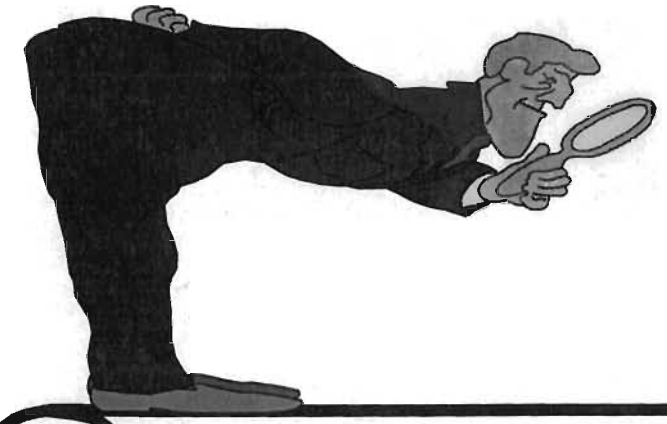

THE INDIAN NATIONS AND THE FEDERAL GOVERNMENT'S VIEW ON THE CONSTITUTION

In October 1980, George Manuel, Grand Chief, British Columbia Indian Chiefs sounded the alarm for the Indian Nations in the Province of British Columbia. Trudeau's Constitutional Resolution posed a threat to the survival of the Indian Nations. The leader articulated that the issue was "beyond consultation, beyond administrative battles with Government, beyond petty politics and was hitting to the very root of the existence of the Indian Nations."

I The Position of the Indian Nations Concerning the Constitution

Over 100 British Columbia Indian Chiefs in Assembly, November 1980 stated their firm position that they must participate in a broad constitutional review:

> "Indian Nations in Canada were never conquered. European traders, and in later years, settlers, were made welcome in a land and environment which was alien to them. Throughout years of European settlement and expansion, Indian Nations sought a mutual accomodation, one that would permit a bountiful land to be shared to the benefit of all.
>
> Indian rights to land, resources, culture, language, a livelihood and self government <u>are not</u> something conferred by treaties or offered to Indians as concessions by a beneficent government. These are the rights which Indian Nations enjoy from time immemorial. THESE RIGHTS ARE PREEXISTING AND INVIOLABLE. A CANADIAN CONSTITUTION CAN ACCOMODATE INDIAN RIGHTS - IT CANNOT DIMINISH, ALTER OR ELIMINATE THEM.
>
> Indian Nations understand the constitution to be a pact among founding peoples, among which we include our selves. We understand our special constitutional relationship with the Federal Government to be in the nature of a partnership with the federative system, which was intended to permit us to survive and prosper as Indian Nations, while contributing to Canada's total development.

> ...a new constitution can have two alternative results insofar as Indian Nations are concerned. It can have the effect of entrenching poverty, dependency, and alienation; or it can re-open avenues to Indian development in terms consistent with rights recognized and affirmed in all previous transactions with the Crown...
>
> ...exclusion of Indian participation from a broad constitutional review must be, of necessity, the first mistake which Federal authorities have to correct. Until this is done, Indian Nations reject the proposed Federal Resolution in total as a hostile and aggressive measure and are prepared to employ all means to resist its implementation. "

Indian Nations: Determination or Termination: Position Paper adopted by the Union of British Columbia Indian Chiefs in Assembly, October 1980

The 1980 Statement reflects a position of unity among all Indian Nations in Canada which remained consistent throughout the Constitutional debate. First, full participation of the Indian Nations in Constitutional renewal was essential. The Indian Nations sought to be represented by Indian Governments at the time and place where legislative jurisdiction over peoples and lands in Canada were being divided for at least the next 100 years. The Indian Nations would not allow their interests to be represented by the Federal or Provincial Governments because it was never through those Assemblies that the Indian Nations exercised their political will. Second, the fundamental constitutional law of the land must entrench Indian rights. The Indian Nations perceived that it was crucial that clauses protecting aboriginal and treaty rights were to be beyond the control of the Federal or Provincial Governments to change or repeal. Short of that protection, the rights of the Indian children yet unborn would be vulnerable to the legislative will

of potentially hostile Governments exercising an agenda inconsistent with the protection of Indian rights.

II The Position of the Federal Government on the Constitution

In a confidential document prepared after October 1980, entitled "Briefing Material on Canada'a Native Peoples and the Constitution" the Federal Government's position towards the objectives of the Indian Nations and the Constitution was unambiguously set out:

> "There is likely to be a major effort by Canada's Native Peoples to win national and international support (especially at Westminister) for their stand against patriation. If the Native Peoples press forward with their plans and if they succeed in gaining support and sympathy abroad, Canada's image will suffer considerably. Because Canada's Native Peoples live, as a rule, in conditions which are very different from those of most other Canadians - as sample statistics set out below attest - there would be serious questions asked about whether the Native Peoples enjoy basic rights in Canada:
>
> - Indians have a life expectancy ten years less than the Canadian average;
>
> - Indians experience violent deaths at more than three times the national average;
>
> - approximately 60% of Indians in Canada receive social assistance;
>
> - only 32% of working-age Indians are employed;
>
> - less than 50% of Indian homes are properly serviced;
>
> - in Canada as a whole the prison population is about 9% Native, yet Native peoples make up

> only 3% of Canada's population. In 1977, there were 280 Indians in jail per 100,000 population, compared to 40 of the national average."

The strategy of the Federal Government was made clear, namely to promote formal discussions with the Indian Nations <u>after</u> patriation, knowing full well that to do so would preclude an effective settling of the issues. The offer of post-patriation discussion would be used as the reason why constitutional participation was unnecessary.

> "Native leaders realize that entrenching their rights will be enormously difficult after patriation, especially since a majority of the provinces would have to agree to changes which might benefit Native Peoples at the expense of the provincial power. They therefore demand an entrenchment of Native rights <u>before</u> patriation."

On the question of entrenching rights in the Charter of Rights the document had this to say:

> "Constitutionalizing treaty rights, for example, which many Indian leaders have called for, begs the question of how treaty rights should be interpreted. Additionally to constitutionalize treaty rights does nothing for the vast majority of Native peoples in Canada, who either have never been party to treaties or who have excluded themselves from the groups which did sign treaties."

In summary, from the Government's view the Indian Nations were to have no direct participation in constitutional renewal. Rather, discussion with the leaders was to be left to a post-patriation climate where Indian Nations faced ten Provincial

Governments and a Federal Government jealously guarding their newly divided jurisdiction. On the question of entrenchment, the Government would entrench only those rights which they were politically forced to do; and they were prepared to preclude Indian rights generally. This fact was demonstrated by the contents of successive drafts of the Canada Bill and the Charter of Rights where, from draft to draft, the clause safeguarding aboriginal and treaty rights appeared and disappeared. The most dramatic gesture was in November 1981, when the Federal Government agreed to remove the aboriginal and treaty clause in exchange for a broader Provincial accord.

III The Source of the Differences of Position between the Indian Nations and the Government on the Constitution

At the root of the different positions between the Government and the Indian Nations is a fundamental disagreement about the nature of Indian sovereignty. For the purpose of the discussion, sovereignty is defined as the inherent right of distinct Peoples to govern their People and control their land through political institutions of their choosing.

(a) The Government's View

The Government's goal has been to assume the sovereignty of the Indian Nations until the Indian Nations are brought fully under the domination of the Legislative Assemblies

of Canada. This goal is stated in government Indian Policy which, on this point, has remained consistent for over one hundred years. This can be illustrated by way of reference to two government policies, one presented in 1947 and another in 1969.

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

> "To abolish, gradually but rapidly, the separate political and social status of the Indians (and Eskimos); to enfranchise them and merge them into the rest of the population on the equal footing. The realization of this plan should:
>
> A) improve the Indians' social and economic position, now so depressed as to create "leprous" spots in many parts of the country;
>
> B) abolish the permanent drain on the federal treasury of the millions of dollars yearly now spent on Indian administration;
>
> C) fulfill the almost forgotten pledge of the government when it adopted the system of confining the Indians to special reserves.
>
> The plan contemplated the appointment of a commission to "study the various Indian reservations throughout the Dominion and to advise on the best means of abolishing them, of enfranchising the inhabitants."

In 1969 Mr. Trudeau and Mr. Chretien formulated the White Paper Policy. The Policy called for the elimination of Indians and Indian lands. The main features were as follows:

(a) The Constitution would be amended, eliminating all references to Indians;

(b) The Indian Act, which guarantees a number of specific rights, would be repealed;

(c) The Department of Indian Affairs and its special budgetary appropriations for Indians would disappear;

(d) Indian Reserves would lose their protected status;

(e) Full jurisdictional powers over Indians would be transferred to the Provinces.

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

> "It's inconceivable, I think, that in a given society one section of the society have a treaty with the other section of the society. We must all be equal under the laws and we must not sign treaties amongst ourselves and many of these treaties indeed, would have less and less significance in the future anyhow, but things that in the past were covered by the treaties like things like so much twine or so much gun powder and which haven't been paid, this must be paid. But I don't think that we should encourage the Indians to feel that their treaties should last forever within Canada so that they be able to receive their twine or their gun powder. They should become Canadians as all other Canadians and if they are prosperous and wealthy and they will be paying taxes for the other Canadians who are not so prosperous and not so wealthy whether they be Indians or English Canadians or French or Maritimers and this is the only basis on which I see our society can develop as equals. But aboriginal rights, this really means saying, "We were here before you, You came and you took the land from us and perhaps you cheated us by giving us some worthless things in return for vast expanses of land and we want to reopen this question. We want you to preserve our aboriginal rights and to restore them to us." And our answer - it may not be the right one and may not be one which is

accepted but it will be up to all of you people to make your minds up and to choose for or against it and to discuss with the Indians - our answer is "NO"

This is a difficult choice. It must be a very agonizing choice to the Indian peoples because, on one hand, they realize that if they come into the society as total citizens they will be equal under the law but they risk losing certain of their traditions, certain aspects of a culture and perhaps even certain of their basic rights, and this is a very difficult choice for them to make, and I don't think we want to try to force the pace on them any more than we force it on the rest of Canadians; but here we are again here is a choice which is in our minds, whether Canadians as a whole want to continue treating the Indian population as something outside a group of Canadians with which we have treaties, a group of Canadians who we have as Indians, many of them claim, aboriginal rights, or whether we will say, well, forget the past and begin today; and this is a tremendously difficult choice, because, if - well one of the things the Indian bands often refer to are their aboriginal rights, and in our policy, the way we propose it, we say we won't recognize aboriginal rights."

PRIME MINISTER TRUDEAU

By 1973 the Indian Nations had pushed back Mr. Trudeau from implementing the White Paper. The method was concerted political action and forcing the issue of aboriginal rights through the Courts in the case of Calder v. The Attorney General (1973) 4W.W.R. 1. In spite of the setback, the Trudeau Government's goal remained constant. It was not until the Constitution debate that the politics were ripe for a renewed approach. The Government's real agenda on the Constitution debate 1982 towards the Indian Nations was stated by Mr. Chretian in 1969.

"The tradition of federal responsibility for Indian matters inhibited the development of a proper relationship between the Provinces and the Indian peoples as citizens.

> The ultimate aim of removing the specific references to Indians from the Constitution may take some time, but it is a goal to be kept constantly in view.
>
> In the long term, removal of the reference in the Constitution would be necessary to end the legal distinction between Indians and other Canadians."
>
> MR. JEAN CHRETIEN

Why has the government been so determined in this goal? The ultimate objective is the legal acquisition of Indian land and resources under Indian control. This point was illustrated during the Pipeline debate in 1977. When the Federal Government voiced its support for the Alcan Pipeline, the question arose as to the 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 would 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..."

If Indian Nations possess a sovereignty which must be respected by the Governments and if aboriginal and treaty rights were entrenched so as to burden the legislative capacity of the Governments, the Government could be prevented from exploitation of all the natural resources of the country, as they see fit. In a nutshell, that fact is at the root of the Government's position on the Constitution.

In summary, from the Government's side, the Indian

Nations must be contained within the Canadian constitution, either as assimilated citizens or as a minority group whose interests are protected or not, according to the legislative will of the Governments' legislative assemblies. Sovereignty of the Indian Nations will not be tolerated.

(b) The Indian Nations' View

The Indian Nations are the original Peoples of this land. There are no Indian stories about crossing over a cold bridge or coming here by boat. From the Indians' viewpoint, if there was a migration it originated in Canada and did not end here. As distinct Peoples, Indian Nations possess sovereignty, relying as they do on their ancestors' ways, passed to this generation as one in a chain whose roots extend from antiquity to the future. The position was restated in 1980 as the Chiefs across the country united on this question to fight the patriation of the Constitution.

> "At the conference of the First Nations held in Ottawa, November 1980, our Indian Nations unanimously joined together in forming a Provisional Council of our Indigenous Governments mandated to form a Provisional Government. We are united in resolution unanimously passed that the Indian Nations of Canada, both those which entered into Treaties and those which did not, will stand together in common purpose in our Declaration which asserts these principles are inviable:
>
> > "We, the Original Peoples of this Land know the Creator put us here.

> The Creator gave us laws that govern all our relationship to live in harmony with nature and mankind.
>
> The laws of the Creator defined our rights and responsibilities.
>
> The Creator gave us our spiritual beliefs, our languages, our culture, and a place on Mother Earth which provided us with all our needs.
>
> We have maintained our freedom, our languages, and our traditions from time immemorial.
>
> We continue to exercise the rights and to fulfill the responsibilities and obligations given to us by the Creator for the lands upon which we were placed.
>
> The Creator has given us the right to govern ourselves and the right to self-determination.
>
> The rights and responsibilities given to us by the Creator cannot be altered or taken away by any other Nations."

PETITION AND BILL OF PARTICULARS OF THE ESTABLISHMENT OF NEGOTIATIONS BETWEEN INDIAN NATIONS IN CANADA AND THE GOVERNMENT OF CANADA TO RESOLVE OUTSTANDING DIFFERENCES PRIOR TO THE PATRIATION OF THE CANADIAN CONSTITUTION.

This Position has remained unchanged since it was forced into articulation by colonization. Its words echo back through petitions and declarations of all the Nations in Canada for at least 100 years.

The only significant refinement to the position of absolute sovereignty in the abstract is the accomodation paid to the particular political situation in Canada. The Indian Nations have defined aboriginal rights to include a co-existence with the

other peoples and governments in Canada. In 1979 the B.C. Indian Chiefs defined aboriginal rights as follows:

> "Aboriginal rights means that we collectively, as Indian People, have the right within the framework of the Canadian Constitution, to govern through our own unique form of Indian Government (Band Councils) an expanded version of our Indian Reserve lands that has an adequate amount of associated resources and is large enough to provide for all the essential needs of all our people, who have been defined as our citizens or members through our Indian Governments."
> (emphasis added)

In summary, in 1979, at a time when the constitution debate became heated, a definition of sovereignty was advanced which could be accomodated within the Canadian constitution. The Indians envisioned a third order of Government where jurisdiction to govern Indians and Indian lands resided with the Indian Nations. This level of government would co-exist with the Provincial and Federal Governments so one nation's development would not take place at the expense of another. The details of the position were set out in the Union of B.C. Indian Chiefs Aboriginal Rights Position Paper, 1979 which has been with the Trudeau Government since November 1979 when it was unanimously passed by the National Assembly of Chiefs. To date it remains unacknowledged by the Government.

In spite of exhaustive, brutal and calculated efforts on the part of the Government to change the minds of the Indian Nations on this point, the Indians have withstood the onslaught

and continue to assert and expect their sovereignty. For the Indian Nations of B.C. this fact has a special significance because for the most part, no treaties have been concluded in the Province. The 'deal' offered by the Government has been improved over the years but the Indian Nations of B.C. have not settled. The sole reason is that the Government has made it a condition of any settlement, that the Indian Nations must surrender their rights to the land forever in exchange for promises, primarily cash. To surrender land is to surrender the future of the Indian Nations. That condition continues to be unacceptable. As George Manuel, Grand Chief put it:

> "I would rather pass on to my grandchildren the legitamacy of the struggle than to leave them with a settlement they can't live with."

(a) The Unique Constitutional Position of the Indian Nations: The Basis of the Legal Argument

The particular legal tool which the Indian Nations had to work with in the debate was their unique Constitutional position.

Canada was formed not in 1867 as Mr. Trudeau would have us believe but with the compacts concluded between the Crown and the Indian Nations. The first major compact was reflected in the Royal Proclamation of 1763. George III issued this proclamation and formalized relationships between the Crown and the Indian Nations on terms which would satisfy the Indians and permit settlement of Canada. The Proclamation itself was a statement of policy which had been forming for many years before 1763. The political urgency was generated by events which occurred in Canada during and after the conclusion of the Seven Years War. During that war, the British and the French fought one another for Dominion over Canada. The Indian Nations, on the whole, sided with the British because representatives of the British Crown repeatedly held out to the Indian Nations that the British Crown would give them protection against the French who had designs on Indian lands. When the war concluded, the British refused to remove their outposts from Indian territory. Indians moved against the British. The greatest of the battles was led by Chief Pontiac. Between 1761 and 1763 seven of the ten British outposts were destroyed by the Indians. The British Crown was under pressure to establish an agreeable Constitutional

arrangement with the Indian Nations. The Royal Proclamation of 1763 became the solution.

The terms of the Royal Proclamation itself were negotiated with the Indian Nations concerned. By its terms, a general prohibition was placed on the settlement of unceded Indian lands, until the lands were yielded up to the Crown through consent of the Indian Nations. The Royal Proclamation recognized and confirmed the sovereignty of the Indian Nations. The Indians were described as "Nations" and it was only through a vote of the Nations in Assembly that rights belonging to the Indian Nations could be conferred to the Crown. Similarly, land rights were recognized insofar as they must be "purchased": until then, Indian land was placed beyond the authority of the governors to grant.

The Courts have addressed the Constitutional force of the Royal Proclamation of 1763. Decisions have held that the Proclamation has the force of statute in Canada and has never been repealed: Campbell v. Hall (1774) 1 Cowp. 204, Regina v. Lady McMaster (1926) Ex.C.R. 68. In the recent decision of The Queen v. Secretary of State for Foreign and Commonwealth Affairs (The Alberta Case) (January 28, 1982) A.C., the Master of the Rolls ruled that the Proclamation was a Constitutional instrument entrenching the rights and relationships contained therein.

Operating within the framework of the Royal

Proclamation, treaties were concluded by various Indian Nations and the Crown. The treaties recognized the sovereignty of the Indian Nations as it was only with the consent of the Indian Nations in assembly that the treaty was concluded; provisions within the treaty assumed the ongoing existence of Indian governments and assumed the existence of Indian land rights. The treaties were designed as fundamental instruments which would endure the passage of time and governments. The durability of the agreements was articulated by the Crown's representatives:

> "The Queen has to think of what will come long after today. Therefore the promises we have to make to you are not for today 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 and the rivers flow in the ocean."

Thus, in conclusion, it was on the basis of Indian sovereignty that the Crown and the Indian Nations concluded this constitutional arrangement.

As a result of those compacts the Provincial and later the Federal Governments were able to consolidate power and authority under the British North America Act. The operation of this rule of law is illustrated by the Petition presented by Marie Joseph Philebot to the Executive Council of Quebec on December 21, 1766, praying for a grant of 20,000 acres of the land in the colony of Quebec. This land had not been ceded by the Indians pursuant to the Royal Proclamation; the land was not granted:

"The Committee having taken the same into

> consideration are of the opinion the Lands so pray to be assigned are, or are claimed to be the property of the Indians, and as such by His Majesty's command as set forth in the Proclamation of 1763, not within their power to grant; the Committee are further of the Opinion that they are restrained by His Majesty's said Order from granting Lands but upon the Conditions therein contained."

As the Provinces and later the Federal Government formed constitutional arrangements, the British Crown preserved the obligations and compacts with the Indian Nations through two processes. In the pre-confederation period, each Constitutional Act saved the operation of the Royal Proclamation while, at the same time consolidated the jurisdiction of the local governments over ceded lands. The saving clauses are contained in the Quebec Act (1771) Section 3; The Constitutional Act (1791) Section 33; The Union Act (1840) Section 46.

At Confederation, a delicate distribution of legislative authority safeguarded Crown obligations to the Indian Nations. Under the B.N.A. Act, the federal government, under Section 91(24) was delegated legislative jurisdiction over "Indians and lands reserved for Indians". The provincial government, under Section 109, retained lands, mines, minerals and royalties of the province "subject to any trust existing in respect thereof, and to any interest other than that of the province in the same". The Imperial government retained the amending formula.

In the judgments by the Privy Council in St.

Catherines Milling & Lumber Company v. The Queen (1889) 14 A.C. 46(P.C.) and later in Attorney General for Quebec v. Attorney General for Canada (The Starchrome Case) (1921) A.C.41, the Privy Council decided that the Indian interest in unceded land is "an interest other than that of the province of the same; hence is a burden on the title of the provinces".

Although the precise scope of Section 91(24) has never been explicitly determined, the category has legal limits circumscribed by the Royal Proclamation of 1763 and the treaties. The Royal Proclamation, as an Imperial statute in 1867, not only bound Canada but possessed overriding force, as to nullify any existing or future local laws which conflicted with it (Colonial Laws Validity Act, 1865). Cases have been decided which support the proposition that the federal jurisdiction was in the nature of a trust, administering Crown obligations and protecting Indians and lands reserved for Indians from the reaches of the provinces.

Regina v. Lady McMaster, supra:

Attorney General for the Dominion of Canada and Attorney General for Ontario and Attorney General for Quebec (1897) A.C.199;

Delbert Guerin et al v. Her Majesty the Queen (1981) Action # T-4656-75.

The Imperial government continued to hold the balance of power, thereby preventing either the Federal or the Provincial government from extinguishing Crown obligations without the

Indians' consent.

Constitutional acts which post-date Confederation evidenced a clear intention on the part of the Imperial government to maintain its supervisory role within the context of Canadian federalism. Section 31 of the Manitoba Act states that 1,400,000 acres of land in the province shall be appropriated for the half-breed residents towards the extinguishment of Indian title. Further, Section 6 of the B.N.A. Act 1871 (UK) provides that it shall not be competent for the parliament of Canada to amend the provisions of the Manitoba Act. This Section was not included in the Federal government's original request to the British Parliament, but was a provision required by the Imperial government. The evidence demonstrates that, in part, the Imperial government was motivated by a desire to prevent Section 31 of the Manitoba Act from being revised or rescinded by the Federal Government which was a valid exercise of its supervisory jurisdiction.

In an Order of Her Majesty and Council admitting Rupert's Land and the North Western Territories into the Union (UK) 1870, clause 14 provides:

> 14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian government in communication with the Imperial Government:

Schedule A of the Rupert's Land Act is comprised of An Address to Her Majesty the Queen from the Senate and the House of Commons of the Dominion of Canada:

> And furthermore, that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the Aboriginies(emphasis added).

Finally, included in the resolution of the Act is the following:

> RESOLVED- that upon the transference of the Territories in question to the Canadian Government, it will be the duty of the Government to make adequate provision for the protection of the Indian Tribes whose interests are being involved in the transfer.

The Act of admitting Ruperts Land conforms with the Constitutional tradition of the Imperial enactments, consolidating on one hand the authority and territory of the local government while, at the same time recognizing and providing for legal claims of the Indian Nations.

When British Columbia entered Confederation in 1871 the Imperial Government continued to hold an explicit jurisdiction in the resolution of Indian title. The supervisory role is

evidenced in Clause 13 which reads:

> 13. The charge of the Indians, and the Trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and the policies as liberal as that are hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union."
>
> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government who appropriate for that purpose, shall from time to time be conveyed by the local government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies. (emphasis added)

This clause was inserted because the Secretary of State for the Colonies had been aware of complaints that the local government was abridging Indian rights.

In summary, the distribution of legistlative authority between the federal and provincial governments , as confirmed by the Privy Council in St. Catherines Milling, supra, provides the Constitutional background for the protection and administration of Crown obligations. The federal government, charged with the administration of the obligations to the Indian Nations, would not benefit from the unburdened title. The provincial government did not have the authority to extinguish Indian Title, but would

acquire the unburdened fee when Indian consent had been obtained. The Imperial government continued to hold the balance of power, thereby preventing either the federal or the provincial governments from extinguishing Crown obligations.

The protective role of the Imperial government in this distribution of power was evidenced during the debate on the White Paper. The Federal Government was advised by the Department of Justice that in order to implement the White Paper policy they were required to seek an amendment to the British North America Act, asking the British Parliament to absolve them of responsibilities and jurisdiction under Section 91(24). This point was pivotal to the Indian position during the constitutional debate. Should Britain relinquish its supervisory jurisdiction, the Indian Nations would be placed within a constitutional arrangement which left Indian rights vulnerable to extinction by an amending process which did not include the consent of the Indian Nations.

In summary, several distinct arguments emerged from the constitutional history of Canada. The first argument concerns the nature of Crown obligations. The Royal Proclamation and the Treaties had been concluded with the British Crown. Some treaties recited that the Party to the treaty was the King or Queen of England & Ireland, her Heirs and Successors. The

treaties had been formed on the basis that Indian sovereignty was recognized and confirmed. From the point of view of some Indian Nations, many treaties were concluded with Britain for protection against Canada. All compacts had been formed with Indian consent. There was not a shred of evidence that the treaties had ever devolved to Canada and certainly the Indian Nations had never consented to Canada becoming a party to them. The federal government was always regarded by the Indians as having an administrative role only under Section 91 (24) of the BNA Act to administer Crown obligations as agents of the British Crown. The Canada Act not only assumed that all obligations were now with Canada, it placed the power in the hands of the federal and provincial governments to terminate those agreements without Indian consent.

The second argument concerned the constitutional position of the Indian Nations. The Indian Nations had formed a constitutional agreement with the Crown, enacted through the Royal Proclamation of 1763 and the treaties. This arrangement was concluded with Indian consent and on the basis of a recognition of Indian sovereignty. The BNA Act was grafted onto this pre-existing constitutional arrangement. By 1867, Canada was comprised of three entities, each with a degree of sovereignity recognized under the constitution - the Indian Nations, the Federal Parliament and the Provincial Parliaments. In 1982, Trudeau was seeking to change the constitution of Canada by eliminating the Indian Nations sovereign units within the

Constitution, by eliminating the Royal Proclamation and the Treaties as constitutional instruments and by placing all future rights of the Indian Nations in the hands of the Federal and Provincial governments who would have the power to change or terminate them without Indian consent. Trudeau was pulling a coup d'etat against the Indian Nations through patriation.

(b) Legal and Legal related Action taken

Although an enormous effort was made by Indian Nations across the country, this report will concentrate on describing the activity as it was initiated by, or effected the B.C. Indians.

1. Goerge Manuel et al v. Her Majesty the Queen
In the Federal Court of Canada, Trial Division
Filed the 25th day of September, 1980, Vancouver Registry

A legal action was initiated in September 1980 by nine Chiefs from British Columbia, suing on behalf of themselves and their Bands. The case sought declaratory relief that the Canadian Constitution could not be patriated without the consent of the Indian Nations.

The pleadings closed in that action; however, the Chiefs instructed that the matter not proceed to trial. The

first consideration was a timing question. Prime Minister Trudeau played ruthlessly with the emotions of the people as he continued to announce break-neck deadlines for the delivery of the Federal Request to Westminster. It appeared that the Request would have left Canada before discoveries could be concluded. Further, through their powers to have Constitutional references concluded by the appellate Courts and then the Supreme Court of Canada, the provinces were able to drive their question to Ottawa at a pace which would leave the Indian Nations' action far behind.

A problem which was to become a recurring theme of the constitutional debate for the Indian Nations was an exclusion of the Indian argument from the forums debating the issue. One elder put it this way: "Canada is inside playing hockey with us, but they won't let us in the door. All we hear from the outside is the call of them scoring". Some Indian Nations appeared at the Manitoba Court at the start of the Provincial Reference and sought leave to have the Constitution question expanded to include the question of the requirement of Indian consent to the Request. This application was refused. Indian Nations from different provinces approached their Attorney Generals' offices separately, seeking to have their province advance a separate Constitution Reference on their behalf. Every Provincial Government which was approached refused to assist the fair hearing of the issue.

The second consideration was a political one. The

'Constitutional Express' had already crossed the country. Hundreds of Indian men, women, children, elders, and leaders left their homes before Christmas scraping together what little they had, to go to Ottawa to fight the Constitution. This powerful train moved the Trudeau Government to announce that the Standing Committee would enlarge its time frame from December 1980 to February 1981 to hear representations from the Indian Nations, among others. Previously, the Standing Committee had announced that they would not hear from the Indians. Indian Nations had come on the train seeking to become a party to the broad Constitutional review: participation at the level of the Standing Committee was rejected. Instead, the Constitutional Express attended at the residence of Governor General Schreyer and presented him with a Petition and Bill of Particulars to be delivered to the Queen. A similar but not identical Bill of Particulars was submitted to the Government of Canada and the 'Express' journeyed to the United Nations to deliver a third bill to that body. The Petition in all three documents was the same. It read:

Petition

> An opportunity exists to elevate the constitutional amendment to an exercise in statemanship and nation building. This is a course which we would welcome because it offers the possibility of creating a place for us in Canada's federal system consistent with our rights as Indian Nations. We have given long and serious consideration in many assemblies of our people to the ways in which our special status can be integrated into Canada's federal system. We are convinced that this aim can be accomplished with the result of strengthening our Indian Nations and of strengthening the Government of Canada. This process,

however must take place before the Constitution is amended.

It is our position that representatives of the Indian Nations, Great Britain and Canada must now enter into internationally supervised discussions outside of Canada to:

1. Review and define the present roles and responsibilities of all parties involved in the existing 'tri-lateral' relationship, including the Indian Nations, the Canadian Government and the British Government.

2. Define in detail the full meaning and extent of the political association between Britain and the Indian Nations in Canada.

3. Define and agree in detail on the full area and boundaries of territories occupied and/or owned by the Indian Nations of Canada.

4. Define in detail the means by which existing and future conflicts may be resolved between an Independent Canada and Indian Nations.

5. Define and determine the extent and amount of payments owed to Indian Nations of Canada by the Canadian Government for lands and natural resources already confiscated or expropriated by the Canadian Government and/or its agents; and agree to the method and terms for payment.

6. Define the terms for political existence between the Indian Nations of Canada and the Canadian Government.

7. Define the equalization payment plan between the Canadian Government and the Indian Nations.

8. Define the alternatives for individual Indian citizenship in addition to their own natural citizenship.

9. Define and agree to the necessary measures to ensure that each Indian Nation can exercise the full measure of self-government, within the Canadian Confederation.

10. Define the roles and authorities of the various parties in matters related to fishing, wildlife, religious lands protection, water resource management and control, use and development of minerals, petroleum resources, timber, and other natural resources.

11. Define the terms of a Treaty which will codify the agreements above, as well as define the measures necessary to settle the unresolved lands and other territorial claims.

12. Agree upon the formation of an International Indigenous Trust Council within the United Nations to oversee future relations between Indigenous Peoples and Countries with which they are associated.

As a last resort, if the tri-lateral negotiations are not commenced, we will take whatever other measures are necessary to separate Indian Nations permanently from the jurisdiction and control of the Government of Canada whose intentions are hostile to our People. We will be forced to take this step while requiring Britain to fulfill the obligations owed to us.

We request that the Government of Canada give serious and immediate consideration to this Petition and Bill of Particulars and in view of the deadlines established, that a response be provided by February 6, 1981.

DATED at the City of Ottawa, December 1980.

GEORGE MANUEL, President
Union of B.C. Indian Chiefs

February 6th came and went without a reply. By the end of the 'Constitutional Express' the leaders assessed that the demands contained within the Bill of Particulars could not be obtained through action concentrated entirely within Canada. Decisions were taken to move activity into Westminster and into the world arena. The legal case followed the politics.

2. The Fourth Russell Tribunal on the Rights of the Indians of America: Rotterdam, November 1980

In November 1980 the Union of B.C. Indian Chiefs presented a written argument and made representations to the Fourth Russell Tribunal on the Rights of the Indians of America on the plight of the Canadian Indian in the constitution debate. The Tribunal was comprised of international jurists who assembled in Rotterdam for the hearing. Representations were made from other Indian Nations in Canada. In particular delegates from the Treaty #9 area in Ontario made a superb presentation on Canada's role in breaking their treaty on the issue of their right to hunt migratory birds.

In its report, (page 37), the Tribunal condemned the domination of Indigenous peoples through Constitutional reform.

> "(5) Violations of All Forms of Internal Self-Government and even of the Right of Local Community-Level Government, as in the cases of the communities of Colcabamoa and Tayacaya and elsewhere in PERU, of virtually all Brazilian groups, of the Mapuche in CHILE, of native groups refused recognition as Indians in CANADA, the UNITED STATES, and elsewhere, and also with the Pitt River Tribe, the Lakota, the Puyallup and other nations in the UNITED STATES. This is a general problem in almost every country of the Americas.
>
> Special mention should be made of the 'termination' policy of the USA, which asserts the ultimate right to totally eliminate native societies as governmental units.
>
> "(6) The General Refusal or Failure to Involve Native Nations in the Creations of Constitutions or Basic

> Instruments of Government in the States of the Americas, even in instances where the federal principle of govenment obtains, as in the current creation of a new constitution in CANADA where Indian rights are, at present, not being considered. As sovereign units of governance, Native Nations and Republics or Pueblos possess the inherent right of refusing any incorporation or of being authentically represented as a self-governing unit where their territory has been included in the area claimed by a state apparatus. In other words, a constitution and government cannot be imposed on Indian people without authentic participation and the right of refusal to be incorporated involuntarily is a precondition."

In the introduction to its report the Tribunal made some general comments about the nature of the testimony before it:

> "Many voices have spoken before us and have expressed vividly the vitality and the capacity for resistence, found among the Indian people...A significant number of Indian nations and communities in the Americas have perserved their own identity and cultural initiative, in spite of the unremitting efforts of genocide and ethnocide directed against them... The program of cultural destruction and social oppression of the native People fo the Americas did not cease when the several countries of the American continent declared their independence. On the contrary, they simply assumed new forms. Since then, the machinery of internal colonialism has been continuously consolidated, ruthlessly seeking the desintegration of Indian communities. Now we are seeing an intensification of agression led by governmental and local ruling groups, often dominated by transnational centers of powers..."
>
> "We are faced with a universal uprising of oppressed nationalities and growing demands for autonomy. They seek an end to enforced alienation and the recovery of cultural identity. Centralized governmental structures are experiencing crises in states which include different nationalities and ethnic groups. This situation coincides, in America, with the breakdown of a European-centred concept of civilization according to which the only civilized people are those who act like Europeans or those elites who pretend to be carriers of

'western' culture.

> This tribunal has served as a forum for testimony against ethnocidal oppression and for the free expression of the will to struggle against those powers that still wish to wipe out the authentic character of the oldest cultures of America."

The experience before the Russell Tribunal was a success. Central to the political objective was the development of a greater public awareness of who the Indian Nations are and the fact that Canada continues ruthlessly to colonize the Indian Nations, creating among the people widespread poverty and sometimes genocide. The Indian representatives returned with the disturbing fact that they were one of a few delegations who did not have to go into the hearings with bags over their heads.

3. Submission to the Foreign Affairs Committee: House of Commons investigating B.N.A. Acts: The Role of Parliament: Chairman Sir Anthony Kershaw, November and December, 1980

A Standing Committee was convened by the United Kingdom Parliament to investigate the role of Westminster with regard to a request to patriate the B.N.A. Act. The Committee had authority to hear witnesses and send for experts to assist them in their deliberations. The Union of B.C. Indian Chiefs sent a written submission and requested permission to make representations to the Committee.

The door slammed shut once more. Instead of allowing

representation from the Indians on the question of Crown obligations from the Indian view, Mr. Kershaw relied on Mr. Freeland from the Foreign and Commonwealth Office.

The enquiry was recorded in a footnote in Mr. Kershaw's report. Mr. Freeland had been asked whether his view that the Crown had no existing legal responsibilities under Treaties made with the Indians had ever been challenged in the Courts; Mr. Freeland replied, "not to my knowledge".

The Report of the Committee was published on January 21, 1981. On the basis of no evidence on the point and no examination of the sides of the point, the Committee concluded this about Crown obligations to the Indian Nations:

> "117. We know of no reason to doubt the FCO's evidence that the United Kingdom has no treaty or other obligations to Indians in Canada: 'All treaty obligations in so far as they still subsisted became the responsibility of the Government of Canada with the attainment of independence, at the latest with the Statute of Westminster. The B.N.A. Act 1867, section 91(24), conferred on the Parliament of Canada legislative authority (exclusive and paramount as against the legislative powers of the Provinces) to make laws in relation to "Indians, and Lands reserved for the Indians". We know of no reason to suppose that the Royal Proclamation was in any way entrenched or protected against the legislative power of the Canadian Parliament. Since the Proclamation, even if it still is in force, is not part of the B.N.A. Acts 1867 to 1930, the United Kingdom Parliament could not make any law affecting it unless Canada had requested and consented to the enactment of such law; such is the effect of the Statute of Westminster 1931, sections 4 and 7(1).
>
> 118. It appears to us that Indian rights and interests are among the many topics, connected with the welfare of Canada and its peoples, which could not

> rightly be made the subject of deliberation by the United Kingdom Parliament in dealing with a request for amendment or patriation of the B.N.A. Acts: se para 113 above. These are all matters for the appropriate Canadian authorities, and we understand that Indian rights and interests, in particular, are being considered now by the Canadian Parliament."

In a Legal Opinion prepared by Rosalyn Higgins, Professor of International Law, University of London at the request of the Federation of Saskatchewan Indians, she had this to say about the Kershaw conclusion:

> "The Committee is, in my view, not in a position to reach the conclusions that it does in para. 118, without having asked a variety of questions in relation to Mr. Freeland's statement quoted in para. 117; and having received satisfactory answers thereto. His unchallenged statement leaves it unclear (i) as to which treaty obligations the FCO regarded as no longer subsisting at the time of independence or the Statute of Westminster; (ii) as to what is meant by the phrase, "with the attainment of independence, at the latest with the Statute of Westminster"; (iii) as to whether the treaties could, as a matter of constitutional and international law, have become the responsibility of the Canadian Government by virture of the Statute of Westminster; (iv) as to what manner, and by what processes of international law, the treaties are said to have come the responsibility of the Canadian Government by virtue of the Statute of Wesminster; (v) as to whether under international law such could occur simply as a matter <u>inter</u> the Crown and the Canadian Government, without the consent of the Indian nations parties to treaties concerned; (vi) as to whether notice of such intent was even given to the Indian parties to the treaties or is to be deemed to have been known and understood by them; (vii) as to whether, on the contrary, the Indian nations have not continued to treat the treaties, (which were made with unusually explicit reference to their binding the Crown indefinitely) as binding the Crown and as engaging the Canadian government only as agent for the Crown."

The approach of the Kershaw Committee reflects a particular form of exclusion experienced by the Indian Nations for centuries. The exclusion is ideological insofar as the

Indian Nations are assumed to be so insignificant politically that their point of view can be dismissed off-handedly without evidence or a hearing. It is a form of racism, which has been reflected in leading Commonwealth decisions involving aboriginal and treaty rights. An example is the case of Milirrpum v. Nabalco Party Limited and Commonwealth of Australia (1971) 17 F.L.R. 141 (S.C.N.T.), a case brought in the Supreme Court of the Northern territory of Australia. The Aborigines alleged that they had a legal right of property amounting to an estate of fee simple in those lands that they had traditionally used and occupied. The action was brought in response to a mining operation harming traditional lands without Indian consent. The Plaintiffs introduced complex evidence to establish that they had legal rights in their land amounting to a property interest entitling them to the relief sought. After an exhaustive examination of the evidence the Judge ruled that the evidence as to the social rules and customs showed:

> "A subtle and elaborate system highly adapted to the country in which the people led their lives, which provided for a stable order of society and was remarkably free from the vagaries of personal whim or influence.
>
> ...if ever a system could be called 'a government of laws, and not men' His Honour concluded 'it is shown in the evidence before me" (at page 267)

In other words, the Court ruled that the Aborigines had a system of law and so they were not too primitive or barbaric to be accorded legal rights at common law.

The question then remained did the existence of the system of law mean that the Plaintiffs had rights to their land? The Aborigines' relationship to the land was described as follows:

> "As I understand it, the fundamental truth about the Aboriginals relationship to the land is that whatever else it is, it is a religious relationship...The physical and spiritual universes are not felt as distinct. There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on it, are organic parts of an indissoluble whole...It is not in dispute that each clan regards itself a spiritual entity having a relationship to particular places or areas and having a duty to care for and tend that land by means of ritual observances. Certain sacred objects, called Rangga are at once symbols of the continuity of the clan and tangible indications of the relationship between the clan and certain land. These sacred objects are closely guarded and shown only to those who may properly see them, and only with due solemnity."

But could this relationship with the land be described as a proprietry relationship? The Judge ruled no.

> "My task is to examine the relationship of the clan to territory associated with it and to decide whether that association is a matter of property. In my view, the proper procedure is to bear in mind the concepts of property in our law and what I know of other systems which have the concept as well as my understanding permits and look at the aboriginal system to find what there corresponds to or resembles 'property'.
>
> "In my opinion, therefore, there is so little resemblance between property in our law or what I know any other law understands that term and the claims of the Plaintiffs for their clans that I must hold that these claims are not in the nature of a proprietary interest."

In other words, the Judge ruled that the Indian Nations

had no property rights because the Indian view of property was different from that of the colonizers. The Indian view was assumed to be inferior and unenforcable.

A different but related example is found in the Report of the Special Standing Committee appointed to inquire into the claims of the Allied Indian Tribes of British Columbia in 1927. The Allied Tribes had pressed to have Canada refer their case to the Judicial Committee of the Privy Council, arguing that they continued to have aboriginal title to the soil of British Columbia. Canada blocked the request by establishing the Special Standing Committee.

The Standing Committee decided that no aboriginal rights existed in British Columbia. They based their finding, in part, on the argument that the B.C. Indians had been conquered. In the absence of Indian or any other evidence on this point, they concluded:

> It is claimed that no conquest had ever been made of the territory of British Columbia. The historic records would seem to indicate that this is not accurate. All the posts of the Hudson's Bay Company were fortified and the officers and servants of the Company were prepared to resist hostile attacks. When a fort was established at Victoria a band of Cowichan Indians under Chief Tzouhalen seized and slaughtered several animals belonging to the whites. The official in charge, Roderick Finlayson, demanded payment for the animals which was premptorily refused. In this action Chief Tzouhalen was upheld by Chief Tsilatchach of the Songhees and the Indians attacked the fort, but were easily over-awed by artillery and later approached the fort to sue for peace. The historic records contain numerous other like references. The fort just

> mentioned was established at Victoria in 1848, and in 1849 Vancouver was made a Crown Colony. British Columbia (the mainland and Queen Charlotte Islands) was made a Crown Colony in 1858, and the two colonies were united in 1866. British Columbia entered Confederation on the 20th July, 1871.

In other words Canada claimed the Indian Nations' traditional territory on the basis of an unrelated episode on Vancouver Island involving the slaughter of several animals.

If it weren't so sad, it might be funny.

4. Development of a Legal Case in London: Preliminary work

In February 1981, lawyers from the Union of British Columbia Indian Chiefs journeyed to London for the first time to investigate initiating legal proceedings in Britain. The 1981 journey continued a process for the B.C. Chiefs which began in 1906. In that year three Chiefs from British Columbia went to Britain to place their claims before His Majesty King Edward VII. In their petition they complained that the title to their land had never been extinguished; that white men had settled on their land against their wishes and that all appeals to the Canadian government had proven useless. In 1909 the Cowichan Indians appealed to the Imperial government to refer the question of the illegal expropriation of their lands to the Judicial Committee of the Privy Council for determination, relying as they did, on the Royal Proclamation of 1763. The matter was not

referred to the Judicial Committee. Instead, a Joint Royal Commission on Indian Affairs in British Columbia was established to examine the unresolved land questions. Although the scope of the Commission could have included the issue of aboriginal title, the Premier of British Columbia refused to discuss the question or support a reference of it by way of stated case to the courts. In 1913 the Nishga Indians further petitioned the King requesting that the question of aboriginal title be submitted to the Judicial Committee of the Privy Council. On June 20, 1914 the Federal Government passed an Order-in-Council agreeing to submit the Indian claims to the Exchequer Court of Canada with the right of appeal to the Privy Council, provided that the Indians agree in advance that if they were successful, their rights would be extinguished and they would accept the Royal Commission findings on the allotment of Reserves. The Indian Nations refused to accept these conditions.

The Royal Commission concluded its work with the reduction of Indian reserve land by 47,058 acres valued at $1,522,704.00 and the addition of 87,292 acres of new reserves valued at $444,853.00. The Executive Director of the Allied Tribes in refusing to consent to the Commission's conclusions, stated, "they took away good land and gave us bad land in exchange". Thus, in 1919 and 1926 the Allied Tribes of British Columbia continued to press for a reference to the Judicial Committee of the Privy Council. A special Joint Committee of the Senate and House of Commons was appointed to enquire into this

Petition and held that as the Indians were not prepared to accept the reference to the Privy Council on the basis that they would agree to the extinguishment of their claims and accept the findings of the Reserve Commissioners "the matter should be regarded as finally closed". The following year an amendment was passed to the Indian Act making it an offense, punishable by imprisonment, to raise money to press for land claims. The law remained effective for a quarter of a century. In 1979 the Chiefs from various parts of Canada including British Columbia made another treck to Britain, seeking the Queen's justice in this constitutional debate. The Federal Cabinet used blocking tactics again by instructing the Queen not to meet with the Indian delegations.

Between February 1981 and August 1981 a legal team was organized and preliminary opinions were obtained concerning the feasibility of taking a legal case through the High Court. Professor Ian Brownlie, QC, D.C.L.F.B.A., was retained as advisor. Professor Brownlie was chosen as a result of brilliant work which he had done for the Dene Nation on the question of self-determination. He advanced the theory that it was possible for a nation within a nation to exercise rights of self-determination. This concept is an improvement on the current thinking which asserts that for a nation to "decolonize" it must be geographically separate from the mother country. Solicitors were Herbert Oppenheimer - Nathan & Vandyk. Barristers John MacDonald Q.C. and Colin Braham were added to the team.

In the summer of 1981, lawyers from the Union of B.C. Indian Chiefs attended a conference on the question of patriation of the Canadian Constitution sponsored by All Souls College. The Indian arguments were added to the debate.

Meanwhile, a legal research team comprised of five lawyers, two of whom taught law at UBC, worked together for an intense month gathering together the relevant law needed to advance the Indian arguments in the British Courts.

By the end of August a legal case in London seemed improbable. The costs were prohibitive. All work on that front stopped.

5. The Memorandum of Law submitted to Sir Michael Havers, October 1981

Due to a lack of funds a decision was taken to request through a Memorandum of Law addressed to the Attorney General that the issue of Indian consent be referred to the Judicial Committee of the Privy Council for Opinion. That body retains jurisdiction to hear such matters by way of reference; and the Request was to the British Government to recommend such a request. Insofar as the Attorney General had power to refrain from placing before Parliament a Bill which was legally flawed, it was hoped that this Memorandum could give the government's offices reason to refuse Canada's request.

Two Memoranda were presented to a senior lawyer in the Offices of the Attorney-General. The documents were submitted under the signature of Professor Ian Brownlie and other Canadian lawyers. One Memorandum outlined objections to the Request from the point of view of the Indian Nations; the second presented the Provincial argument. Although there was no basis for alliance between the Provinces and the Indian Nations, each had strong arguments to block the Request and the success of one would be to the benefit of the other.

The Memorandum was used as a vehicle to lobby members of the House of Commons and the House of Lords.

A word on the lobby in London. By June, 1981 the Union of British Columbia Chiefs had a full time staff person in London dedicated to the administration of a Parliamentary lobby. The task was immense - over 600 M.P.s and over 1,000 Lords. A systematic approach was taken to the setting up of appointments: political parties and governmental committees were approached first, then the Nationalist Party, selected members of the London Party, members of the Kershaw Committee, the Archbishop of Canterbury and members of the Lords. All the lawyers in both houses were approached in an effort to circulate the legal argument.

Chiefs came in waves, attending the appointments which had been confirmed and battling the fantastic ignorance about

Canada in general and Indians in particular. At one meeting which was jointly attended by Saskatchewan and B.C. delegates, the M.P. turned to the Indians and asked where they came from. A Chief replied, "Saskatoon, Saskatchewan". The M.P. turned to his researcher and said, alarmed, "They do not speak English".

The Constitution Express arrived in Britain bringing hundreds of Indians to Westminster to hold a Potlatch, celebrating ties with the Crown. The Saskatchewan Chiefs completed a cultural tour outside of London. Gradually the lobby opened up and the existence of the Indian Nations was an assumption. By November M.P.s were asking what objections the Indian Nations had with the Canada Act and by February they were asking what they could do specifically.

Although ultimately unsuccessful in convincing the British Government or the Parliament that the matter should be referred to the Judicial Committee of the Privy Council, the debate in Westminster reflected in the Hansards is a tribute to the fantastic effort the Indian Nations successfully put into the lobby.

Twenty-seven of the thirty hours used in debating of the Canada Act in both houses dealt with the Indian question. Speakers from <u>all</u> parties spoke eloquently and informatively about the issues. Mr. Chretien expressed anger when Clinton Davis compared the situation of the Indian Nations to El Salvador. The debate in the House of Commons went an extra

sitting because by 10:30 p.m. on the first night of second reading, strong debate continued over the Indian question. Forty-four M.P.s voted against the Canada Bill on the first reading, many having expressed sympathy with the Indians. Almost 1/3 of those who voted on second reading, voted against the Bill. The last word on the Canada Bill in the House of Lords was expressed by a Canadian who threw papers from the gallery shouting that the Canada Bill was passed on the backs of the Indian Nations. He was taken bodily from the House.

It is interesting how David Enns, M.P., summed up what he understood the Indian Nations were asking in Westminster:

> "The Indians are not asking for material assistance from us or for money. They are asking us to ensure, as we promised, that their constitutional status is protected in the renewed Canadian Federation. They have asked us for the constitutional tools to enable them to develop their own nationhood, their own forms of self-government and to preserve their traditions."

Such clarity contrasts sharply with that of the Trudeau government which said throughout the debate that it could not help the Indian Nations because they just did not understand what the Indian Nations wanted.

6. The legal Action in Britain on the Constitution

By mid-January 1982, three separate legal actions were

brought by Chiefs representing their Bands from the provinces of Alberta, New Brunswick, Nova Scotia, Ontario, Manitoba, Saskatchewan, British Columbia and the North West Territories. The Action The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, Royal Courts of Justice, January 28, 1982 is called the Alberta Case. The Action Chief Robert Manuel and Others and Her Majesty's Attorney-General, Royal Courts of Justice May 7, 1982 is called the Chiefs' Case. The Action Noltcho and Others and Her Majesty's Attorney-General, Royal Courts of Justice May 7, 1982 is called the Saskatchewan Case.

Unquestionably it would have been preferrable for the Indian Nations of Canada to have launched one legal action. Although there was a substantial measure of agreement among the Indian Nations concerning their position on the Constitution, intense idealogical debate continued among the Indian Nations on the degree to which the Indian Nations are sovereign, and the relationship of the Indian Nations to the Government of Canada. The divisions of opinion on these points have been nurtured for over a century by the federal government who continues a policy of rewarding "co-operative bands" at the expense of those bands who refuse to bend to Government policy. The two poles of the debate range from self-determination to assimilation. The legal actions reflect a difference of view with regards to that argument. In addition, groups competed with each other to

advance "better arguments".

On a more positive note, each case took a different approach and one approach or other may have succeeded. This reasoning was certainly a part of the strategy for the Provincial references, where three different cases were advanced.

(A) The Alberta Case

The Alberta Case challenged the decision of the Foreign and Commonwealth Office that all obligations to the Indian Nations had become obligations in right of Canada by 1931. The case proceeded on the law alone, without the benefit of Indian witnesses. Admissions were made by lawyers for the Indians that the treaties were not international treaties. There was no evidence before the Courts, from the Indian side, as to why they concluded treaty, with whom they thought they were treating or what representations had been made to them concerning the treaty. The argument, squarely put, was that as a matter of law, obligations had been undertaken by the British Crown which had never devolved to Canada. This is so because Canada's sovereignty is burdened by the United Kingdom Parliament's power to amend the B.N.A. Act.

The legal opinion of Louis Blam-Cooper, Q.C. was that the action would fail, but the action may have political value. He stressed that section 40 of the Crown Proceedings Act 1947

empowered the British Government to issue a certificate blocking any action where obligations are alleged to arise in respect of the British Crown.

The Court of Appeal heard the application for a week. It was a shame that the arguments for the Indian Nations were so poorly developed by the English legal team retained by the Indian Association of Alberta. In the end, the Court found that the Crown obligations were in Canada.

On close reading of the case, it is clear that the Judges could not develop a coherent theory to explain the devolution of agreements to Canada. Nor could they explain how agreements could originate with the British Crown but be terminated by the Canadian Government without the consent of the Indian Nations.

Three Judges at the Court of Appeal each had an entirely different reason for saying that obligations of the Crown to the Indian Nations were in Canada. Chief Justice Denning sets out the treaties were made with the British Crown. At that time the Crown was single and indivisible. But says Lord Denning, that law was changed in the first half of the century - not by statute, but by constitutional usage and practise. The Crown became separate and divisible. This was recognized by the Imperial conferences of 1926 and finally the Statute of Westminster gave legal force to that rule. As a result, Lord Denning stated that the obligations of the Crown to the Indian

Nations transferred to Canada without requiring the formal consent of the Indian Nations. The British or the Canadian. This theory may be called the transfer theory.

> "Now at the time when the Crown entered in the obligation under the 1763 proclamation or the treaties, the Crown was in constitutional law one and indivisible. It's obligations were obligations in respect to the Government of the United Kingdom as well as in respect of Canada, C. Williams vs Howarth (1905) A.C. 551. But, now that the Crown is separate and indivisible, I think that the obligations under the Proclamation and the Treaties are obligations of the Crown in respect of Canada. They are not obligations of the Crown in respect of the United Kingdom. It is, therefore, not permissible for the Indian Nations to bring an action in this country to enforce these obligations. Their only recourse is in the courts of Canada."

Mr. Justice Kerr does not accept the transfer theory advanced by Lord Denning but advances another argument. He rules that the treaties were made with the Crown in right of Canada. He relies upon the fact that since 1867 there was in place a Government in Canada and the obligations were with respect to that Government. He says the question of independence does not matter.

> "...the situs of such rights and obligations rests with the overseas Government within the realm of the Crown, and not with in right or respect of the United Kingdom, even though the powers of such Governments fall a very long way below the level of independence. Indeed, independence, or the degree of independence, is wholly irrelevant to the issue, because it is clear that rights and obligations of the Crown will arise exclusively in right or in respect of any government outside the bounds of the

> United Kingdom as soon as it can be seen that there is an established Government of the Crown in the overseas territory in question. In relation to Canada this had clearly happened by 1867."

Put simply, His Lordship says that if you have a government in a place and there are obligations in respect of that country, the obligations arise in respect of that Government.

Thus, Lord Justice Kerr disagrees with Lord Denning on three points. First, Lord Denning says that the treaties were made with the Crown of Britain, and Lord Justice Kerr says that the treaties were made with Canada; Lord Justice Denning says that independence is the key to the Crown dividing; Lord Justice Kerr says that independence has nothing to do with it. Lord Justice Denning says that the Crown obligation devolved to Canada at least by 1931; Lord Justice Kerr says that the obligations were with Canada at least by 1867.

Lord Justice May advances a different theory. He said that independence is the key to the question. As soon as Canada became independent with the Statute of Westminster 1931, any treaty the Crown had concluded with the Indian peoples in right of the United Kingdom became the responsibility of Canada with the attainment of independence.

> "As a result of this process and on the authorities to which I referred, I have no doubt that any treaty or other obligation the Crown had entered into with the Indian

> peoples of Canada in right of the United Kingdom had become the responsibility of the Government of Canada with the atainment of independence, at the latest with the Statute of Westminster of 1931."

Lord Justice May agrees with Lord Denning that 1931 is a crucial date but he founded his reasoning on an entirely different basis. Lord Denning says that the treaty evolved as a result of the Crown dividing; Lord Justice May says that the treaties became the obligations of Canada when Canada attained independence. Lord Justice Kerr did not rely upon either of those two dates but said that the treaties belonged to Canada because it was with Canada that the treaties were originally contracted.

The case was refused leave to appeal to the House of Lords. Lord Diplock, in delivering the judgment for the Court, said that for all of the accumulated reasons stated in the Court of Appeal's decisions, the matter is settled. The House of Lords decision amounts to a new example of how the Indian argument was blocked.

(B) The Saskatchewan Case

The Saskatchewan Case asked whether the Saskatchewan Treaties were binding on the British Crown and whether they

impose obligations which constitute trusts which remain in full force and effect. Unlike the Alberta Case, the Saskatchewan Case would proceed on Indian evidence rather than law alone. The crucial facts which were put in issue in the the Saskatchewan Case, as different from the Alberta Case were:

1. The Treaties were concluded with the British Crown as protection against Canada. The Indian Nations would never have concluded a treaty with Canada.

2. Representations were made to the Indians that the treaty was with Britain and the Indian Nations entered into a treaty on this basis.

3. The treaties were international treaties.

All of these facts taken together place the Saskatchewan Case on a different footing than the Alberta Case on the sovereignty question. The concession in the Alberta Case that the treaties were not international treaties can be construed so as to deny the full scope of sovereignty possessed by the Indians. Further, the reliance in the Saskatchewan Case on Indian evidence rather than law demonstrates a different view of where the power of the argument arises. The Saskatchewan Case put the power with the Indian People. The difference of approach was represented at the beginning of the Alberta Case. Notice had been served on Saskatchewan to participate in the Alberta Case. The invitation was declined in Court on the basis that Indian evidence was required to get to the bottom of the case.

Both the Alberta Case and the Saskatchewan Case were

framed in terms of Crown obligations and were vulnerable to be struck under the Crown Proceedings Act.

The Canada Act was proclaimed April 17. On April 20, the British Govenrment brought the Saskatchewan Case to Court to strike it on the basis that the issues had been decided in the Alberta Case.

In spite of the difference of facts pleaded in the two cases, and notwithstanding the real lack of decision in the Alberta Case, Judge McGarry ruled to strike the Saskatchewan Case and relied on Lord Diplock's decision in the House of Lords.

> "In the result, my conclusion is that the Alberta Case is decisive of the present case, despite the suggested distinctions, and that the language of emphasis of the Appeal Committee in that case requires me to strike out the statement of claim in the Notlcho action, or at least justifies me in doing so; and this I do."

It seems clear that if the reasoning in the Saskatchewan Case had been advanced on a simple contract point and not a contentious political one, the case may have survived the striking application. This case too amounts to another example of how the Indian agrument was blocked.

What then is the result of the Alberta Case, and the Saskatchewan Case from the point of view of the Indian Nations?

First, the judgment of Lord Denning in particular advances the general position of the Indian Nations under

Canadian law in that he rules that the Royal Proclamation of 1763 is entrenched in the present British North America Act and binding on the Federal and Provincial Governments.

> "To my mind the Royal Proclamation of 1763 was equivalent to an entrenched provision in the constitution in the colonies in North America. It was binding on the Crown 'so long as the sun shines, and the rivers flow'. "
>
> ...I have no doubt that all concerned regarded the Royal Proclamation of 1763 as still of binding force. It was an unwritten provision which went without saying. It was binding on the legislatures of the Dominion and the Provinces just as if there had been included in the British North America Act a sentence; "The aboriginal peoples of Canada shall continue to have all their rights and freedoms as recognized by the Royal Proclamation of 1763".

All of these statements assist the Indian Nations in their discussions with the Government concerning entrenchment of aboriginal and treaty rights. Lord Denning says that the rights are already entrenched and shall remain so forever.

On the assertion of sovereignty by the Indian Nations, the Denning decision is both helpful and hurtful. Insofar as the Royal Proclamation and the Treaties are entrenched within the constitution, the Judgment recognizes that the sovereignty of the Indian Nations is also entrenched. However, all ties with the British Crown are denied and the Indian Nations are sent back to Canada for remedy. Insofar as Treaties concluded with the consent of the Indian Nations may, by operation of law, be

devolved to a third party without Indian consent, most recognition of Indian sovereignty is lost in the process. Further, by sending the Indian Nations back to Canada, and commenting as he did that the Canada Act safeguarded Indian rights, Lord Denning relegated the Indian Nations to a position of a minority group in Canada, thereby strengthening the hand of the Canadian Government.

Lastly, the Saskatchewan Case was advanced after the Alberta Case had been decided. This effort leaves the record showing that whatever the Courts say, the Indian Nations still assert their sovereignty and their ancient tie with Britain. The door remains open to assert these points in the future.

(C) The Chiefs Case

In October 1981, the Union of British Columbia Indian Chiefs in assembly raised sufficient money to proceed with the legal action in London. Treaty 9 and the Manitoba Chiefs joined the effort. The legal team returned to Europe to continue preparations for the legal action.

One hundred and twenty-four Chiefs representing themselves and their Indian Bands, joined as Plaintiffs in this action. Most of the Plaintiffs came from the northern regions of the country; people whose traditional economy was based on the land.

An examination of some critical dates reflects the strategy of the British Government to block the case by passing the Canada Act before the case could be heard.

The request came to Britain December 9, 1981. The Writ was issued on December 10, 1981; the first day possible under law for the case to begin. The Statement of Claim was filed January 22, 1982. On February 25, 1982 an application was made by the Chiefs before His Honour Judge Vinelot seeking a speedy trial. The date of June 8, 1982 was set for the trial. In granting the application, Judge Vinelot noted that "the case raised issues of constitutional law of great importance which should be settled at the earliest convenience. If the Plaintiffs succeed, the Canada Bill will be declared unconstitutional and of no effect". On the first day of the second reading of the Canada Act, David Enns M.P., urged Parliament to await the decision of the Chiefs' case before passing the Act. On March 17, the Statement of Defence was filed by the British Government. On March 29, the Canada Act was given Royal assent. On March 31, the British Government brought on a motion to strike the case. On April 17, the Canada Act was proclaimed and on April 20, the British Government actually brought the case to Court on an application to strike.

Following the passage of the Canada Act, the British Government relied upon the argument that the Court could not look behind an Act of the British Parliament because Parliament is supreme. There is no doubt that the British Government was on

stronger ground with this argument than in meeting our argument that the consent of the Indian Nations was required before the Canada Bill could be passed.

The motive of the British Government was the subject of a speech by David Enns, M.P.

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

The Chiefs' case was founded on entirely different grounds than that of the Saskatchewan or Alberta Case. Unlike the other two cases, the Chiefs' Case was not vulnerable to be struck under the Crown Proceedings Act.

The question before the Court was an interpretation of the Statute of Westminster, a United Kingdom Statute. The Statute of Westminster recites and enacts in Section 4 that the laws passed by the United Kindgom Parliament for the Dominion overseas may apply only at the request and with the consent of that Dominion. Section 7 of the Statute of Westminster more

precisely details that the British North America Acts may be amended at the request of the Dominions. The question before the British Courts was "who is the Dominion of Canada?".

It was the position of the Indian Nations that the Dominion of Canada was comprised of the People of Canada represented by three separate entities, the Federal Parliament, the Provincial Legislatures and the Indian Nations. It was further asserted in the Statement of Claim that the B.N.A. Act was grafted onto a pre-existing Constitutional Arrangement between the Crown and Indian Nations in which Indian sovereignty was expressly recognized through the Royal Proclamation and the Treaties.

A declaration was sought that the U.K. Parliament had no power to amend or change the Constitution of Canada, especially to the prejudice of the Indian Nations, as the Canada Act did, without the consent of the Indian Nations.

In line with the Saskatchewan Case, the Chiefs' case relied on the evidence of the Indians and was premised on the sovereignty of the Indian Nations.

During the application to strike the case, the British Government argued that the British Parliament is supreme. That principle is a theory only and it is based upon the fact that the British Parliament possesses all the sovereign power required to

make any legislative decision. The Chiefs argued that although that point is generally true, in the case of Canada, and all of the other Dominions governed by the Statute of Westminster, the British Parliament had abdicated to the Parliaments of those Dominions, substantial sovereignty. As a result, the British Parliament is no longer sovereign with respect to Canada but possesses the limited sovereignty which remains to it. That sovereignty is set out in the Statute of Westminster which empowers the British Parliament to enact laws for Canada, at its request and with its consent. The consent of the Indian Nations and the Province of Quebec had not been given. This argument must succeed before the Chiefs' Case could be brought to trial.

After four days of argument, Judge McGarry rejected the argument of the Chiefs and ruled that the British Parliament was supreme and could pass any law they pleased over Canada.

> "I do not think that countries which were once colonies but have since been granted independence are any different position. Plainly once a statute has granted independence to a country, the repeal of the statute will not make the country dependent once more; what is done is done, and is not undone by revoking the authority to do it. Heligoland did not in 1953 again become British. But if Parliament then passes an Act applying to such a country, I cannot see why that Act should be in the same position as an Act applying to what has always been a foreign country, namely, an Act, which the English Courts would recognize and apply but one which the other country will in all probability ignore."

To rule in this manner, the Judge had to ignore or distinguish two centuries of legal debate on the point.

The Court of Appeal blocked the argument, but on different grounds. The Judges conceded, without deciding the question that Parliament could abdicate sovereignty, leaving a limited role for the British Parliament. But they ruled since the Canada Act contained a provision that it had been passed with the consent of Canada, the Court could not look behind the expression of consent to see if that consent was real.

> "Though Mr. MacDonald, as we have said, submitted that section 4 requires not only a declaration but a true declaration of a real request and consent, we are unable to read this section in that way. There is no ambiguity in the relevant words and the Court would not in our opinion be justified in supplying additional words by a process of implication; it must be construed and apply the words as they stand."

The Chiefs have appealed that decision to the House of Lords. The House of Lords must first decide whether or not they will allow leave to appeal. If in the end they do grant leave, the Chiefs will have an opportunity of saying that the Court of Appeal is wrong. If at that stage the House of Lords agree, the matter will return for trial and the Chiefs will attempt to prove that the Canada Act is unconstitutional because it does not carry their consent. If in the end leave is denied, the Chiefs will have exhausted domestic remedies on the question of self-determination and will be free to move into international arenas on that question.

IV Section 37 of the Canada Act

The Canadian Government has proposed a Constitutional Conference where Aboriginal and Treaty rights will be identified and defined. The section of the Canada Act which sets out the terms for the conference is section 37 which reads:

> "37. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.
>
> (2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Consituions of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.
>
> (3) The Prime Minister of Canada shall invite elected rrepresentatives of the governments of the Yukon Territory and the Northwest Territories to participated in the dscussion on anu item of the agenda of the conference convendd under subsection (1) that, in the opinion of the Prime Minister, directy affects the Yukon Terrirory and the Northwest Territories.

The Constitutional Conferences as proposed reflects, the Governments' position on Indian sovereignty. Its elements are as follows:

1. The Indian Nations are not invited as a Nation. They are invited as invitees to a Conference between the Federal Government and the Premiers.

2. The Indian Nations are not negotiating with the Crown. For the first time the discussion is with the Candaian

Government.

3. The sovereignty of the Indian Nations is entirely rejected. Trudeau has said the Indian is a "non-starter". In its place the First Ministers' will identify and define the rights of the Indian Nations.

The sovereignty of the Indian Nations is further undermined insofar as all discussions will take place within the framework of the Canada Act which provides that the Federal and Provincial Governments have the power to terminate aborigional and treaty rights without the consent of the Indian Nations by the vehicle of the amending formula.

What is the significance of the legal case, and the action taken on all fronts during the constitutional debate? All the sacrifices which the Indian Nations made, all the long hours in strange countries had to be made in order to keep the historical record reflecting the truth. Canada continued in its colonization of the Indian Nations and the Indian Nations continued to assert sovereignty throughout the battle on the constitution. Even after the Alberta decision had been rendered by the English Courts, the Chiefs pressed ahead. Even after the Canada Act had been patriated, the Chiefs continued. Indian Nations have the right to consent to a constitution which affects the sovereignty of the Indian Nations. That statement is the last words spoken on the record of the constitution debate. Whether the House of Lords hears the case or not the record keeps the door open for future generations to carry on the struggle.