the Indians and:

> "I told you I could not negotiate a treaty with the Indians but that I was charged by

> your Great Mother, the Queen, to tell you that she had been very glad to see that you had acted during the troubles like good and true children of your Great Mother. I told you also that as soon as possible you would all be called together to consider the terms of the treaty to be entered into between you and your Great Mother ... I promise that in the spring you would be sent for, and that either I, or some person directly appointed to represent your Great Mother, should be here to meet you, and notice would be given you when to convene at this place to talk over what was right to be done."[1] (emphasis added.)

Indian Commissioner Wemyss Simpson in 1871 reported on the treaty-making to the Secretary of State for the Provinces as follows:

> "The Indians of both parties have a firm belief in the honour and integrity of Her Majesty's representatives and are fully impressed with the idea that the amelioration of their present condition is one of objects of Her Majesty in making these treaties."[2]

In negotiating Treaty 3 the Queen's representatives said:

> "The Queen wishes you to enjoy the same blessings, and so I am here to tell you all the Queen's mind, but recollect this, the Queen's High Councillor here from Ottawa, and I, her Governor, are not traders; we do not come here in the spirit of traders; we come here to tell you openly, without hiding anything, just what the Queen will do for you, just what she thinks is good for you, and I want you to look me in the face, eye to eye, and open your hearts to me, speak to me face to face. I am ready now with my friends here to give you the Queen's message. Are your ears open to hear? Have you chosen your speakers? "

As one of the Chiefs said during the negotiations for Treaty 3 (1873):

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[1] The Treaties of Canada with The Indians, Alexander Morris, 1880, Toronto

[2] Ibid

> "What we have heard yesterday, and you represented yourself you said the Queen sent you here, the way we undersood you as a representative of the Queen. We have understood you yesterday that Her Majesty has given you the same power and authority as she has, to act in this business ..."[1] (emphasis added.)

The Commissioner reported:

> "His Excellency then said -- 'I told you I was to make the treaty on the part of our Great Mother the Queen, and I feel it will be for your good and your children's.'"

The Qu'Appelle Treaty was entered into in 1874. One of the Chiefs persisted in ascertaining the authority of Lieutenant-Governor Morris as follows:

> "Is it true you are bringing the Queen's kindness? Is it true you are bringing the Queen's messengers kindness? Is it true you are going to give my child what he may use? Is it true you are going to give the different Bands the Queen's kindness? Is it true you bring the Queen's hand? Is it true you are bringing the Queen's power?"

The report on the Qu'Appelle Treaty was provided in a letter dated September 12, 1874 to Britain where the statements of its Lieutenant-Governor are set out:

> "In our hands they feel the Queen's, and if they take them the hands of the white and red man will never unclasp. In other lands the white and red man are not such friends as we have always been, and why? Because the Queen always keeps her word, always protects her red man."

It was and continues to be of fundamental importance to the Indian Nations that they treated with Her Royal Majesty, the head of a family, rather than with a government whose laws may come and go. Examination of the treaty-making documents indicates that this very concern was a serious issue to the Chiefs who negotiated Treaties. The longevity of the

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[1] Ibid

treaties seemingly was also important to the Royal Majesty's representatives who stated:

> "The Queen has to think of what will come long after to-day. Therefore, the promises we have to make to you are not for to-day only but for tomorrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean."

There can be no doubt that the Royal Majesty was, by virtue of the prerogative power, the party to Treaties made with Indian Nations and a party to obligations created under the Royal Proclamation. The Royal Majesty's ultimate responsibility to the Indian Nations arises not simply because it was the Royal Majesty with whom Indian Nations treated. In fact, the Royal Majesty alone maintains the jurisdiction in law to fulfil these obligations.

There exists no legal jurisdiction within the Dominion of Canada to assume full responsibilities for the treaty obligations. The treaty-making prerogative rests with the Crown and there has never been legislation in Canada, either before or after Confederation, which authorizes any Canadian official to conclude treaties within the Indigenous Nations.

Furthermore, in entering into treaties with the Indian Nations, the Indian Nations were treated by Great Britain as protected people with the collective status of Nations. The Royal prerogative alone, gives power to deal with the Indian Nations on this collective basis. As such, the political relationship established between Her Majesty the Queen and the Indian Nations, from which specific obligations are created, is beyond the capacity of the Parliament of Canada.

The relationship between the United Kingdom and the Indian Nations is bi-lateral. The Indian Nations have never con-

sented to releasing the United Kingdom from her obligations under the relationship. Until such consent is given, the United Kingdom remains bound to the Indian Nations.

Administrative and financial responsibility over Indians and reserve land may have been transferred to Canada in 1860. Legislative responsibility may have been transferred in 1867 under S. 91 (24). However, the ultimate and final trust remains with Britain through the Royal Proclamation and the treaties.

Within the context of the Constitution of Canada, Great Britain holds the final legislative power which protects the Indian interests. The protection at present is delicately balanced between federal and provincial jurisdictions through the scheme of the B. N. A. Act and the operation of Section 91 (24) and Section 109. The only method by which the Indian interest might be abolished under the British North America Act would be through an act of the Parliament of Great Britain, patriating the British North America Act to the Dominion of Canada.

From that point onwards it would be solely within the authority of the Governments of Canada to obliterate the jurisdiction. The resolutions proposed by the Parliament of Canada to patriate the Constitution provide no assurance whatsoever that obligations presently owed to the Indian Nations will be respected.

Two centuries ago, Great Britain enabled her colony to be established in Canada by entering into political and legal obligations with the Indian Nations. Now she is being asked to confer final self-government on her former colony. The government of this former colony has never entered into or assumed such obligations with the Indian Nations. It is

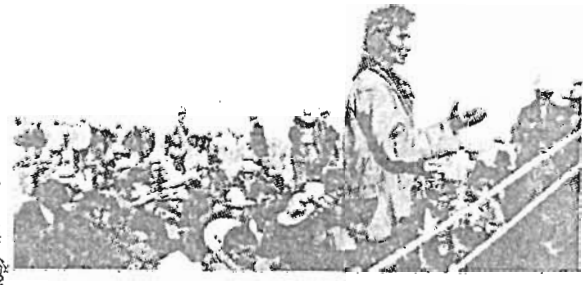
not conceivable that any sense of justice would allow a former colony to develop to full self-government leaving the original inhabitants severed from their long-standing protector and leaving the federal government with full power to further expropriate Indian land and culture.

Great Britain has legal obligations both to protect the self-determination of our Indian Nations as well as to facilitate the self-determination of Canada. If Great Britain chooses to deny the existence of the Indian Nations to further the self-determination of Canada, they must do so with the consequence of facing the full sanctions of international law.

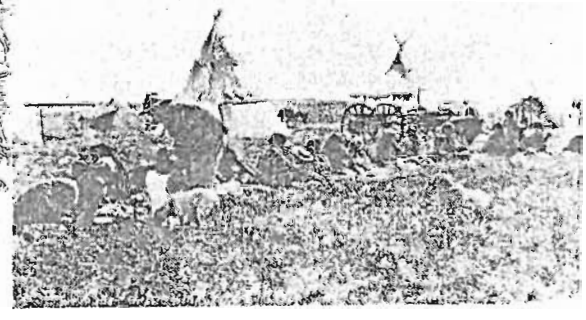
"It will be the duty of the Commissioner (Simpson) to talk to you on the particular details of the treaty.... When you hear his voice, you are listening to your Great Mother the Queen, whom God bless and preserve long to reign over us." (A.G. Archibald, Lieutenant Governor of Manitoba, at the Stone Fort and Manitoba Post Treaties, July 27, 1871).

THE WALPOLE ISLANDERS AT THE EXHIBITION.—FROM A PHOTOGRAPH BY CLARKE.

GROUP OF WALPOLE ISLAND INDIANS GREAT BRITAIN, 1856.

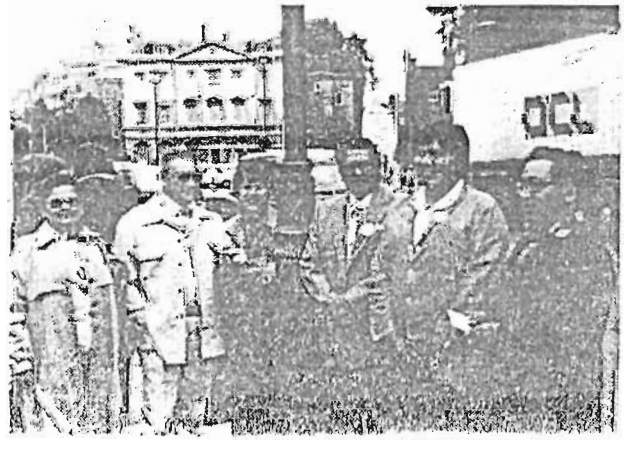


The people of Alberta and Saskatchewan met with government representatives in earnest, sincerely believing that any agreements they made with the Queen would be honored forever.



Nellie Taylor of Deadman's Creek Band displays the tomahawk, peace-pipe, Queen's portrait and union jack pole (the flag has since dis-integrated) presented to Indian members of the Land Commission of 1912-1914.

Since 1979, such leaders as the President of the MicMac Indians of Nova Scotia, and the Iroquois and Allied Tribes, have been visiting the Queen, to protect agreements made with her family.



V.

Fulfillment of Obligations

PART V

Fulfillment of Obligations

A. Federal and Provincial Complicity

(a) The British Columbia Experience

The 1837 Select Committee Report on Aborigines (British Settlements) referred to above warned against allowing local legislatures to deal with Indian claims or Indian lands, because of the inherent conflict of interest between those local legislatures and the Indian people, and because of the overriding obligations which the Crown in right of Britain had for the protection of the original inhabitants. Consequently, no local laws were applicable to the original inhabitants, except with the express authority of Her Majesty the Queen. Further, the original inhabitants' land could not be disposed of by the local legislatures. In 1867, the administration of Britain's obligation to the Indian Nations was transferred to the Government of Canada. From that time to the present, the Government in Canada has continuously breached the fundamental obligations and have unlawfully expropriated Indian lands and resources. The history of federal provincial relationships from 1891 to the present time shows a complicity between the two levels of government in those expropriations.

The case in point we will be dealing with is that of British Columbia. However, this situation is by no means unique and similiar examples can be drawn from across Canada.

Since confederation, an issue filters through the history of federal/provincial/Indian relations in British Columbia. This issue has been called the "Indian land question". This "question" involved complaints by the British Columbia government to the Dominion that the Indian reserves in British Columbia were

too extensive. As a result, a three man commission was set up, one appointed by the Dominion government one by the provincial government, and a third jointly appointed. Notwithstanding the Royal Proclamation, these commissioners, over the heads of the Indian people, were empowered to "sit and determine for each nation separately, the number, extent and locality of the reserve or reserves to be allowed to it".[1] The legislation purported to allow the commissioners to reduce Indian land, and allowed the Dominion to surrender to the local government this land, again without consent. Because the Indian Act of 1876 required a surrender of lands, with Indians' consent in order for it to be sold, an Order was issued which enabled the commissioners to deal "absolutely and at once with the British Columbia reserve, without reference to either the Dominion or local governments" - i.e. dispense with Indian consent.

It should also be noted that the reserves that were established by the commissioners and by the B.C. colonial government before them were not set up after the Indians ceded their rights to their land. In other words, the very establishment of these reserves involved an unlawful expropriation of Indian territory.

The commissioners' work broke down, and then a single federal commissioner was appointed, whose allotments of reserve land had to be approved by the Province. During this entire period there was a consistent refusal by the provincial government to approve any of the reserves made by the sole commissioner. This, of course, lead to a non solution of the "Indian land problem". Ultimately, another agreement was entered into between the federal and provincial government in 1912 (the McKenna-McBribe Agreement).

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[1] "Report of the Committee of the Honourable the Executive Council", approved by his Excellency the Lieutenant-Governor on the 6th of January, 1876.

Federal legislation was passed in 1919-1920[1] following the McKenna-McBride Agreement, which allowed a Royal Commission to reduce Indian reserves in British Columbia without the consent of the Indians. This led to an expropriation of approximately acres of Indian reserve land.

In 1930 a federal Order-In-Council (PC 208) was passed allowing the Province of British Columbia to expropriate, without compensation, up to 1/20 of Indian reserve land for public purposes. Again, the federal government purported to alienate Indian lands without allowing the owners of that land, the Indians, to have any say.

Not only the land but the resources on and under the land were expropriated through the legislation of the Federal Government. In 1943-44 the British Columbia Indian Reserves Mineral Resources Act, S.C.,c.19 incorporated an agreement between the Federal Government and the Provincial Government which granted to the Province ownership of gold on Indian Reserves. As a result of this agreement, both the Federal and Provincial Governments maintain that the Provincial Government has a right to enter onto Reserve land, and take all the profits from the gold located on Reserves.[2]

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[1]The British Columbia Indian Lands Settlement Act S.C., c 51.

[2]There is a stipulation that 50% of the royalties will go to the Band, but the Province does not, as it turns out, exact any royalties for the rights, and therefore nothing is payable to the Band. The Province get its profit from Companies through various licenses and taxes.

(b) The Transfer Agreements

Under various British North America Acts, and Federal/Provincial Resources Acts, the public lands in the provinces, and the mines and minerals thereunder, were transferred to the Provinces. However, these transfers were "subject to any trusts existing in respect thereof". The trust responsibility which has been enumerated above was therefore excepted from the transfer of public lands to the province. Notwithstanding this, the provinces have purported to deal with this land as though it was not subject to the Indian interest.[1] We have attached as Appendix I a list of the various British Columbia Provincial Resource statutes which deny to the Indian people the use of their traditional Reserve lands.

The Province of B.C. goes so far as to declare in the Wildlife Act that all wildlife in the Province is Crown property. Despite authority to the contrary there are some legal cases which have held that even on Reserve land wildlife belongs to the province, and therefore Indian people cannot hunt out-of-season on their own land.[2] On established reserves and within Indians' traditional territory Indian people are prosecuted for hunting.

Without Indian consent, the Governor-in-Council may allow the expropriation of Reserve land for road right-of-way purposes, hydro purposes and railway purposes. This is an addition to the power to take up to 1/20th of Reserve land for public purposes. For British Columbia this enables the Province to encroach on Reserve land and virtually expropriate thousands of acres.

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[1]The Assessment Act, R.S.B.C., 1979 purports to tax non-Indian users of Indian land, thereby depriving the Indian Band from an essential and valuable resource.

[2]Regina Cardinal v. Attorney General of Canada (1973) 6WWR. 205

B. Federal Legislation

(i) Indian Act

In addition to the provisions of the Indian Act recited above, which allow the expropriation of Indian land without consent, Section 88 was added to the Indian Act in 1951. This makes Provincial law applicable to Indians unless it is contrary to the Indian Act. This has meant, for example, the encroachment on customary spiritual practices.[1]

Notwithstanding uncertainty in the courts, and constant political pressure by the Indians of Canada, the Federal Government refuses to amend Section 87 of the Indian Act, which deals with the taxation of Indians. For years the Federal Government interrupted its own legislation, Section 87 of the Indian Act, to exempt Indians from income taxation. The Courts ultimately held that the Section did not deal with income taxation.[2] The Federal Department continues to apply the exemption rather than amend its legislation, allowing expensive and lengthy litigation which is still proceeding through the Courts. This is dispite a decison of the Court of Appeal of British Columbia[3] which holds that the Federal Government has an obligation to pass legislation exempting Indian people from taxation. It should also be noted that promises were made by the British Crown in the treaties that there would be no taxation.

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[1]Provincial Court of British Columbia, and County Court Judgments in Regina v. Anderson and Charlie prevented the hunting of deer meat out of season for a spiritual "burning" which was commanded by an ancestor. Thus the Accused were found guilty, despite the evidence that the non-fulfilment of the command had lead to sickness. In the past Indian potlatches and religious ceremonies were made illegal by the Federal Government.

[2]Russell Snow v. Regina, Federal C.A., April 19, 1979.

[3]Lillian Brown and others v. Regina, B.C. Court of Appeal, December 4, 1979.

ii) Fisheries Act

Fishing is survival for most Indian nations in British Columbia. Despite a Supreme Court of Canada judgement[1] which has been followed in the courts of this country allocating the priorities in taking fish as follows: conservation, then Indian fishing followed by the commercial take[2], Federal Fisheries continues to give priority to the exploitation of the fishery by commercial enterprises. Hundreds of Indian people are prosecuted each year for fishing contrary to the Fisheries Act, even in situations where the fish are plentiful and the Indian fisherman is fishing for food and is in need.

(iii) Other Federal Legislation

Generally speaking, with respect to both Federal and Provincial Legislation, there is an enormous conflict between the Indian use of land and resources, and the desire of the Governments to exploit these resources. This continuing debate, was aired during the hearings respecting the building of a pipeline in the MacKenzie Valley. In a report done by Mr. Justice Thomas R. Berger dated April 15, 1977, Mr. Justice Berger stated that all land claims of the Indians, Eskimos and Inuits must be settled before any development of the pipeline.

> "Native people desire a settlement of native claims before a pipeline is built. They do not want a settlement - in the tradition of the treaties - that will extinguish their rights to the land. They want a settlement that will entrench their rights to the land and that will lay the foundations of native self-determination under the constitution of Canada.....They insist upon the right to determine their own future, to insure their place, but not the assimilation, in Canadian life....Special status for native people is an element of our constitutional tradition, one that is recognized by the British North America Act, by the treaties, by the Indian Act, and by

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[1] Joseph Jacketal v. Regina, Supreme Court of Canada, July 18, 1879

[2] R. v. Adolph, Adolph, Adolph & Bob, Provincial Court of B.C., October 9, 1980.

> the Statement of Policy approved by Cabinet in July 1976....If the pipeline is approved before a settlement of claims takes place, the future of the North - and the place of the native people in the North - will, in effect, have been decided for them. Therefore, you recommended that the MacKenzie Valley Pipeline be postponed for ten years."

Hearings were in 1979, this time with respect to the building in British Columbia of a section of the proposed Alaska Highway Gas Pipeline.

The Federal Government, before the hearings commenced, had made a commitment to construct the pipeline. The task of W. Winston Mair, the presiding officer, was therefore to simply set out the terms and conditions for the building of the pipeline. He stated on Page 29 of his Report; released February 15, 1980.

> "It became clear from the hearings and visits to the Reserves that the expansion of forest industries and agriculture is the prime architect of their plight, as they are pressed back upon their core holdings with diminishing access to the extensive surroundings areas essential to their next economy and way of life."

and at page 30

> "Even a minor erosion of land base, income or socio-cultural position could be serious for a people already feeling hard pressed....'it is one thing to push a person who stands in the middle of a field. It is a very different matter to push a person who stands on a cliff face.' The accumulative impact of oil and gas development, forestry, agriculture and recreational and other activities has now placed the Indian people 'on a cliff face'. The pipeline could provide the final 'push'".

Despite this admission, the approval had already been given to the gas pipeline, and the presiding officer was left with the hopeless recommendation that an immediate review of this situation be done within the context of a resource/land use and socio economic development plan for the entire region.

C. Federal Government Policy Towards Indians

On a visit to British Columbia in 1876 the Earl of Dufferin, Governor General of Canada, summarized the position of the Crown with respect to the Indian people as follows:

> "...no government, whether provincial or central, has failed to acknowledge that the original title to the land existed in the Indian tribes and communities have hunted or wandered over them...and before we touch an acre we make a treaty with the Chiefs representing the Bands we are dealing with, having agreed upon and paid the stipulated price...we enter into possession."

What contrast between these words and those of the present Prime Minister of Canada. In a speech given on August 8, 1969 in Vancouver, British Columbia he said:

> "While one of the things the Indian Bands often refer to are there aboriginal rights and in our policy, the way we propose it, we say we won't recognize aboriginal rights. We will recognize treaty rights. We will recognize forms of contract which have been made with the Indian people by the crown and we will try to bring justice in that area and this will mean that perhaps the treaties shouldn't go on forever. It's inconceivable, I think, that any given society one section of the society have a treaty with the other section of the society. We must be all 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 that things in the past were covered by the treaties like things like so much twine or so much gunpowder 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 will be able to receive their twine or their gunpowder. They should become Canadians as all other Canadians."

With respect to the stated Indian request for a preservation of Aboriginal Rights he commented:

> "And our answer - it may not be the right one and it may not be the one which is accepted but it would 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'."

These words were said on the unveiling of the Federal Government's "New" policy with respect to Indian people. This came to be called the White Paper. It was proposed that the Indian Act be repealed, and that the Provinces take over the "same responsibility for Indians that they have for other citizens in their Provinces".

From the Federal Government's perspective the establishment of a reserve system in Canada had always been viewed as a transitional measure, to be terminated at some time in favour of individual Indian ownership of the land under a Canadian land tenure system. Indeed under the original Indian Act of 1876 it was the governments intention to survey reserves into individual lots, have Band Councils assign these lots to band members. The Band member could receive a location ticket if he could prove he was "civilized". During a three year probationary period if the Indian could demonstrate he would use the land as a Euro-Canadian might, then he was fully qualified for membership in Canadian society. He would become "enfranchised" and given title to his land. This meant that his special status as an Indian was eradicated, and he could own the land as a white person would, completely contrary to the traditional communal use of the land which had been part of the Indian land tenure system for thousands of years.[1]

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[1]Tobias, John L. "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" the Western Canadian Journal of Anthropology, Vol. VI, No. 2, 1976 at page 18.

As discussed above, this was clearly not the basis upon which the Royal Proclamation was enacted, nor the treaties negotiated pursuant thereto.

While this particular plan for reserves has not been implemented we submit there is abundant evidence that the federal government is ready to end this "transitional" phase and terminate the present reserve system.

As has been stated elsewhere:

> "The elimination of reserve lands is termination of status and rights for Indian people. The easiest way to destroy Indian people and their culture is to eliminate the land base. The forced change of status of Indian Governments to that of municipal governments and the change of reserve land status from federal crown land to provincial crown land is a very sure means of termination of Indian rights and status and elimination of a land base."[1]

The only reason that the "White Paper" provisions were not implemente was that Indian Nations were able to unite solidly across Canada in effect of opposition.

The policy of assimilation has prevailed in Federal thinking for many years. In 1947 A Plan for Liquidating Canada's Indian Problem within 25 Years, was presented by D. Jeness in 1947 to the Parliamentary Joint Committee.

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[1] "The Canadian Governments Termination Policy", Marie Smallface Marule, a paper prepared for "One Century Later", the 9th Annual Western Canadian Studies Conference, February 18-19, 1977, at Page 12.

people status comparable with that of their white neighbours. The commission should be given a broad mandate so that it may adjudicate in each case the relative merits and demerits of individual versus co-operative ownership of reserve lands, the proper disposition of trust funds, timber and mining rights, and other complicated problems. It should present its report within two years of its appointment, and legislation implementing its recommendations should follow with as little delay as possible.

4. Increase the educational facilities of the migratory northern Indians (whose territory is not suited for either farming or ranching) in order to qualify them for such new types of employment as: aeroplane mechanics, mineral prospecting, wireless operation, game and forest protection, fur farming, etc. These educational facilities might include:

All of these pursuits, even that of aeroplane pilots, were carried out by the Eskimos in Greenland and even by the Eskimos in Siberia. Before the war three Siberian Eskimos who live just across the strait from Alaska were civilian aeroplane pilots, but I doubt if we have a single Eskimo who could read the instructions on the dial of an aeroplane or even read the barometer or the thermometer. In Greenland they are doing that all the time, and they are doing that even in Siberia.

(a) Intensive classes for children in ordinary school subjects, and special courses for adults in mineral prospecting, motor mechanics, etc., during the summer months when the Indians tend to congregate;

This plan was made out before there was an investigation into Indian education by Dr. Moore.

(b) Free technical training for selected boys and girls at suitable centres, e.g., Le Pas, Churchill, etc.

D. JENNESS.

April/1943.

PLAN FOR LIQUIDATING CANADA'S INDIAN PROBLEM WITHIN 25 YEARS

Objective.

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 an 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 yearly now spent on Indian administration.

C. Fulfil the almost forgotten pledge of the government when it adopted the system of confining the Indians to special reserves.

Outline of Plan.

1. Change the present Indian educational system by abolishing separate Indian schools and placing Indian children in the regular provincial schools, subject to all provincial school regulations.

For a period of 10 or more years this may require:—

(a) Per capita subsidies from the federal government in lieu of school taxes levied on Indian families;

In British Columbia, may I remark, you could see in the same little district Japanese children going to the schools with white children and half a mile away Indian children going to segregate schools—not half as good.

(b) Morale promotion among the Indians (e.g. clothing grants, home inspection, etc.) and an educational campaign among white school communities, to mitigate any prejudice.

(c) Special facilities (scholarships, etc.) for Indian children to attend technical schools and colleges remote from their homes.

2. Include the Indians (and Eskimos) in all "Reconstruction" measures, e.g. those dealing with unemployment, public health, health insurance, and other phases of social security.

3. Appoint immediately a commission of 3 (the chairman to be a judge, and one member an agriculturalist) to study the various Indian reservations throughout the Dominion and to advise on the best means of abolishing them, of enfranchising the inhabitants, and giving them an eco-

This policy of assimilating Indian people and expropriating their land and their resources continues to be implemented by the Federal Government to date. In a policy Document #408-79, dated July 20, 1979, entitled "Native Claims Policy - Comprehensive Claims", the Government speaks frankly concerning the policy of native claims in Canada. In discussing the number of factors affecting the claims process which have been identified and which should be considered in dealing with future policy directions, the document states details:

> "There has also been a spreading attitude among the native leadership that Indian title, rather than being extinguished, should be confirmed, which has been diametrically opposed to historical federal policy".

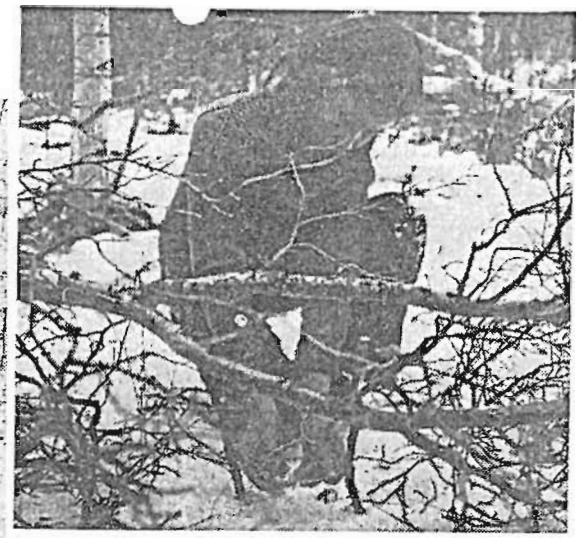
In fact, the Indian Nations of today have had the frustrating task of attempting to negotiate outstanding comprehensive claims in a climate where the federal negotiators tell our Indian leaders that Indians have no legal claim to the land, but rather only a moral or political claim.

When the Federal Government decided to support the Alcan Pipeline, the question arose as to interference with the development by Indians asserting their claim to the land. The Government's internal policy document of November 30, 1977 reveals that Indian title will not stand in the way of development:

> "A few things are clear. The Government of Canada is prepared to extinguish native land claims if necessary by legislation to support its international work and commitment but it will only do so in a way which represents the fairest possible settlement to those involved."

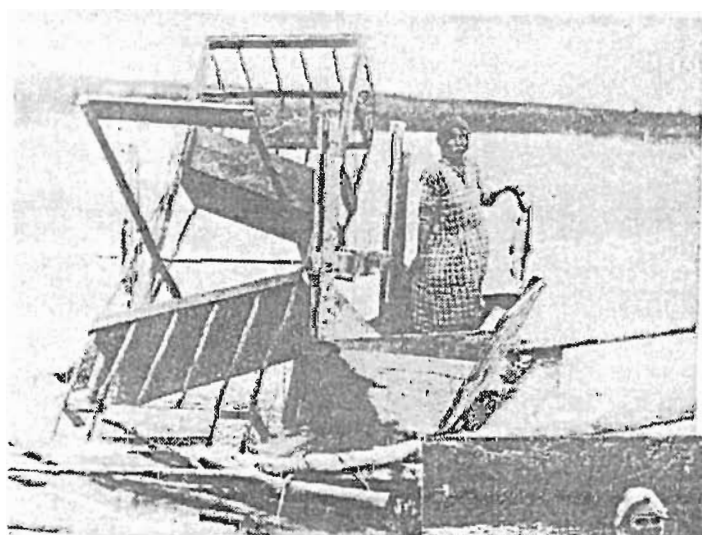
The Government of Canada, in complicity with the provinces, has clearly abused the legislative reign which Great Britain conferred upon it to administer Great Britain's obligations for Indians and lands reserved for Indians. Perhaps the difficulty arises from the fact that Great Britain, having simultaneously conferred measures of self-government on Canada, ceased to monitor Canada's administration. Or perhaps Canada and the provinces, acting in a clear conflict of interest, acted in a high-handed and illegal fashion to strengthen the interest of the Canadian Confederation at the expense of our Indian Nations.

DENE NATION

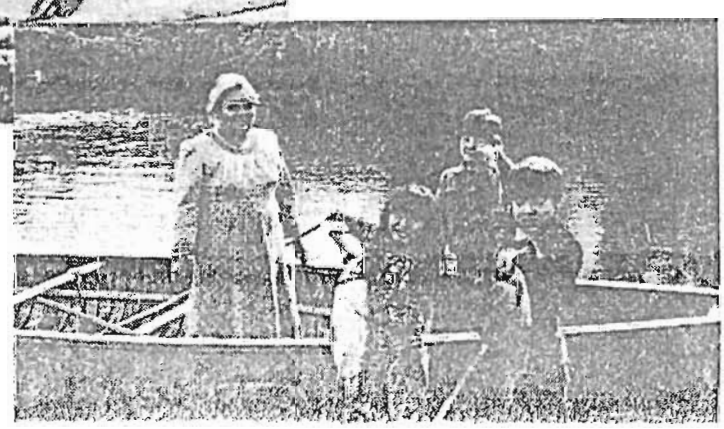


"You see our roots are deep; our trails are there. Everywhere you go you see our signs. There are stories to be told of what has happened in these mountains; there are also legends that have been told in the past, through many generations. To us Indian people it is priceless. Do the white men understand what this means to us? No. To us, our land is our survival and the strength of our people."

(Johnny Morgan, Elder of Bonaparte Band, April, 1979)

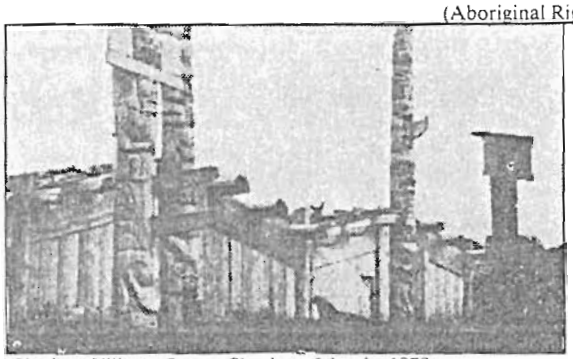


COUNCIL OF YUKON INDIANS

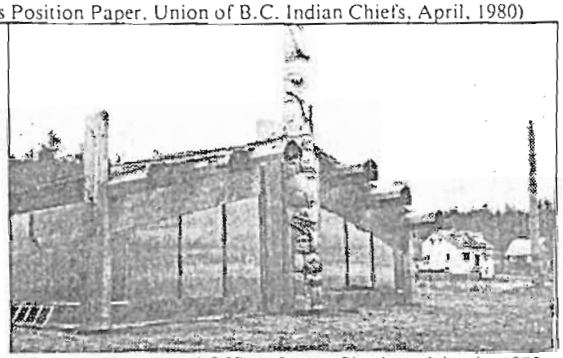


"Traditionally, as aboriginal people we had uncontested, supreme and absolute power over our territories, our resources and our lives. We had our own political, legal, social and economic systems.... Our people have no desire, under any circumstances, to see our Aboriginal Rights extinguished. Our people have consistently said that our Aboriginal Rights cannot be bought, sold, traded or extinguished by any Government."

(Aboriginal Rights Position Paper. Union of B.C. Indian Chiefs, April, 1980)



Skedans Village, Queen Charlotte Islands, 1878

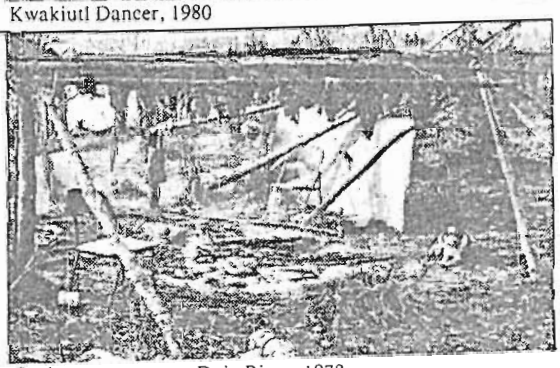


Skiegate Village Band Office, Queen Charlotte Islands, 1978

Kwakiutl Dancer, 1900

Kwakiutl Dancer, 1980

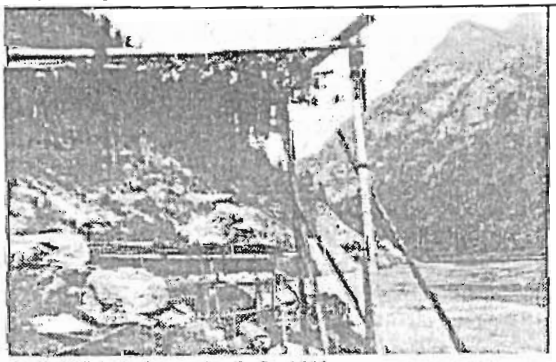
Drying moose meat, Kootenays, 1911



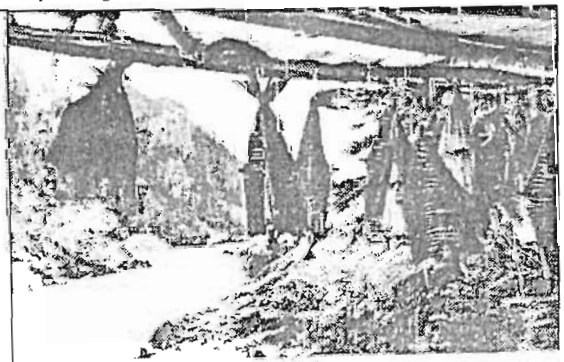
Drying moose meat, Doig River, 1978

Dipnetting for Salmon on Fraser River, 1911.

Dipnetting for Salmon on Fraser River, 1980.



Indian fish drying racks, B.C., 1880



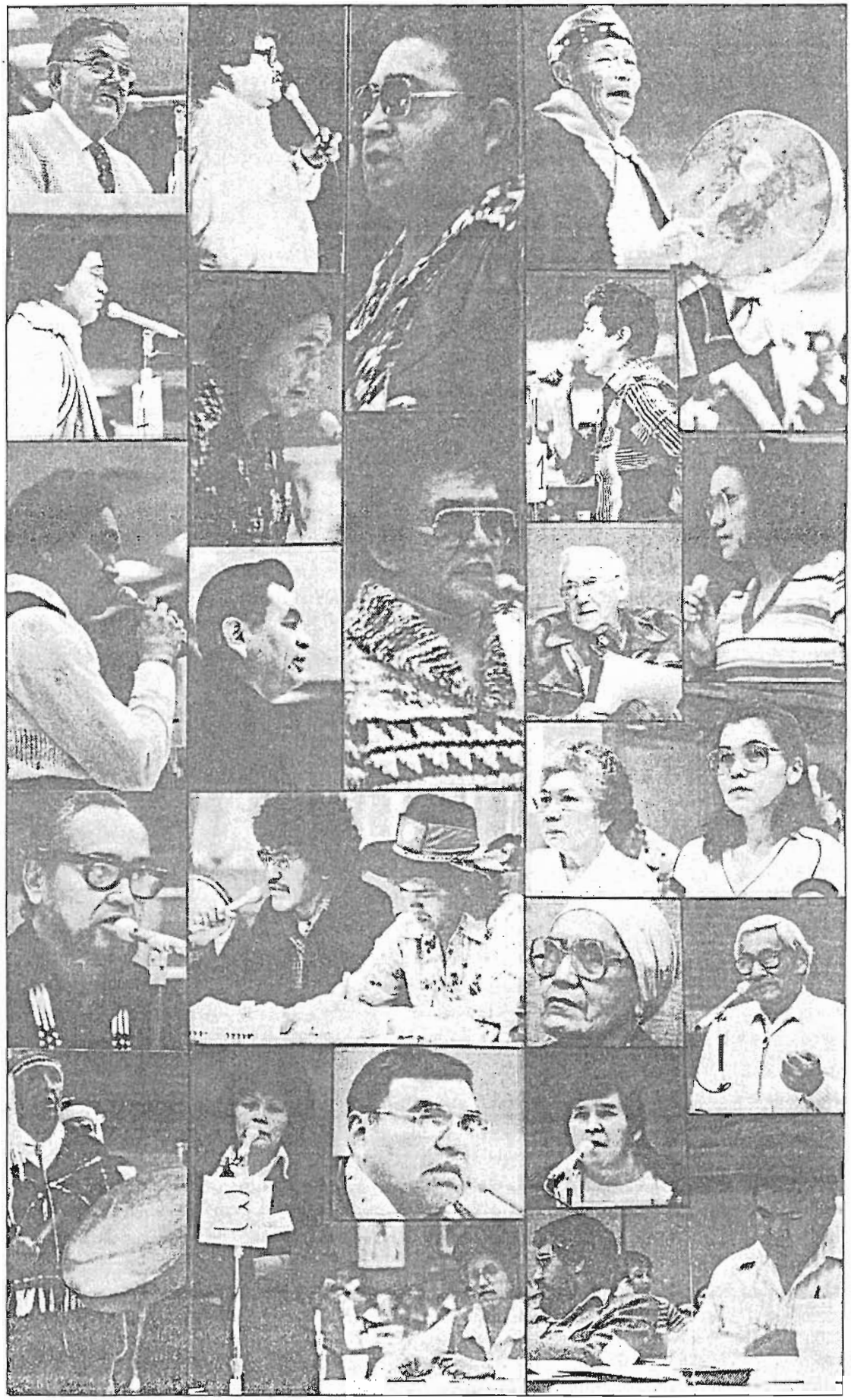
Indian fish drying racks, B.C. 1980

DENE

INDIAN NATIONS IN LEGISLATION, 1980.

Dene Nation
Council of Yukon Indians
Grand Council, Treaty 3,
Grand Council, Treaty 9
Iroquois and Allied Tribes
Federation of Saskatchewan Indians
Union of New Brunswick Indians
Four Nations Confederacy
Indian Association of Alberta
Union of Nova Scotia Indians.

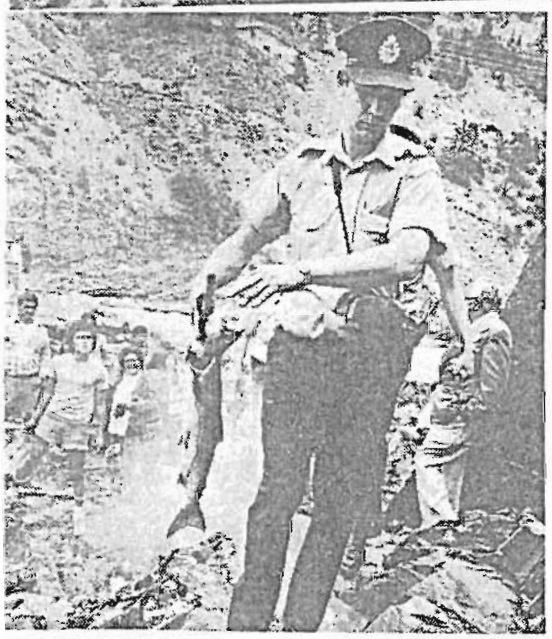
UNION OF B.C. INDIAN CHIEFS
ANNUAL GENERAL ASSEMBLY, 1980



"I informed the natives... that they we t liberty to hunt over the unoccupied lands. d to carry out their fisheries with the same freedom as when they were the sole occupants of the country."

(Lieutenant-Governor James Douglas, 1854)

Bridge River Band 1978



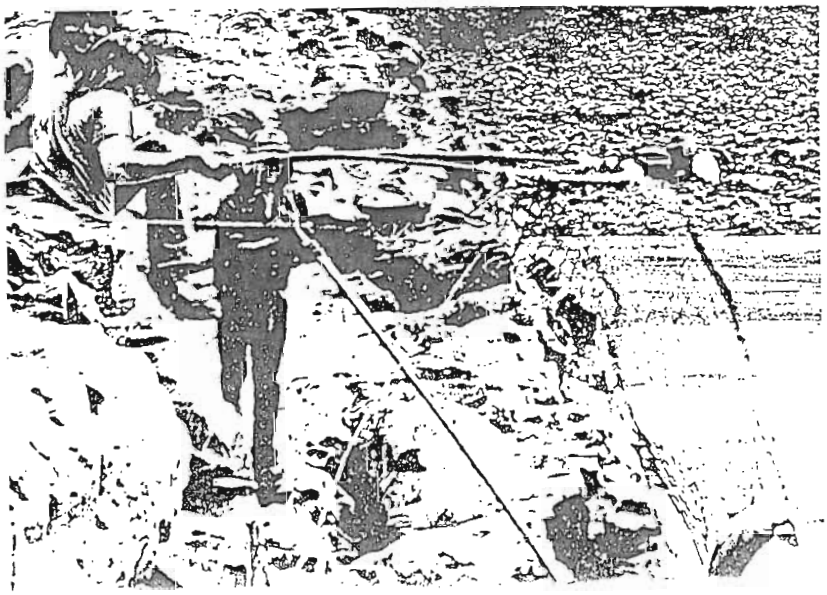
Fountain Band, 1979

"Indians and fish are inseparable. This has been quite so throughout our history. Traditionally the fisheries resource formed the economic and cultural base of the Indians throughout the entire west coast."

(Godfrey Kelly, Elder of Skidegate Band, 1979)

Bridge River Band 1980

Fountain Band, 1980



The Federal Government and Patriation

We all know deeply that the Federal Government policy to terminate Indian status, and reserve land would be fully realized through the patriation of the Canadian constitution. This is not only reasonable in terms of the past conduct of the Federal Government and particularly of the Trudeau Government, but in terms of the proposed Charter of Rights itself.

The only mention of Indian rights is Section 24 of the Charter which states:

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

The Charter does not entrench any of the obligations to our Indian Nations. The only direction given is that the Charter shall not be construed as denying the Indian rights and freedoms that exist in Canada.

For over a hundred years now, the Federal and Provincial Governments have refused to recognize that we are the original peoples of this land and have right to the lands and resources and to our Indian Governments. They have minimized wherever possible those legal obligations owed to us and when they have been able to get away with expropriating our lands and resources, they have done so. At the 12th Annual General Assembly of the Union of British Columbia Indian Chiefs held in Vancouver on October 17th., 1980 the present Minister of Indian Affairs was asked specifically if the Federal Government recognized aboriginal rights and if those rights were incorporated in the Charter. The Minister refused to answer this question. Where then, are the protections for the obligations owed to us?

Under the guise of non-discrimination, Section 15 of the Charter states that there shall be equality without regards to race. What

will that section do to our Indian people? We fought for over two years to stop the pipeline through northeastern British Columbia because of the damage which the development would do to our people. We were unsuccessful in our fight. We fought hard then to attempt to minimize the impact of the pipeline by working closely with the Northern Pipeline Agency to secure preferential hiring programs for the Indian people in the area. Those programs were scheduled to begin after the date of the proposed patriation. We recently learned that the preferential hiring program are now in danger because of the Federal Government interpretation that such programs would be contrary to the Charter of Rights.

As Sam Michel, one of our elders from the Fountain Band, said earlier in this paper:

> "We were the richest people in the world... We didn't have a penny in our pocket, but we were the richest people in the world. We had everything: we had game, we had fish, we had everything..."

Today we are the poorest peoples in Canada suffering more than our share of social breakdown. In a recent report prepared by the Indian and Northern Affairs Canada documenting "Indian Condition" (1980) the following conclusions were made:

(a) The levels of Indian juveniles considered delinquent is almost three times the national rate and is consistent with the high proportion of Indian children in care and the increasing proportion of Indian children living off reserves out of their home communities.

(b) About nine percent of the prison population is Indian compared to three percent share of the national population.

(c) The overall rate of violent deaths for Indians is more than three times the national average.

(d) The life expectancy is lower for Indians.

(e) The labour force statistics reveal massive umeployment and poverty.

We have had real difficulties trying to survive without adequate control over our lives, our governments, our resources. Matters

have been made worse because the governments who do assume control in those areas continue to implement the policy of expropriation and assimilation.

As we see it, non-discrimination is another way for the Government to say to us, assimilation.

Future amendments to the constitution could be done by the Federal Government in conjunction with eight provinces with eighty percent of the population. Unless our national position is protected, there will be a tyranny by the majority over the minority rights of Indian people. We lose the supervisory protection of Her Majesty's Parliament in Britain. We will lose the protections which the Indian Nations derive from our special status and unique position within the Canadian consitution. What we really stand to lose and why we are fighting the patriation with all of our power, is our right as original peoples to continue to live on our land and carry to our future generations the culture and life which our ancestors carried to us.

Our Indian leaders attempted to be included in the constitutional discussions which took place between the Federal Government and the Provincial Governments during the Fall of 1980. Despite repeated requests, and some promises, the participation was effectively denied. The Federal Government has indicated that Indian people will be consulted after the patriation. Such consultation is after the fact. The purpose of patriating the constitution has been revealed in the constitutional talks. At the present time, the Provincial and Federal Government are attempting to re-order their relationships to each other and to the resources of the land to create a more workable confederation. Over forty percent of the land in Canada is presently unceded. It is our land and our resources which the Governments are currently dividing among themselves. The Federal Government carries the trust responsibility over Indians and lands reserved for Indians. Yet the Minister of Indian Affairs was not present at any of the

constitutional talks as our representative. Nor were our Indian leaders permitted to represent our interests.

In the province of British Columbia, a Master Tuition Agreement exists by which the Federal Government pays to the Provincial Government a sum of money each year to educate our Indian children. For many years Indian people have attempted to change that agreement, and divert our education money to create an education system of our choice for our Indian people. We exerted considerable presssure upon the Federal Government to particiapte in making changes. We have been repeatedly told that Indian people may participate after the financial arrangement between the Federal and Provincial Government had been concluded. Our leaders refused to participate in discussions on that basis because the essential item of finances would have already been concluded. The decision to allow Indian participation in constitutional talks after patriation parallels the politics experienced in our fight for control of our education. Essentially the Canadian Government has blocked our effective participation.

We seek the justice of Great Britain, to honour the Royal Majesty's obligations to us. We feel that patriation should be refused until the position of our Indian Nations within Canada has been resolved to everyones satisfaction.

On Wednesday, November 12th, 1980 Mr. Freeland, legal counsel for the Parliamentary Standing Committee, advising Parliament of Great Britain on the question of the constitution, advised the Committee that Britain did not owe any outstanding obligations to the Indians of Canada. Therefore, his opinion was that no presentation by the Indians should be heard. The Committee proceeded to deliberate as to whether or not the patriation of the constitution could take place without the agreement by the provinces. The consultation with the provinces assumes that provincial authorities represent

in some substantial way the interests of the people within the provincial boundary. However, Indian interests have never been represented by the provinces. Nor for that matter, have our interests ever been adequately represented by the Federal Government.

We have also sought a legal opinion from Professor Ian Brownlie, QC, DCL, FDA, concerning the viability of taking an action through the courts of Britain involving the rights of our Indian people. The opinion concluded that we do not have recourse through the courts of Great Britain.

We are asking this Tribunal to understand the position which we find ourselves in the world today and to lend the weight of your authority to our plea for justice.

"They thought we were gonna die off and disappear, but we didn't. We are coming back" (David Elliot, Elder of Tsartlip Band)

"The land is our culture and it is our only future. Before, we lived as one with the lands and the waters. We have our own system, our own way of educating our children, our own way of managing the land and its resources for the benefit of all. In short we had sovereignty over our own lives and means to live. There are our Aboriginal Rights. We have never ever given up, through Agreement or Legislation, our Aboriginal Rights to control our own lives and means to live."

(George Manuel, President, Union of B.C. Indian Chiefs, 1978)