Metis Society of Saskatchewan
Report To:
The Royal Commission
On Aboriginal Peoples

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Preface

"We are a new generation, starting our lives of defeat, without hope, ashamed of ourselves as Half-breeds. Although our forefathers had fought gloriously against the Ottawa regime, we were still the wretched of the earth. How much easier and happier it would have been to start, knowing the glory of our forefathers and their accomplishments. The truth would have given us all strength and pride. But instead we followed in the debased path cut for us by the white image makers".

From - *Prison of Grass* by Howard Adams.

The Metis were the trail-blazers who led explorers, missionaries and traders westward and inland. They acted as middlemen between advancing European settlement and Indian bands. They acted as interpreters when treaties with Indians were negotiated. They brought the province of Manitoba into being. All of these contributions have often been ignored. Today, all the Metis seek is restitution and the recognition due to them for their role in building the nation.

From - *The Metis* by Donald Purich.

I. Introduction

The Metis People, for the past century, have been forced to exist within the position of marginality. Identifing as a nation, seperate and apart from existing Indian Nations, we have had withheld from us the rights that are accorded the people governed by the treaties. At the same time we are, because of the colour of our skin and because of our different culture, denied acceptance within the dominant Canadian culture. We are, in the words expressed to the Commission, Canada's "forgotten people" simply, "the most dispossessed" of Canada's Aboriginal people.

In the long history of the Metis Society of Saskatchewan the goal has been to rectify this beleaguering situation. The M.S.S. has undertaken research, organization and political lobbying in order to help assert the Metis perspective in Canadian Society. In furtherance to these goals of recognition, self-governance and self-determinacy the M.S.S. has prepared this report for the Royal Commission on Aboriginal People.

In the previous two rounds of the Royal Commission some excellent suggestions were voiced by the representatives of the Metis community. Amongst those suggestions were those delivered to the Commission by Clem Chartier and Gerald Morin.

Mr. Morin, the National President of the Metis people, requested that there be an amendment made to s.91(24) of the Constitution Act 1867. An amendment to this section could alter the federal government's position so that it's jurisdiction would include all of Canada's Aboriginal people, including the Metis.

Mr. Chartier asked the Commission to consider that the Metis people have been dispossessed of their lands and resources, that they have lost the benefit of self-government so that they now reside in a "jurisdictional limbo". The Metis People being the stated responsibility of neither the Federal nor the Provincial governments. We hope to address these and other issues in the pages that follow.

This report was created as a joint effort by the researchers of the M.S.S., using a variety of resources including our valuable archival materials.

II. Metis History

A). Introduction:

The notion of Metis political involvement in Canadian history is hardly a rare one. Yet, when most Canadians remember the "National Dream", the uniting of Canada by national rail road, they seldom realize that the transcontinental rail road, and most other Canadian transportation systems for that matter, followed routes originally blazed by the Metis. In fact, the Metis have played many major roles in the opening of the Canadian frontier. As commercial harvesters of the buffalo, as freighters, as free traders who developed a trade network from the Red River settlements far into the west and deep into the United States and as a brave people who lived full lives in an environment where most people feared to go.

As they travelled into those new territories, the Metis fought major battles with the Sioux, signed treaties with them and brought other Indians into the trade networks. The Metis provided an interconnection and communication system between the far flung settlements and posts. As we all know, the Metis were essential middlemen between the Government and Indians during the signing of treaties.

These people, who evolved as a mixture of the French and Scottish fur traders and the Indian people, emerged complete with a culture of dress, song and dance that exists to this day. And from that culture there also grew a sense of nationhood which, when necessary, has expressed itself militantly, once in the formation of the Metis Provisional Government in Manitoba in 1869 and again in the Metis resistance at Batoche in 1885.

The outcry that followed the execution of Riel in 1885 reverberated loudly in Quebec. The hopes of the Québécois for an equal partnership in Confederation were in effect buried with Riel. The resulting mistrust and fear helped topple the national Macdonald-Conservative government of the day and doomed Conservative governments in Quebec for one hundred years. In addition to planting the seeds of the Parti Québécois which we see thriving in Quebec today.

The Metis are the only charter group in Canada with a history of national political independence before joining Confederation. The Metis, under the leadership of Louis Riel, negotiated Manitoba's entry into Confederation on terms originally designed to protect the political, cultural, and economic rights of the Metis. The Macdonald government's betrayal of those terms resulted in the loss of Metis lands to speculators in brutal disregard of the Metis culture and civil rights.

The masterminds of Confederation, the founding fathers, were unable or perhaps unwilling, to accommodate the rights of a minority group which had organized politically in defense of lands they had occupied for generations. John A. Macdonald had succeeded in putting down the "damn Half-breeds" but he had also created, or at least exposed, a fundamental weakness in Canadian federalism, its inability to deal with minority interests and collective rights.

The Metis people have played an instrumental role in the formation of the Canadian mosaic. Accordingly, all of us as Canadians ought to consider that role as we reflect on the concerns of the Metis Nation for independence and self sufficiency. We should all attempt to see that the Metis position is strengthened, as we reward that segment of society which has contributed so much to the fabric of Canadian life.

B). The Early History of The Metis

The history of Metis people is partially known to Canadians because of the drama of the "rebellions" as well as the recent fascination with Louis Riel and Gabriel Dumont. In any case, the Metis people have a proud history and have developed as a distinct people within the Canadian Federation.

Those persons of mixed blood were not always known as the "Metis", people of mixed English and Indian blood were known as "Half-castes" or "Half-breeds". Those people who were a mixture of French were known as the "Brois Brule" and later as the "Metis". Later both groups became known as the "Metis" and the name is now the preferred term.

In the unique role of middlemen between the Indians and the white traders, the Metis formed an entirely separate identity and culture by combining elements of both the Indian and European Cultures. By the 1790s it is estimated that as many as 10,000 Metis were living in the Northwest. The Metis people due to their position in the fur trade formed many isolated communities all the way from the Ottawa River to the mouth of the Mackenzie on the Arctic Ocean.

The conflict between the Northwest Company and the Hudson's Bay Company in the late 1700s and early 1800s culminated in the amalgamation of the two companies in 1821. This had significant impact upon the Metis and several thousand were left unemployed. These people were encouraged to settle in the Red River region and to take up agriculture. While some remained with the Hudson's Bay Company, others moved west as traders and entrepreneurs. After 1821 the steady stream of Metis immigrants to the Red River from all parts of the Northwest lead to the emergence of a broader sense of Metis community and to the sense of Metis

Nationalism. To advance this point the Metis have several times used the coercive element. The Metis people successfully asserted their rights against the Selkirk colony in 1816 and in the Metis Labour movement in the 1830s, then again against the Hudson's Bay Company in 1849.

By the Provisional Government of 1869, the Metis asserted their rights against the Government of Canada, with their rights later being given recognition for this effort in the formation of the Province of Manitoba.

C). Metis Rights

The basis for Metis rights in Canada is no different than that of other Indigenous peoples. In their tradition of recognizing Aboriginal title, the English have many times acknowledged that the rights of mixed-blood peoples stem from those same Aboriginal rights.

In the history of the treaty process there are numerous examples of the inclusion of mixed blood peoples. The Metis or Half-breeds have been repeatedly recognized as having a full share in "Indian title" to the land. Aboriginal title was recognized in the Articles of Capitulation of Montreal as early as 1760. Balkers Proclamation of 1762 recognized Aboriginal title in Nova Scotia and New Brunswick.

The Royal Proclamation of 1763 effectively formalized British recognition of Aboriginal title and is now considered by historians to be the Magna Carta of Aboriginal Rights. The Proclamation applies to Atlantic Canada, the central provinces and, arguably, the rest of Canada as well. It contains principles that have been confirmed in Nova Scotia and New Brunswick in the 1764 and 1775 Plans for the Future Management of Indian Affairs and in Quebec, by the 1775 Instructions to Governor Carleton. The "Proclamations" principle of Metis title were applied in the North West by the terms of transfer of Rupert's Land in 1870 and ultimately in the provisions in the Manitoba Act and the Dominion Lands Act.

Throughout all of Canadian history the Metis Aboriginal rights have been recognized in legislation and in other legal documents. Metis were included in the Robinson Treaties of 1850 and "Half-breeds" were enumerated as part of the treaty population. And, in 1875 the government signed the Rainy River Half-breed Adhesion to Treaty No. 3. Also, both the Federal and Ontario governments have recognized the Aboriginal title of the Metis in the signing of Treaty No. 9 at Moose Factory, Ontario. The Government stated in those documents that "Half-breed title is of the same nature as the Indian title..." and asked Ontario to make land grants of 160 acres each to the Metis.

In the treaty period on the prairies, many mixed blood peoples were given a choice between entering into Treaties or receiving Half-breed land grants. The Manitoba Act and the Dominion Lands Act recognized the Metis share in "Indian title" for the prairie provinces and the treaty areas of the Northwest Territories by offering land in exchange for those rights.

A Privy Council Order establishing the 1899 Half-breed Scrip Commission for the Treaty No. 8 area gave a mandate to make scrip grants to Half-breeds in Northeastern British Columbia. In short, Canadian history is a record of legal and political documents recognizing Aboriginal rights, including that of the Metis.

In law, mixed blood peoples were recognized as sharing in Aboriginal rights. The legal tradition is consistent. It is only Governmental practice that has been uneven.

D). The History of Land Scriping

After Confederation in 1867, Canadian politicians campaigned to acquire the west for Canada. The Federal Government arranged to purchase the ownership rights to the lands claimed by the Hudson's Bay Company with the British Imperial government acting as an intermediary in the transaction. Upon payment of the agreed sum by Canada, the Hudson's Bay Company was to transfer its rights to the Imperial Government which would then transfer them to the Canadian Government. But, because the Canadian Government failed to negotiate this reallocation with the residents of Rupert's Land, the Metis, led by Riel, were forced to take action to protect their interests. This was followed by an unauthorized proclamation by the Canadian Lieutenant-governor designate purporting to assume sovereignty over the west before the Hudson's Bay Company had even relinquished its rights. As a result of this precipitate action no legal government then existed. In the face of this void Riel formed a Provisional Government. When Canada once more took action to acquire sovereignty over the west the Dominion Government agreed to negotiate the terms of transfer with delegates of this Provisional Government. The Metis people rejected the notion of seeking independent nationhood status or annexation to the United States because they were convinced that their rights as an Aboriginal group would be protected in the Canadian Confederation.

Hence, the delegates of the Provisional Government began negotiations with the Government of Canada. They were received officially and met twice with the Governor General. In direct negotiations between Sir John A. Macdonald, Sir George Etienne Cartier and the Provisional Government's delegates, the terms of the Manitoba Act were drafted. The Manitoba Act was passed by the Provisional Government, by the Canadian Parliament and later confirmed by Imperial Legislation. And, it is now part of the Constitution of Canada.

The Manitoba Act provided for provincial status for Manitoba and recognized the political power of the Red River Metis. It was basic to the Metis position that Red River should enter Canada as a province. This would have the effect of continuing both the democratic form of government and the Metis political power which had been achieved by the Provisional Government. Canada agreed to this demand and the province of Manitoba was created. Solidifying Metis power, however, required action on the land question. The Metis wanted unfettered control of the land, as the other provinces had. But, the Canadian Government insisted on Federal control of land, agreeing instead to special land grants for Metis families. There was hard bargaining on this question with the government of Canada initially suggesting a total of one hundred thousand acres. The Metis negotiators pressed for three million acres and in the end both sides agreed to one million four hundred thousand

acres. One negotiator for the Metis Provisional Government recorded the understanding as follows:

> These lands will be chosen throughout the province by each lot and in several different lots and in various places, if it is judged fitting by the local Legislature which will have to distribute these parcels of land to family heads in proportion to the number of children at the time of the land distribution; so that these lands are then distributed to the children by parents or guardians, always under the supervision of the above mentioned local Legislature which will be able to pass laws to ensure that these lands are kept in Metis families.

Clearly, the Manitoba Act recognized Metis land rights and provided for a Metis land base, however, the Federal government later betrayed the Metis and the provisions made in the Manitoba Act. The government did this by not allowing a Metis land base to become established. Rather, the Federal government vested political power in the European settlers who were flooding into the new province of Manitoba. The bulk of the Metis population was thereby displaced and forced to move further north and west.

Even though the Manitoba Act formally recognized the Metis claim to Indian title and established a system of "Half-breed" grants it was problematic in that it failed to protect the grants. Provisions for that protection were not written into the Manitoba Act whereas a provision for the extinguishment of Indian title was. Section 31 reads:

"And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the Halfbreed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the Halfbreed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine."

During debates on the Manitoba Act, John A. Macdonald, who had been involved in the negotiations, described the purpose of the Halfbreed grants in this way...

"No land would be reserved for the benefit of white speculators, the land being only given for the actual purposes of settlement. The conditions had to be made in that Parliament who would show that care and anxiety for the interest of those tribes which would prevent that liberal and just appropriation from being abused."

In correspondence, John A. Macdonald further referred to the land grants saying...

"...the general desire that the land given to the Halfbreeds should not be alienable."

A scrip system, he said, would "be more mischievous than beneficial..."

The Federal Government had agreed to protect the Halfbreed grants, nonetheless that promise was later broken. When further Halfbreed grants were established by legislation in 1874, the use of scrip was authorized, even though J.A.Macdonald himself knew that problems would arise. Even though the scrip was expressly non-assignable, the government, in fact, aided in scrip speculation. In fact governmental actions ensured that no land base would be established by using a system of grants that previous colonial experience had shown would be subject to corrupt speculation.

A second major element of the Halfbreed grants scandal was delay. The historian G.F.G. Stanley has written:

> White immigration had rushed into Manitoba after the Red River Rebellion, and the Metis soon found that a new order had descended upon them, sweeping aside their old methods of life and leaving them helpless...Despairing of ever receiving their land patents, many disposed of their rights for a mere song.

The government delayed making the Halfbreed grants for several different reasons. The suggested need for a census of possible claimants, the confusion over eligibility criteria and of course the need for land surveys were used as excuses for delay. European settlers, however, were being liberally given land while the Metis

grants were being frustrated by government bureaucracy. As a result, no grants were made under the Manitoba Act for six years from the time of its passage.

Since the grants were made over a four year period, it was ten years before the grants were finally completed. In the meantime, much of the land that was once in Metis hands was lost to new settlers. For example, certain townships and other specified lands which were reserved by grant for Metis became populated by European settlers during the delay period. Instead of a Metis land base being established in conformity with the Manitoba Act, most of the Metis population was in fact displaced. Louis Riel referring to this frustrating situation in 1874 remarked:

> What we want is the...proper execution of the Manitoba Act. Nothing more, but equally nothing less.

That plea was ignored and it was not until the Northwest Resistance at Batoche that the government was forced into making Halfbreed land grants outside of Manitoba. The Metis stand of 1885 in Saskatchewan compelled the federal government to again recognize Metis land rights and to again pledge that they would establish a Metis land base. This the Federal Government claimed to do under the provisions of the Dominion Lands Act. However, for a second time, governmental actions frustrated

the goal of truly recognizing Metis land rights. The 1879 Dominion Lands Act had been amended to permit grants to Halfbreeds merely in order:

> . . .to satisfy any claims existing in connection with the extinguishment of the Indian title preferred by the Halfbreeds resident in the Northwest Territories, outside the limits of Manitoba, on the 15th of July 1870, by granting lands to such persons, to such extent and on such terms and conditions, as may be deemed expedient.

This applied to what is now Alberta, Saskatchewan, the Northwest Territories and parts of Manitoba. However as seen above, no action was taken through this provision for six years. While the legislation feigned to provided for land grants, claimants were in fact given scrip redeemable under the Dominion Lands Act. This practically ensured widespread and corrupt speculation. In 1924 the government began making direct cash payments, abandoning any pretence that the system was intended to be one of legitimate land grants.

The Dominion Lands Act states that the grants should be made, "on such terms and conditions, as may be deemed expedient,". As was the case with the Manitoba Act the "terms and conditions" were never specified in the legislation and subsequently the government deliberately chose not to reveal those terms or conditions.

Every governmental decision facilitated "illegal" speculation and the resulting loss of Metis rights. The federal government allowed homesteaders to undertake such atrocious things as abandoning their homesteads in order to have a Halfbreed locate his land scrip on their "abandoned" land. The scrip claim would then, for a fractional cost, be transferred to the homesteader, who now would no longer have to fulfil the ordinary homesteading requirements. Pearce, who had originally drafted the scrip forms in the Northwest to prevent speculation, opposed this use of scrip, and as he said he knew of "no single case where the original grantee (of the scrip) actually obtained the land".

The Federal government went so far as to keep scrip accounts for the major scrip speculators, transferring scrip credits to whatever land district the speculator requested. The Federal Government even instructed Dominion Lands Agents to post the names of Scrip dealers in a conspicuous place in their offices. Further, when a private prosecution began against one of the most notorious scrip speculators in 1921, the Government moved to amended the Criminal Code to establish new limitation periods which in effect withdrew the charges.

Even though the Government of Canada had recognized Metis rights and Parliament had enacted legislation to make land grants to the Metis, in practice the grants were not made. The administration of the land grants scheme time and again

ensured that Metis would lose their rights rather than obtain land. With surprising candour, Sir John A. Macdonald even excused his government's delay in implementing the Dominion Lands Act on the basis that, "the Manitoba Act grants had also been such a failure".

Still at the present time, the Federal Government has not yet formally acknowledged their fundamental failure to implement the Manitoba Act and the Dominion Lands Act provisions which were designed to establish a Metis land base in exchange for the Metis Aboriginal title. That failure means that the Metis have comprehensive Aboriginal title claim on the prairies and in the Northwest Territories a claim which stems from expressly recognized Canadian and Imperial legislation.

E). Recent Reform

The failure of the Manitoba Act and the later failure of the Dominion Lands Act Scrip system forced the Metis from the fertile agricultural lands of the southern prairies. This dispersal of the Metis meant that new forms of organization had to be created. This led to the formation of the Provincial Metis Organizations that are now so influential in Canada's political scene.

In Alberta the work of the Metis Association led to the Ewing Commission of 1936. The Federal government, which denies any responsibility for the Metis, declined to be involved in the work of the Commission. Following the recommendations of the Commission, however, the Province established a limited number of Metis colonies in northern Alberta. But, the Province described the program as a form of charity or relief and not as a formal recognition of Metis rights.

In that same period, the Metis in Saskatchewan and Manitoba attempted to press claims against the Federal and Provincial governments. Though Saskatchewan established the Green Lake colony in 1940, no systematic response to any of the Metis claims has come from either the Federal or Provincial governments.

It is today commonly recognized that the government's responses with regard to Aboriginal rights has been faulty and incomplete. Still, it has taken the Metis people many years of organization and struggle to achieve even the partial recognition of these facts. The struggle to achieve recognition of Metis self-government and land rights continues.

Recently, however, some progress was made when the Metis were recognized as being Aboriginal people in Section 35(2) of the Constitution Act 1982. This and other political accomplishments, the formation of the Royal Commission on Aboriginal Peoples, for example, seem to indicate that the Metis people of Canada will someday be full partners in the land claims process, the related economic and social development and in the constitutional change toward that end.

III. Metis Self-Government

The Metis people have fought for their political rights for several generations. These efforts have met with limited success in terms of government recognition, still, the assertion by the Metis of their rights to self-government, self-determination and the collective ownership of land has never ceased. In fact, shortly after the Metis oppression at Batoche the Metis began a yearly observance of that resistance which continues to this day and now has come to symbolize the ongoing Metis struggle toward nationhood.

In asserting the right to self-government, it is the position of the Metis Society of Saskatchewan that it is of the foremost importance to continue the dialogue between the Metis people and the Federal and Provincial Governments whatever the nature of past injustices.

A). Self-Government Defined

Self-government is broadly defined by David A. Boisvert, in his publication Forms of Aboriginal Self-Government,[1] as any institutional arrangement designed to secure greater participation in the governmental policy making process by Metis

people. However, the position of the Metis is that this definition does not extend far enough toward correcting the generations of injustice which precede these talks. Simple involvement in the decision making process is not the ultimate goal of the Metis, rather, we wish to eventually have complete control of the governmental system as it pertains to our political, social, economic and cultural existence.

Self-government for the Metis people is a highly complex and comprehensive concept. Much of the difficulty will arise in the form of protracted negotiations between the Federal and Provincial governments and the Metis Nation Members. But, it must be kept in mind that the notion of self-government within a federation is a new concept on the world scene and exists only in a limited way where it is being implemented. The Metis Society of Saskatchewan welcomes the opportunity to break new ground in this important area.

B). The Right to Self-Government

The position of the Metis people is that our right to self-government originates as a gift from the Creator. This right cannot be extinguished or diminished in any way by unilateral political decisions. The right can only be extinguished with the express consent of the Metis people and this consent has never been given. That is

the philosophic position of the Metis people within Saskatchewan, but there is of course our legal position as well.

From the perspective of the Metis Society there are two ways that the Metis legal right to self-government can originate.[2] One is that the right inheres to the existence of the Metis people as Aboriginals. That is, the Metis people have the right as it flows from the historic self-governing circumstances of the Aboriginal peoples within North America. While the Metis Society asserts the right to self-government it should be noted that the inherent rights also include but are not limited to the right to education, natural resources, health care, forestry, culture and language. The basis for these rights is similar in nature to the philosophic foundation for self-government as we see it.

The second way that the right to self-government can derive is as a Contingent Right. The "Contingent Right" is a right that is created through its formalistic recognition in a legal document or by an authoritative body. For example, the contingent right in law can only exist if the right is created in law by the Courts, the Legislature or the Constitution. Also, the right does not exist prior to its legal creation.

The inherent right can be recognized by the authoritative body but such a body must create the Contingent right. This distinction may seem purely rhetorical in nature but it constitutes the distinction of whether the Aboriginal Rights package is recognized and entrenched in the Constitution or created by it. The position that the Metis Society of Saskatchewan takes is that the rights of the Metis people already exist and must now be formally recognized by the Federal and Provincial Governments.

C). The Need for Metis Self-Government

While the basis of the right to Metis self-government is clear, what may not be so apparent is, "Why do the Metis want to have a self-governing body?" The answer to this question is not a simple one.

First, as we review the history that is outlined in Section II earlier in this report we see that the contact between the Metis and the European colonizers was rife with mistrust, confrontation and injustice. Moreover, this is the social, economic and political background that the Metis bring with them into the Canadian context. We are, like our Indian sisters and brothers, relegated to the lower echelons of this society. We are treated as an inferior people in our own land.

We see this as the basis of the institutionalized racism that all of the Aboriginal peoples of Canada, including the Metis, suffer every day. The governmental system that is in place in Canada is really there for the descendants of European colonizers. The Metis and the Indians are excluded from the mainstream of this system. This marginalization comes by way of social, economic and cultural differences. The mainstream power structure is, from one perspective, a society of like minded individuals who have created an exclusive political system. The only way to become a member of this closed system is to conform to the standards of that system. For the Metis this would mean assimilation and the abandonment of our culture. This is out of the question.

The Metis Society rejects the notion that the reason why we wish to create our own self-governing system is to undermine the Canadian structure. Rather, in order to escape the institutionalized racism of the dominant political structure the Metis Society believes that the only route for the Metis is to reinstate our traditional system of self-governance complete with the control of all our own, culturally sensitive institutions.

We Metis intend to take charge of our own political, social and economic development and change according to our own agenda. We know the problems and we are in the best position to find and implement the solutions.

D). Impediments to Metis Self-Government

There are several barriers blocking the progress of the Metis people along the road toward self-government. These barriers are, of course, complex and include economic, legal, social, cultural and political dimensions. They will eventually have to be dealt with in the political arena through negotiations among the concerned parties. The Metis Society, for this reason, is very interested in having the parties return to the negotiating table where the following issues, among others can be placed on the agenda.

First, the Metis people are dispossessed of a land base. This is one of the main impediments for creating a system of self-governance since the financing of the administrative functions of government is so expensive. With a land base, our people would be in a position to supplement any monies from the Federal and Provincial governments through the financial returns gained from resources and land use. At the present time, the Federal Government, however does not seem agreeable to this Metis goal. The then Minister of Justice, acting on behalf of the Federal Government, announced in a letter on April 24, 1981 that all Metis rights to land had been extinguished as a result of the scrip programs.[3] The Metis people obviously question this legal opinion and the Metis of Manitoba, to take one example, are currently

engaged in a Court battle challenging the government's view regarding the extinguishment of Metis land rights in that province.

A second obstacle that is blocking the movement of the Metis people towards self-government is the wording of the Constitution. While the Constitution Act 1982 section 35(2), recognizes the Metis people as being Aboriginal, it does not directly recognize the right of the Metis to self-government. The entrenchment of this right into the Constitution of Canada is one goal that the Metis Society of Saskatchewan sees as being fundamental to the ongoing progress towards actual Metis self-government. Therefore, we will continue to lobby the Federal Government until the Constitution of Canada is amended to include this right.

Another Constitutional issue that continues to impede the efforts of the Metis to create self-government is that the Federal Government refuses to recognize its responsibility for our people. Under section 91(24) of the Constitution Act 1867 the Federal government is charged with the responsibility for Indians and lands reserved for Indians. In the case of Re Eskimos (1939) 2 DLR 417, the section 91(24) definition of "Indian" was found by the courts to include Inuit people. Thus, Inuit people fall within the Federal Government's realm of responsibility. Even with this ruling, the Federal Government refuses to recognize that they also have responsibility for the Metis, who are Aboriginals as defined in the Constitution Act 1982.

Other impediments to self-governance by the Metis include the general perception and misconceptions by the non-Aboriginal element of Canadian society. It is difficult for the mainstream community to comprehend the reasons why the Metis need a separate system of governance. Rather than recognizing that the Metis are embracing their own culture, the non-Aboriginals see the Metis as rejecting Canada. This is not the case; Metis people simply wish to be freed of the external standards that have been placed upon us by the non-Aboriginal world. We do not wish to separate from Canada, instead we want to be freed from racist Canadian institutions.

E). Options for Change

We believe that in order to establish changes in the preceding problem areas, there are some concrete steps that need to be taken.

Short term goals

The initial strategy is to enlarge the already existing system. This means to apply the already operating tripartite process and the existing Metis government. Possibly we could ensure that agreements formed in the tripartite process are sufficiently funded to enable the implementation of negotiated agreements. Also, the mandate of the process could be broadened to include the negotiation of Metis self-government and the rest of the intended Metis structure within its parameters. Additionally, we could expand the responsibilities of the existing Metis political system so that it includes the administration of the current governmental programs that affect Metis.

We should enter into the process of constitutional talks that this time focuses exclusively on Aboriginal issues. This might result in the implementation of the changes which were agreed to prior to the failure of the Charlottetown Accord. One

specific change, of course, would be the entrenchment of the general justiciable inherent right of Aboriginal self-government.

As an alternative to the entrenchment of the Aboriginal right to self-government, the Federal or Provincial governments might pass a Metis Self-government Act to enable the Metis people to begin the process of self -governance with out the need for constitutional change. Or as an option the Provincial governments could each pass legislation similar to the Alberta Metis Acts, thus enabling the Metis people to exercise rights and at the same time provide a land base. However, this latter possibility clashes with the Metis view that we come under the jurisdiction of the Federal government. Nevertheless we feel that this can be proceeded with as an interim measure, with corrective measures to be undertaken later.

Another prospect is to fund the existing Metis government to undertake an extensive re-evaluation of existing services that are offered to Metis by the Federal and Provincial Governments and by the Metis Society as well. The purpose of the review would be to identify the weaknesses in those programs and to discover ways that make them more efficient, while devolving the delivery of those government services to Metis institutions.

Long Term Goals

The desired end result is for the Metis people to be self-governing. This means having complete control over all of the programs that affect our people and to gain administrative control over areas associated with Metis culture. In short, this means that we wish to exercise the right to self-determination, administered under the umbrella of a Metis operated government.

Another specific long term goal of the Metis is to be, at some point, financially self-sufficient. To ensure this, there may be instituted a system somewhat similar to that employed by the provincial governments. The resulting model could include transfer payments from the federal government and the power of taxation over Metis businesses and Metis individuals. This would provide our people with the self-sufficiency needed to control our own destiny. Also, it would free the Federal and Provincial governments from the fiscal responsibilities of administering such services for the Metis.

We also hope that this movement will lead eventually to the ownership and control of a Metis land base. With the acceptance of Metis self-government in the future, the establishment of a Metis land base cannot be far behind. We hope to see a day soon when Métis self-government will be instituted on Metis owned land. The possible revenue gained from development of the land based resources may also aid

in the financing of Metis governmental initiatives. Moreover, Metis management and development of these resources could one day lead our people toward a more prosperous future.

We also expect to control our own system of education. The existing systems are simply too limited in their conceptions regarding the Metis situation to ensure that Metis youth learn a truly positive self-image. A Metis administered kindergarten to grade twelve system is essential for strengthening the identities of upcoming generations.

Also, we need additional resources to educate Metis at the post-secondary level. This would mean education and training for self-advancement into a career of the individual's choice. For some the decision may be to seek positions as administrators or support staff within Metis institutions, including the organizations associated with self-government.

In addition to these other long range goals, the Metis Society of Saskatchewan intends to develop more fully a range of social programs. These include the management and administration of health care programs, social services programs, justice initiatives, housing for Metis as well as economic development programs and services. All of these would be administered in a manner consistent with Metis values, beliefs and traditions.[4]

Clearly, there are a great many possibilities for concrete change at the political and administrative levels.

Conclusion

The ultimate form that Metis self-government will take is, of course, a matter for negotiation among the concerned parties. But, the preceding discussion allows us to see the various configurations that the final structure may some day resemble. For example, the future structure will, in all likelihood, be one that combines elements of the above suggestions.

And finally, the powers accruing to the Metis Government might be such that they evolve in an incremental fashion. Beginning with a structure that is partially autonomous but mostly administrative, it would then change gradually over a specified time frame to a government with an increased power base and comprehensive autonomy. Also, there will be the need for a structure in the Metis government that takes into consideration the various ways that the Metis Nation is diversified, rural and urban, North and South, on and off of a land base.

While this gradual plan for change is acceptable to the Metis Society, it still needs to meet with the approval of the other levels of government. For that to happen, all of the concerned parties must return to the negotiating table.

IV. Metis Land Base

For a number of years now, we have actively sought to regain ownership and control over the land and resources that are a fundamental feature of our heritage. Various political and legal strategies have been initiated to rectify a historical situation which saw us dispossessed of our land and its resources. The principle involved in these land rights actions is clearly very important, not simply because of the obvious need to obtain formal recognition of past injustices, but also to protect the interests of present and future Metis generations. Land, and the rights to the resources both on and beneath the surface of that land, are essential to the existence and healthy survival of any nation.

Throughout Metis history there has always been an especially close connection between the people and the land. The economic, political, and social life of Metis communities has traditionally revolved around the characteristics of the physical environment. But, perhaps more importantly, the relationship between the community and its land has played a central role in shaping Metis identity. Through a strong sense of rootedness to the land and what the land offers, Metis institutions, culture, and spirituality have developed and grown. For these reasons, and within the context of Metis self-government goals, it is vital to the Metis people to re-claim the full range of rights and responsibilities we have associated with the land and its resources.

A). Metis Objectives

Metis people in Saskatchewan (and, for that matter, throughout the Homeland) seek full control over the decisions that affect their everyday lives. The self-government, self-determination goals of the Metis require the establishment of a prosperous social, cultural, and economic infrastructure. Its foundation must be built upon the return or transfer of a just and appropriate land base along with all renewable and non-renewable resources.

There are several possible applications for these lands. For some, Metis land would be used primarily for residential purposes, that is, as a place to live, and especially in the northern areas of the province, as a place to practice the ways of our culture. Hunting, gathering, fishing and trapping -- all are traditional means of pursuing a livelihood. All require, however, a fairly substantial land base and control over the resources within that geographic area.

Land would also be used for specific non-residential, economic initiatives. Mining, forestry, agriculture, tourism, and a wide range of other industries or forms of economic activity could be supported within certain regions of the province claimed as part of the Metis land base. These opportunities could be developed in various ways -- through Metis owned and operated businesses, as joint ventures or co-

management agreements, or through leases and other types of land use arrangements with non-Metis. Whatever the case, the land and resources in question would be expected to generate suitable levels of revenue for Metis owners and for Metis purposes.

Another important form of land use refers to the expression of Metis nationhood. For many years, Metis people have indicated that there is a strong need for having a certain area designated as the cultural and political centre of our Homeland. Batoche, Saskatchewan has come to represent this location. One objective of the Metis plan for establishing a land base is to gain ownership of the land at Batoche, thereby providing a commonly recognized place for Metis people to gather, appreciate their collective past, and build for the future.

In short, our basic objective with respect to land and resources is similar to the goals of other Indigenous peoples. It is to regain ownership and control of those lands and resources necessary for the maintenance of Metis culture and the traditional means of support. At the same time, the purpose is to enable individuals and communities who so choose to participate fully in the mainstream or global economy.

This is not an unrealistic goal. What should always be kept in mind is that the longer the land and resource issue remains in dispute, the longer the economic and social inequities faced by many Metis people will continue. Perhaps as importantly,

until this dispute is settled to the satisfaction of the Metis, the problems witnessed in too many instances on lands claimed by the Metis -- a depletion of supposedly "renewable" resources, the sale of non-renewable resources without compensation being paid to the Metis, and the ongoing encroachment onto the traditional Metis homeland by other parties -- will persist.

B). Regaining a Land and Resource Base: The Need for a Process

The goal of reaching acceptable settlements regarding land and resources has, of course, proven to be difficult up to this point in time. Part of the problem lies in developing an adequate process that can address the complex political, legal, economic, and social issues surrounding land claims disputes. The general position of the federal government has been to exclude the Metis from land claims processes available to other Aboriginal groups. The Honourable Jean Chretien, while acting in the capacity of Minister of Justice and Attorney General of Canada, conveyed in 1981 the legal opinion that the Metis had no valid land claim in law. Moreover, the federal government reiterated the view that the scrip program had, in effect, extinguished any Aboriginal rights or title that the Metis might have had. In essence, this policy has been maintained up to the present time. In addition, Metis have been excluced from the specific claims policy and as a consequence of that , the Indian Claims Commission's hearings on the Primrose Air Weapons Range which saw a large number of our people displaced from their traditional territory.

From the Metis Society of Saskatchewan's viewpoint, this is an unacceptable situation. A key step in moving forward towards an appropriate settlement of the issues in dispute is the recognition, within the Constitution, of the inherent right of Metis to a land and resource base. Unfortunately, the result of the Constitutional Referendum in the fall of 1992 makes it unlikely that such recognition will be achieved in the near future.

In the interim period, several alternatives are being pursued. Specific court cases have sought to establish the rights of Metis, as one of the recognized Aboriginal peoples, with regard to resources. This has proven to be especially significant in connection with the goal of protecting the traditional way of life of Metis in northern Saskatchewan.

There is also, of course, the non-constitutionally based Tripartite Agreement signed in February, 1993. Discussions and negotiations resulting from the terms of reference included in this Agreement could begin addressing several process related tasks, including:

- The calculation of land areas being claimed as well as the surveying or mapping of locations.

- An assessment of the value of land and resources within specific areas.

- The development of an environmental scan procedure which would identify the important trends (economic, demographic, social, etc.) likely to have an impact on renewable or non-renewable resources within a particular area.
- The identification of strategies to ensure that training and education, where needed, are available for Metis management and development of resources.
- Traditional resource use mapping.

These and other preparatory steps could provide some of the important background information regarding land and resource issues. This research is necessary since the process of arriving at settlements or agreements will require an informed understanding of not only the current situation, but also an anticipation of Metis needs far into the future.

C). Regaining a Land and Resource Base: Options and Opportunities

The Tripartite Agreement should also prove useful in the consideration of specific options for acquiring land as well as control over resources. Clem Chartier (1993: 22-23) has identified several possibilities worth pursuing, including:

- Transfer of title to Metis collectives in fee simple. This is the preferred option insofar as the Metis are concerned. Ownership of the land would clearly rest in Metis hands although it may be necessary to protect the newly acquired assets from taxation as well as other governmental measures which have the effect of reducing land values and therefore Metis opportunities.

- A combination of direct land transfers and leases or resource use agreements on surrounding lands. While not without problems, this option would provide Metis individuals and communities with significant control over how renewable and non-renewable resources are used and by whom. The form and duration of the agreements -- leases, co-management arrangements, and so on -- may vary according to the type of resource being managed or developed.

- Long-term leases or arrangements without any transfer of land. This option is viewed by the Metis as an interim step towards complete ownership and control of land and resources. An important purpose of this measure would be to protect Metis interests on lands currently under development by outsiders. As with the preceding option, the arrangement may be in the form of a lease, a co-management contract, or some other alternative.

- Leases or arrangements for Metis who want to become involved in economic or resource developments in areas of the province outside of their communities. Once established, the Provincial Metis Economic Development Authority could, for example, encourage initiatives in particular industries located mainly in central and southern Saskatchewan. A geographic area could be targeted for resource development. Leases coupled with land or resource use agreements would specify the terms of the development.

One lesson to be drawn from Metis history is that land settlements or agreements have relatively little value unless measures are in place to keep the land and resources in Metis hands. Therefore, each option must be accompanied by strategies for retaining Metis ownership or control. Legal safeguards will have to be

instituted, for example, to protect all acquired lands from uncontrolled resale or resources from misuse. Furthermore, funds and human resources will be needed to monitor the terms of each agreement and, if necessary, to act upon any violations.

Whatever option is investigated further, there are a range of other factors to be taken into account. For example, the diversity of Saskatchewan's geography and the distribution of its population requires a careful assessment of the impact that differences between northern and southern regions, urban and rural areas, and so on may have on land and resource settlements or agreements. In the future, decisions will also have to be made concerning the process for adding to the land base. Clearly there are opportunities, and perhaps there is even a need, for creative solutions to the complex issues associated with land and resources for Metis people.

D). Conclusion

The Royal Commission on Aboriginal People offers a valuable opportunity for Metis people to voice their self-government objectives in the land and resources area. In addition, discussions and negotiations taking place within the tripartite framework, while not having the same significance as constitutional amendments, can nevertheless address matters of vital interest to the Metis throughout the province and the rest of Canada. The very act of entering into discussions and negotiations should reaffirm in the minds of all representatives -- Metis, Provincial, and Federal -- as well as interested observers, the strength of the Metis vision concerning land and resources. The aim is twofold: to regain and retain ownership and control of land and resources.[5]

Finally, the Commission can take a proactive approach in recommending to the federal Government that a process be established through which the Metis in Northern Saskatchewan can address their claims and redress issues caused by their displacement in the 1950's when the Primrose Air Weapons Range was established.

V. Special Circumstances of Metis People in the North

Introduction

The issues of the rural Metis are different than the issues of the urban Metis. At the same time, the concerns of the Metis people of northern Saskatchewan differ greatly from those of their southern sisters and brothers. These sorts of distinctions derive from the social and practical circumstances which occur in these different places. Of course, these circumstances have necessarily led to different adaptations by Metis.

Also, the treatment by the Provincial government of the Metis varies depending upon where they are located. For example, the delivery of health care services are far less efficient in the North than in the South. This discrepancy is partially due to the remoteness factor, but on the other hand, the government is not redirecting the resources that are needed to bring the Northern health care system up to par with the South.[6]

A). Hunting, Gathering, Fishing and Trapping

In the Northern parts of Saskatchewan the Metis people historically lived and still live primarily off of the land. They live the traditional lifestyle of hunting, gathering, fishing and trapping mostly in small communities like Pinehouse, Saskatchewan. This lifestyle is greatly dependent upon the ability of the Metis people to have access to the resources of the land and movement on the land itself.

There are many Metis communities that have been in existence for more than two hundred years. Ile a la Crosse in Northern Saskatchewan has been a home to Metis people since 1774 and Cumberland House even longer. While this long tradition of occupation usually leads to stability and establishment, for northern Metis communities there is no recognition of any rights that accompany this type of achievement. Instead, even though the occupation in these northern communities far precedes the formation of the province of Saskatchewan, we see no direct acknowledgement of the rights to hunt, gather, fish and trap for the Metis when the natural resources were transferred to the province from the Federal government.

The Natural Resources Transfer Agreement (1930), (the NRTA) , in Saskatchewan called The Saskatchewan Natural Resources Act (1930), provides for the transfer of the natural resources into the care and control of the Provincial

government from the Federal government. The Act gives the province jurisdiction and powers over the many areas of usage of the land and also transfers the fiduciary obligations of the crown to the province. Paragraph one of the Act states . . .

> ...the interest of the Crown in all Crown lands... within the province...belong to the province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same...

This indicates that any interest that the Metis have in the land within the Province of Saskatchewan is protected. It also means that the province has the responsibility to honour any trust or other interest that the Metis may have *vis a vis* the governments. It is the position of the Metis of Northern Saskatchewan that they have an interest in the lands there and that this interest is not being honoured by the province of Saskatchewan. Currently, the Metis people are not recognized as having the same rights to hunt, gather, fish and trap that Treaty Indian people have.

Paragraph 10 of the Saskatchewan Natural Resources Act calls for Saskatchewan to create Indian reserves and to honour the other obligations of the Crown under the treaties. That paragraph reads . . .

> 10. All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the crown and the province will from time to time, upon the request of the superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands, hereby transferred to it's administration, such further areas as the said superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall there after be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.

Paragraph 12 of that same Act recognizes the Indian right to hunt, gather, fish and trap on all unoccupied Crown lands and on all lands to which Indians have a right of access. That paragraph reads . . .

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the province hereby assures to them, of hunting, trapping and fishing game for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

However, the Metis are not allowed access to unoccupied Crown land and are not recognized as having the right to hunt, gather, fish and trap, even though the Metis

have lived in the north for many generations and have the same hunting, fishing and trapping lifestyle as the Indians.

Looking to the wording of paragraph 12 we see that it specifically grants rights to Indians and does not mention the Metis. This could mean one of two things, either that the federal government intended to exclude Metis people from having hunting and fishing rights, amongst other things, or that the Metis have been included within the scope of this document when it was originally drafted. It is contended that, at the time of the drafting of the NRTA and the Constitution Act 1867 before that, when the drafters used the term "Indian" they in fact meant to include all of the Aboriginal peoples in Canada within that term, or perhaps all people with any Indian blood.

The Federal government makes the quick reply that all the rights of the Metis people were extinguished with the passing of the Manitoba Act and the Dominion Lands Act. Those Acts (as is explained in Section II of this document), were passed under the pretence that land would be granted to the Metis for them to use as a subsistence base. In fact very few of the land grants actually remained in the hands of the Metis. Moreover, as Clem Chartier[7] writes, "the understanding of those people who elected to take scrip was that their rights would not be completely curtailed", by entering into the scrip system. Rather, they believed that "the most crucial and

treasured right of the half-breed, that is, the right to continue the traditional livelihood of hunting was guaranteed"[8]. As this quote, taken from a meeting at Palmbere Lake in August of 1977, indicates the feeling of the Metis people differ greatly from the position that the government takes.

> Charlie Janvier from LaLoche and Ross Cummings from Buffalo, they said they were 16 years old at the time they first gave the scrip and they were promised everything. They said they were promised everything as long as the sun moves you'll get what you want and this scrip, it's going to be just for a while, your kids or your children, they're going to have another scrip and they're going to get some more money and your hunting rights of everybody will never be affected. Now the say everything is broken, there is nothing what we were promised, that is what these 2 old "chips", ah, old chaps said.[9]

The two gentlemen mentioned above were quoted by interpreter Louis Morin. Mr Janvier, at the time of the scrip distribution was 21 years old and Mr. Cummings claims he was 16 years old but the records show that he was 18. Their statements demonstrate the mind set of the Metis people at the time the scrip was distributed. Support is given for this proposition in the testimony of Robbie Fontaine at the trial level of R. v. Laprise (1977) 3 W.W.R. 379, a Saskatchewan court case concerning the right to hunt. That testimony as contained in the defendants factum reads . . .

> Robbie Fontaine, 79 years of age, testified that he was a half-breed and that he had some recollection of the time when the Treaty and Scrip Commissioner attended the area. His evidence was that it had only been for the last twenty to thirty years that the non-Treaty Indians have required licences to hunt. He said that Treaty and non-Treaty Indians always lived the same lifestyle in the area.
>
> Mr Fontaine further gave evidence of an occasion many years before where he took a trip similar in duration to that taken by the accused to hunt caribou, although he was not a Treaty Indian, that hunting was considered lawful. He corroborated the evidence of the accused with respect to the tradition of sharing the fruits of hunting.[10]

Clearly, the Metis people of that area had similar practices with regard to hunting that all Aboriginal people had. This was the concern of the drafters of the NRTA. In the years after the passage of the NRTA the Federal Deputy Minister of Justice was requested to give several legal opinions as to the position that the courts might take with regard to various terms used in the Act. Among those terms were "Indian", "game" and "unoccupied Crown lands". It was the concern of the Alberta government that these terms would be interpreted so that Metis as well as Indians would want to exercise "Game" rights as well. Referring to section 12 of the Alberta Agreement, W.S. Gray a solicitor for the Alberta Attorney General Office writes . .

> No interpretation appears to have been given to the word "Indian", and before dealing any further with the suggestion, I would appreciate having an opinion from your department or the Department of Justice as to what interpretation is put upon the word "Indians" in the agreement. We take it that the proper definition is the definition of

> Indians in The Indian Act, as distinguished from the definition of non-Treaty Indian, and therefore that the privileges given to the Indians under section 12 of the Act are confined to Treaty Indians.[11]

Referring to the above highlighted portion of the quotation the Deputy Minister of Justice for Canada writes . .

> With this opinion, I do not agree, The terms "Indian" and "non-treaty Indian" are defined in s. 2 (d) and (h) of the Indian Act R.S.C. 1927, c. 98, in and for the purposes only of that Act. Distinction is made between them only for certain purposes; but a "non-treaty Indian" is still an Indian, no less so than a treaty Indian, and it is because he is an Indian and, as such, a ward of the Crown that he is made the subject of the dispositions contained in the provisions of the Indian Act . . . This large interpretation of the expression (which I regard as, in itself, the more proper and natural) also seems to be that most consistent with the object of this particular clause of the Agreement.[12]

> Later in another correspondence the same Deputy Minister writes . . .

> I am satisfied that if they had intended to limit the benefit of this provision to treaty Indians, they would have taken care to express that intention unambiguously, as they might very easily have done: e.g., by using the words 'treaty Indians of the Province'.[13]

Clearly it was the opinion of many of the members of the Government of the day that the Metis people as non-treaty Indians should have the right to hunt and fish for subsistence. Even with all of this evidence and the patent need of the Metis for

greater access to the land for traditional subsistence hunting no rights have to date been recognized.

There is currently a court case before the courts that challenges this very issue. A case before the Alberta courts makes an issue of the fact that Metis hunting rights have not been recognized. The Alberta case, called R v. Ferguson,[14] arises from a circumstance on October 7, 1990 where the accused Ernest Frank Ferguson, of Metis descent, shot and killed a moose while hunting for food. Mr. Ferguson believed that while he was hunting he did so on land that was "unoccupied crown land". Later he took the moose to a butcher shop in order to have the moose butchered and wrapped and was subsequently charged for hunting without a licence under s.26(1) of the Alberta Wildlife Act, S.A. 1984, c. W-9.1: and with being in possession of wildlife contrary to s. 54(1), of that same Act. In this case the accused was acquitted on the basis that the Metis as "non-treaty Indians", fell within the 1930 Natural Resources Transfer Agreement. At the end of his judgment, refering to a quotation from R v. Sparrow 70 D.L.R. (4th) 385 Judge Thomas Goodson writes. . .

> The last quotation makes reference to holding the Crown to a "substantive promise". In the case of the "Metis" the question that comes to mind is, "what is that substantive promise?" Is it land? Is it scrip money? Is it the right to hunt for food? It is difficult to imagine a more basic Aboriginal right than the right to avoid starvation by feeding oneself by the traditional methods of the community.[15]

This case is being appealed by the Crown, however, and is eventually destined for the Supreme Court of Canada. The Metis people watch the outcome of this case with great interest.

The NRTA does not allow for the fact that most of the land in the North is in fact unoccupied Crown land. There simply is nowhere else for the Metis to go to hunt, gather, fish and trap except on that land. Also, there is no benefit to anyone by not allowing the Metis the right to subsistence hunting and fishing. There is only the hardship which not recognizing that right causes the Metis people.

B). Specific Issues

Employment and Economic Development

The central issue, from the perspective of the Metis leaders of the North, is that the Metis have undergone a complete loss of the access to and ownership of the land without any kind of benefit package being created by the government to replace what they once had. This has directly led to the inactivity and unemployment of the people. The fact that there is little work in many areas of the North and that the Metis are not allowed access to the land in order to partake in their traditional procurement of food, has in effect outlawed our northern way of life.

The rate of unemployment in the northern Metis communities is difficult to calculate because of problems with the enumeration of the Metis people and figuring in the numbers of people who have simply "given up" and are no longer seeking employment. In any case, most reports point to unemployment figures in the 80 to 90 percent range for much of the North. As many Metis communities are relatively small and lack a sufficient economic base, few Metis obtain suitable, long term employment within the public sector. Moreover, business opportunities for the non-Metis are not legion in the north and are restricted for the most part to mining and other raw resource extraction. This means that there are few opportunities for Metis employment and less so in these poor economic times.

Even though there is a great deal of mining carried out in the north few of the Metis or Indians of the North are involved in the extraction process. What we see then is a situation where the minority are in control of the majority of the resources. A situation where more northerners are directly involved in the extraction process is needed to make the situation in the north more equitable. As an alternative, a system could be developed where there is a sharing of the revenue from the resources extracted from the north with the people of the north. What occurs now is the raw material is taken from the north and little or nothing is returned in its place. To repair this problem an economic development fund could be created in the north using a system of royalties paid for the extraction of raw materials.

In short, what is needed are extensive government programs and strategies encouraging and supporting private sector development initiatives which will help employ and train Metis. Enabling us to begin working and to create our own employment opportunities in the future.

Housing

In the North there is far less access to acceptable housing for Metis people than there is in the south. As well, the housing that is available offers far fewer of the modern conveniences which are standard in the south. The cost of building in the north, the restrictive public tenders program and the inaccessibility of the northern communities all contribute to the overall housing problem for Metis people.[16]

The Federal Government is currently operating with a policy of phasing out existing projects by the end of this year. That has resulted in a great deal of the funding dollars being lost from housing projects for Metis. This has proved to be crippling to the aspirations of the northern Metis who are now unable to build and own much needed housing or even to repair the existing homes.

In 1993 there were 38 new homes built for Metis people in all of Saskatchewan. It has been estimated by the director of the Provincial Metis Housing Corporation (PMHC) that in La Loche alone as many as 100 to 150 new dwellings are needed just to keep pace with the current population figures. This housing deficit places many Metis in living situations that are simply unacceptable.

From the perspective of the Metis Society what is needed is a Metis owned and operated Housing Corporation to fill the gap being left by the removal of funding from the Provincial Housing Corporation. In the past there was a pilot project mandated for 5 years that attempted to do just that. The Demonstration Program, as it was referred to, was a system where a Metis was allowed to purchase a house in kit form and to built it herself or himself. Along with the kit the system provided building supervisors who would visit the building site to ensure that the house would meet the provincial building specifications. This system met several of the needs of the Metis at one time. It gave the people meaningful employment, ensured that the individuals would have an interest in their own homes and put housing within the reach of many more Metis. The Metis purchaser would make house payments for 5 years and then the house would then be hers or his. This, in addition to making housing available to the Metis, relieved the Federal government of the current system with long term commitments and the Metis of mortgages of 25 to 30 years which are most often in

arrears. The director of PMHC estimates that the carrying costs to the government has risen to $400,000 from $100,000 per unit since the end of this program.

The national policy of public tender has the effect of the Metis being shut out of building their own homes. This policy states that all building financed by public organizations must be put to a public tender. The difficulty arises in the need for a 10% bid bond in the sealed bidding process. This means that if the builder is bidding on a project that costs $100,000 then she or he must include a certified cheque for $10,000. This cost makes it prohibitive for many Metis to enter into the bidding process and places the work in the hands of people from outside of the community.

Housing of differing types is also required, this has never been offered in the past, but the needs of the people in the north are as varied as those of southern people. There is the need for housing for the elderly, disabled and single parents as well. These groups are largely overlooked by the government when making policies concerning housing. Currently, it is only possible for families to have houses built and families are always given priority over seniors and individuals on waiting lists for housing.

The potential for positive changes in the future are many, but what is specifically needed is a Metis owned and operated property management corporation. The current PMHC program is subject to political whims and is essentially operated

by the mainstream institutions and standards. A Metis corporation could meet the needs of the Metis people in a way that could not be done by mainstream institutions. The cultural and community sensitive effect of such an organization could correct the current housing problems and put more Metis to work.

Justice

The Justice system in the north is very different to the sort of Justice delivery in the south. In most areas the Justice system in the north is completely inadequate for the needs of the people. In many places in the north the nearest court is hundreds of miles away. Therefore the judges, the prosecutors and the lawyers, legal aid, members of the private bar and the police are forced to fly in to the communities. Unfortunately, they often all fly into the community together in the same aircraft, dispense the "justice" they have come to dole out and then all leave the community again as quickly as they arrived. The people who live in these communities feel that this sort of "flown-in", packaged justice system is no justice at all. What is needed is a system that takes into consideration the nature of these northern communities and brings some real justice, that keeps communities together and involves the community in a meaningful way.

Health Care

The quality of health care in the North is vastly inferior to the health care that is available in the southern part of the province. This inferior standard is what all northern people are accustomed to. However, the quality of health care that is delivered to the Metis in the north can best be described as inadequate.[17]

In the northern half of Saskatchewan there are approximately 35,000 people. of this number about one third are treaty Indians and two thirds are Metis and non-status Indians with a sprinkling of non-Aboriginal professionals. These figures are significant when we consider that there is little or no funding for the Metis who make up the majority of the people in northern Saskatchewan. Moreover the average age of the people in the north is far younger than the average in the south. About 50% of the population in the north is under the age of twenty years. The needs of the youth are very different than those of the elderly. What we see in the south is most of the elderly living in the urban setting yet this is where the policies for the health care system is formed. Moreover, the type of health needs in the north are, because of the demographics basically the opposite of the needs of the people in the south. Clearly the unique needs of northerners are being confused with the needs of the southerners in health care and other areas.

In the northern portion of he province there are 4 hospitals that service the

needs of the Metis people. These are Il a la Crosse, La Loche, La Ronge and Creighton. However, these hospitals offer nothing but the most basic health care with all of the more complex care being given by hospitals in the larger centres in the south. In La Loche, the health care for the community is delivered out of an old hospital and a trailer. This is the sort of situation that led the 1985 Murray Commission to comment that in northern Saskatchewan we have "the third world in our own backyard".

In the north there is a division between the service that is administered to the Metis people and to Treaty Indians. The Federal government funds the health care for Treaty peoples and the health care for the Metis is funded by the Provincial government. What results is that the Metis have limited funding for their health care benefits. This translates into many non-insured services such as, a lack of protection for vision, no coverage for prostheses and limited coverage for the cost of prescription drugs. The result is that many Metis people who can not afford to pay for these things simply go without.

Another service network that is lacking in the north is home and community care. In some northern communities there are programs such as, meals on wheels, transport for the elderly, home maintenance and daily visits but other services that are greatly needed just do not exist. For example, there are no special care homes

or nursing homes in the north at all. Also there are no facilities for physical therapy anywhere in the north. Metis people needing these types of care must travel hundreds of miles from their home communities to receive these services. This is very traumatic to people who value close family contacts so highly.

The medical practitioners in the north are for the most part not local people. The doctors who come to the north are often foreign doctors who are only there to complete their internships so that they can practice in Canada. Once they have completed their stay they quickly relocate. This results in a high turn over of health care professionals in northern communities. What is needed are educated people who are from the communities that they work in. This will lead not only to more employment of northern Metis but also to health care that is more culturally sensitive. Currently doctors do not speak the native languages of the citizens of the north. This leads to reduced sensitivity of the needs of the northerners and to situations where the care that they are given is incorrect. There are times when Aboriginal people who could not speak english were given the wrong operation because of miscommunication between doctor and patient. What is needed is culturally sensitive delivery and interpreters to communicate needs in the patient's language .

Many northern people seem to have a poor level of health-literacy. This means

Many northern people seem to have a poor level of health-literacy. This means that they do not have the necessary education to understand the basics of health care such as boiling lake water to kill the micro-organisms that it contains. Greater health education is needed for people in the north outside of the school system.

In the north particular problem areas are youth suicide and infectious disease. Suicides in numbers that would be viewed as epidemic in the South or in the non-Aboriginal population are common place in Northern Metis communities. The sort of hopelessness that results from the belief that a person has no future can be placed as the cause for this kind of phenomena. To combat this the youth of the north have to be given concrete evidence that they do have a potential future and that they can have full and productive lives.

Lastly, the inadequate housing has brought on situations where there are at times three families sharing one dwelling. This sort of overcrowding of people is the perfect environment for the growth of diseases such as tuberculosis. In the north this and other infectious diseases are currently on the upsurge.

Conclusion

The lives of the Metis in the north are just as valuable as the lives of anyone in this country. Yet the people of the north are delivered service that is far inferior to that delivered in the south. In the south there seems to be the notion that if the services in the north are poor then the people there should simply move, rather than to imagine improving the services for the people in the north.

Many times the call for change in the northern situation has come from the south. But, in every plan there is the lack of input from the northern people themselves. The Metis leaders believe that the route to take for the future is to enable the people from the north to make the next plan for northern reform. They argue that it is the people from the north who know the problems, therefore they should be the ones who decide upon and implement the solutions.

Much of the problem is that northerners are not included in the policy making process. They should by consulted fully in all of the steps throughout the entire process of formation, planning and implementation.

Also, the people of the north need to be involved in the management of the renewable and non-renewable resources. In the future, it is the people of the north who will be left with the mess after all of the resources are taken away. Therefore, it should be the people of the north who aid in making the best choices for resources management.

VII. Application of Section 91(24)

The Constitution Act 1867 (the 1867 Act), amongst other things, describes the division of powers between the Federal and Provincial governments. Section 91(24) of the 1867 Act gives the Federal Government exclusive jurisdiction over "Indians and lands reserved for Indians". However, it is the position of the Federal Government that the term "Indian" does not include Metis people even while it was found by the Supreme Court of Canada that "Indian" includes Inuit People. Moreover, the case law is rife with examples of the terms Native, Aboriginal, Indian and Indigenous Peoples being used interchangeably in connection with Metis and other Canadian Aboriginals. In any case, the exclusion of the Metis from the Federal Government of Canada's jurisdiction has, in no small part, led to the crushing dispossession and marginalization that the Metis people struggle under today.

A). The Metis People are Aboriginal.

Section 35(2) of Constitution Act 1982 includes Indian, Inuit and Metis peoples as the Aboriginal people of Canada. Clearly, there is no argument on the part of the Federal government over the fact that Metis derive their "rights" from their Indian

heritage. Although "Metis" is currently the preferred term, the word "halfbreed" was popular in early legislative provisions and while referring to Metis people in parliamentary discussion.

Prior to the late 1800s the Metis were recognized as possessing Indian title to land and other Aboriginal rights. However in the late 1800s the policy of extinguishing those Aboriginal rights was beginning to be promoted. This, in part, resulted in the development of the Manitoba Act, 1870 33 Victoria (1870) Cap. 3 (Canada), where provision was made for the extinguishment of such title amongst the Metis people. This alleged extinguishment was based on the setting aside of 1.4 million acres of land to be distributed to the children of the Halfbreed heads of families, in such manner and conditions to be decided upon by the Governor General in Council. The Metis of Manitoba are currently in the midst of a court battle challenging the unconstitutional manner in which this legislation is purported to have extinguished Metis title.

Similar legislation was enacted by the Federal government to encompass the Metis People who were not included in the purview of the Manitoba Act. The Dominion Lands Act S.C. 1879, c. 31, attempts to provide the scriping of land or monies to Metis people in exchange for their land and other Aboriginal rights.

B). Legislation

The British practice during the colonization period was to have the Imperial Parliament assume responsibility for the well-being of the Aboriginal inhabitants of the country being colonized. This was the case in British North America until 1860 when this responsibility was delegated to the Province of Canada. However, prior to this transfer of responsibility there was various legislation made in Lower Canada which referred to Indian people.

Section 5 of An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada, 13 and 14 Victoria (1850) Cap. 42, included a definition of who were considered to be Indians for the purposes of that Act. The definition was rather broad and would include Metis people as well as "Indians" based upon their content of Indian blood. That Act was repealed the following year, with the 1851 Act adopting a more restrictive definition but one that also includes Metis people based on the criteria of the definition. The point being that the criterion, in any case, was the possession of Indian heritage.

This same criteria was adopted in several other Acts passed in Canada, including An Act Respecting Indians and Indian Lands, 23 Victoria (1860) Cap. 14 and An Act Providing For the Organization of the Department of Secretary of State

of Canada and for the Management of Indian and Ordinance Lands 31 Victoria (1868) Cap.42. It should be noted here that the latter Act was passed the year after the passage of the Constitution Act 1867 and it is found to include the broader definition of "Indian" that the Federal government now attempts to reject.

It was in 1869 that the federal government began to implement the policy of excluding persons of Indian ancestry from the definition of "Indian". This was evidenced in An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31 Victoria Cap. 42. This Act expanded the circumstances where Indian people could lose their Indian status to include Indian women marrying non-Indians and the children of those marriages. From this point forward the policy of enfranchisement by the federal government against Indians was in place until 1985 when Bill C-31 was passed to reinstate Indians who had lost their status by marriage.

C). Case Law

The Supreme Court of Canada decision Re Eskimos (1939) 2 DLR 417[18], deals directly with s. 91(24) of the Constitution Act 1867. In that decision the Court decided that Inuit people should in fact be defined as Indians for the purposes of the Constitution. The majority decision in this case, delivered by Chief Justice Duff, refers to the documentation prior to 1867. The Chief Justice stated that it was "clear that here the Eskimo are classified under the generic term Indian". Later in the same case, referring to the area not yet acquired in Canada, the Chief Justice stated that:

> Thus it appears that, through all the territories of British North America in which there were Eskimo, the term "Indian" was employed by well established usage as including these (Eskimos) as well the other aborigines; and I repeat the British North America Act, in so far as it deals with the subject of Indians, must, in my opinion, be taken to contemplate the Indians of North America as a whole.

Presumably the "other aborigines" Justice Duff refers to are the people who are today's Metis.

Justice Kerwin, in a separate decision, stated that he sees the deciding factor as being "the manner in which the subject was considered in Canada and in England at or about the date of the passing of the Act". That being the case, the legislation passed between 1850 and 1869 treats all non-whites generically clearly indicating that the Metis or Halfbreeds should be encompassed by s.91(24). Moreover, Parliament at the time enacted legislation wherein Metis title is expressly recognized, in so far as Parliament is attempting to extinguish it. (See the Manitoba Act and the Dominion Lands Act).

More light is shed on this topic by the 1888 decision of the Privy Council in St. Catherines Milling and Lumber Company v. R (1888) 14 A.C. 46[19]. In that case the Privy Council was asked to decide, *inter alia*, the meaning of the phrase "lands reserved for Indians", that being the notable phrase from s. 91(24) of the 1867 Act. Lord Watson in expressing the ruling of the Privy Council stated:

> ...the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

Clearly, the courts have been reluctant to form a narrow interpretation with respect to s. 91(24). This same position has evidently survived with the move of

highest authority from the Privy Council of England to the Supreme Court of Canada. Looking to the Supreme Court decision in Nowegijick v. R (1983) 1 S.C.R. 29[20], the court stated that enactments and legislation with respect to Indians should be construed in a liberal manner.

This principle was recently affirmed in the Supreme Court of Canada decision R v. Sparrow 70 D.L.R. (4th) 385[21]. At page 407 in that decision the court states that the "...treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.".

It seems, therefore, looking at the case law, that any doubts ought to be resolved implementing the broader statutory interpretation of the 1867 Act, in this instance bringing Metis people within the definition of "Indian" in Section 91(24). Moreover, taking in regard the plethora of case law read in conjunction with Section 35(1) of the Constitution Act 1982 and the rest of the legislation the outcome is clear: Metis are Aboriginal people, our rights are affirmed within the Canadian Constitution and we fall within the purview and responsibility of the Federal Government.

This view has been supported by the willingness of Canada's First Ministers and the Aboriginal leaders in 1992 to amend the Constitution Act 1982 to for greater certainty, clarify that section 91(24) of the Constitution Act 1867 includes all of the Aboriginal peoples of Canada.

VI. Constitutional And Legal Position of Metis People

The Metis Society of Saskatchewan has been asked by the Commission to indicate its position with regard to the Constitution and the laws of Canada. While this has been the goal of many of the preceding pages the position of the Metis Society of Saskatchewan can be put into context by the following summary.

A). Metis Self-government

Fundamental to the aspirations of the Metis people is to have recognized our inherent right to Self-Government. From the time of our emergence as a culture and nation the Metis people have asserted their inherent right to self-determination.

It is the position of the Metis Society of Saskatchewan we have the inherent right to self-government as granted to us by the Creator. This right to self-governance need not be granted by any entity other than the Creator and it can not be extinguished by any parliament or legislature without the express consent of our People. The consent to extinguish our right to self-governance has never been given by the Metis. Therefore, the Metis people contend that we have the inherent right to self-government.

B. The Metis Nation Accord

The Metis Nation Accord was reached and drafted during the 1992 constitutional talks. It was intended as the basis for the future of Metis self-governance. This agreement was reached and created between the Metis people, the Federal Government and the provinces of British Columbia, Alberta, Saskatchewan, Manitoba and Ontario along with the Northwest Territories. The Metis People today wish to see the resurrection of this Accord. We promote the Accord and believe that this agreement will assist us in realizing Metis Self-government. In this connection, we are pleased that the Commission has given it's support to the Accord in Partners in Confederation, Aboriginal peoples, Self-Government, and the Constitution, August 1993.

C). Metis Land Base

Our people have actively sought to regain ownership and control over the land and resources that are a fundamental feature of our heritage. The situation of Metis people in the North is especially sensitive to the question of land.

Various political and legal strategies have been initiated to rectify a historical situation which saw the Metis dispossessed of their land and resources. The principle involved in these land rights actions is clearly important, not simply because of the obvious need to obtain formal recognition of past injustices, but also to create a healthy Metis society for present and future generations. Land, and the rights to the resources both on and beneath the surface of that land, are essential to the existence and healthy survival of any nation. The Metis nation is, of course, no exception.

D). 91(24) of the Constitution Act 1867

The Constitution Act 1867, amongst other things, describes the division of powers between the Federal and Provincial governments. Section 91(24) of the 1867 Act gives the Federal Government exclusive jurisdiction over "Indians and lands reserved for Indians". However, it is the position of the Federal Government that the term "Indian" does not include Metis people even while it was found by the Supreme Court of Canada that "Indian" should include Inuit people. Moreover, the case law is rife with examples of the terms Native, Aboriginal, Indian and Indigenous Peoples being used interchangeably in connection with Metis and all other Canadian Aboriginals. It is therefore the position of the Metis Society of Saskatchewan that the

exclusion of the Metis people from the Federal Government of Canada's jurisdiction is unconstitutional, against the express opinion of the Supreme Court of Canada and is in opposition to all of the principles of justice.

The call from the Metis Society of Saskatchewan then is to have the fact of our heritage and place in Canadian society recognized by the federal government, to have the fact of the injustices to the Metis people over the generations to be rectified and for the Federal government to help do that by recognizing that the Metis fall within section 91(24) of the Constitution Act 1867.

VII. Recommendations

In conclusion, the Metis Society of Saskatchewan will offer several recommendations. We do this in the hopes that the results of the Royal Commission on Aboriginal Peoples process will enable the Metis people throughout the province of Saskatchewan to realize our self-government aspirations.

1. That the inherent right of the Metis people to self-government be recognized by the government of Canada and the governments of the Provinces. And that this right be affirmed and entrenched into the Constitution of Canada and implemented in the laws of this country.

2. That the inherent right of the Metis people to land and resources be recognized by the government of Canada and the governments of the Provinces. And that this right be affirmed and entrenched into the Constitution of Canada and implemented in the laws of this country.

3. That the Constitution of Canada be amended to clarify that all of the Aboriginal peoples of Canada fall within the jurisdiction of the Federal Government, as that jurisdiction is stated in s. 91(24) of the Constitution Act 1867.

4. That there be created a comprehensive and self-autonomous process by which the Metis land claims can be reviewed, assessed and ultimately negotiated. And that there be included in that process a mechanism by which lands lost to the Metis people, such as those lands in the Primrose Air Weapons range, can eventually be returned to the Metis people.

5. That the Natural Resources Transfer Agreements of Manitoba, Saskatchewan and Alberta be amended so that all of the Canadian Aboriginal peoples shall have the hunting, trapping and fishing rights that are contained therein.

6. As an interim measure, that the conservation and managed development of renewable and non-renewable resources in areas occupied or claimed by the Metis, will be accomplished through co-management or partnership arrangements between the Metis and appropriate parties.

7. That it be ensured that all of the self-government projects and initiatives that are formed for and by Metis people are sufficiently funded to ensure that the objectives of the projects are achieved.

8. That the mandate of the Tripartite process be enlarged so that it will include the negotiation of Metis self-government.

9. That the constitutional talks be reopened with a special emphasis on Aboriginal issues.

10. That there be an extensive reevaluation of governmental services as they relate to Metis people and that such evaluation be conducted under the authority of the Metis government.

11. That there be instated a Metis education system that educates Metis at both the kindergarten to grade twelve and the post-secondary levels.

12. That there be created a system of Metis economic development programs which will form the Metis economic base. These may include systems of leases, land transfers to Metis, equity capitol and loans for Metis businesses.

13. That the health care that is delivered to the Metis people in Saskatchewan be brought up to par with the health care delivered to non-Aboriginals and that

this health care be made culturally specific for Metis.

14. That the Metis people be given the same health care benefits that are given to the Treaty Indian people of Canada.

15. That there be instilled a quota system whereby a greater number of Metis people are hired in projects that take place in the North. And that those quotas affect all levels from the level of labourer through senior management positions.

16. That there be created a method of resource sharing whereby the benefits of the natural resources from the north can be shared with the people of the north so that the resources benefit the place that they come from.

17. That the unsatisfactory housing situation for many Metis people be corrected and that there be formed housing projects in order to deliver adequate housing to Metis. And that those housing projects be delivered by Metis institutions.

18. That northern Metis people be more involved in the formation of policies and programs that affect northern people.

19. That the administration of Justice be altered so that it is more sensitive to the needs and aspirations of the Metis. And that the delivery of justice be administered where ever possible by Metis people in their own communities.

20. That the relevant government parties to the Metis Nation Accord be counselled to ratify and implement the Accord in full cooperation with the Metis Nation.

The above changes and initiatives will require significant participation on the part of the federal and provincial governments regarding funding to the Metis people and their political, economic and cultural organizations. This could be accomplished through several means including resource reallocation, transfer payments, block funding or some other sort of funding system that will aid in the Metis administration of Metis programs.

Endnotes

1. Form of Aboriginal Self-Government, David a. Boisvert, Institute of Inter-governmental Relations, Kingston, Ontario, 1985.

2. This discussion is written with reference to Contingent Versus Inherent Right of Self-Government, Paul Chartrand Manitoba Metis Federation paper, 1986.

3. This refers to two letters, one letter sent April 24, 1981 from Jean Chretien to Harry Daniels the then President of the Native Council of Canada. The second letter sent on December 22, 1981 from Jean Chretien to Jim Sinclair, the then Constitutional spokesman for the Native Council of Canada.

4. The above discussion is taken from policy materials and from conversations with elected members of the Metis Society of Saskatchewan.

5. This Section of the Document was researched and prepared by Bruce Karlenzig, researcher for the Metis society of Saskatchewan.

6. The bulk of this Section is taken from conversations with Northern Regional Directors and Administrators of Affiliates of the Metis Society of Saskatchewan.

7. British North America Act, 1930: The legal Right To Hunt, Trap And Fish, Unpublished article by Clem Chartier, 1978.

8. Op cite, at note 7.

9. Op cite, at note 7.

10. Op cite, at note 7.

11. Letter sent on August 5, 1933 from the Attorney Generals department of Alberta to Harold W. McGill, Deputy Superintendant General, Dept. of Indian Affairs.

12. Taken from a legal opinion by the Federal Deputy Minister of Justice, W. Stuart Edwards dated August 30, 1933

13. Taken from a legal opinion by the Deputy Minister of Justice W. Stuart Edwards dated November 7, 1933.

14. Her Majesty The Queen v. Ernest Frank Ferguson, the reasons for judgnment were given by judge Thomas Goodson September 14, 1992. It is a trial court decision but is currently being appealed by the Crown to the Alberta Court of Appeals.

15. See appendices.

16. This portion of this Section comes from intreviews with Leon McAuley Director of the Provincial Metis Housing Corporation.

17. This portion of this Section comes from interviews with Earl Pelletier, of the Metis Society 9f Saskatchewan.

18. See appendices.

19. See appendices.

20. See appendices.

21. See appendices.

Appendices

Tab 1. The Saskatchewan Natural Resources Act (1930).

Tab 2. Re Eskimos (1939) 2 DLR 417.

Tab 3. St. Catherines Milling and Lumber Company v. R (1888) 14 A.C. 46.

Tab 4. R v. Sparrow 70 D.L.R. (4th) 385

Tab 5. Nowegijick v. R (1983) 1 S.C.R. 29

THE SASKATCHEWAN NATURAL RESOURCES ACT

20-21 GEORGE V, CHAPTER 41

An Act respecting the transfer of the Natural Resources of Saskatchewan

[*Assented to 30th May, 1930.*]

HIS MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short title.

1. This Act may be cited as *The Saskatchewan Natural Resources Act*.

Agreement confirmed.

2. The agreement set out in the schedule hereto is hereby approved.

SCHEDULE

MEMORANDUM OF AGREEMENT

Made this 20th day of March, 1930.

BETWEEN

THE GOVERNMENT OF THE DOMINION OF CANADA, represented herein by the Honourable Ernest Lapointe, Minister of Justice, and the Honourable Charles Stewart, Minister of the Interior,

Of the first part,

AND

THE GOVERNMENT OF THE PROVINCE OF SASKATCHEWAN, represented herein by the Honourable James Thomas Milton Anderson, Premier and Minister of Education of the Province, and the Honourable Murdoch Alexander MacPherson, Attorney-General,

Of the second part.

WHEREAS by section twenty-one of the *Saskatchewan Act*, being chapter forty-two of the four and five Edward the Seventh, it was provided that "All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the Province under the *North-West Irrigation Act, 1898*, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said Province with the substitution therein of the said Province for the North-West Territories;"

AND WHEREAS the Government of Canada desires that the Province should be placed in a position of equality with the other provinces of Confederation with respect to the administration and control of its natural resources as from its entry into Confederation in 1905;

AND WHEREAS the Government of the Province contends that, before the Province was constituted and entered into Confederation as aforesaid, the Parliament of Canada was not competent to enact that the natural resources within the area now included within the boundaries of the Province should vest in the Crown and be administered by the Government of Canada for the purposes of Canada and was not entitled to administer the said natural resources otherwise than for the benefit of the residents within the said area, and moreover that the Province is entitled to be and should be placed in a position of equality with the other Provinces of Confederation with respect to its natural resources as from the fifteenth day of July, 1870, when Rupert's Land and the North-Western Territory were admitted into and became part of the Dominion of Canada;

AND WHEREAS it has been agreed between Canada and the said Province that the said section of the *Saskatchewan Act* should be modified and that provision should be made for the determination of the respective rights and obligations of Canada and the Provinces as herein set out;

NOW THEREFORE This Agreement Witnesseth:

TRANSFER OF PUBLIC LANDS GENERALLY

1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the *British North America Act, 1867*, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall from and after the coming into force of this agreement and, subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals, or royalties before the coming into force of this agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter.

2. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto.

3. Any power or right, which, by any such contract, lease or other arrangement, or by any Act of the Parliament of Canada relating to any of the lands, mines, minerals or royalties hereby transferred or by any regulation made under any such Act, is reserved to the Governor in Council or to the Minister of the Interior or any other officer of the Government of Canada, may be exercised by such officer of the Government of the Province as may be specified by the Legislature thereof from time to time, and until otherwise directed, may be exercised by the

4. The Province will perform every obligation of Canada, arising by virtue of the provisions of any statute or Order in Council or regulation in respect of the public lands to be administered by it hereunder, to any person entitled to a grant of lands by way of subsidy for the construction of railways or otherwise or to any railway company for grants of lands for right of way, road bed, stations, station grounds, workshops, buildings, yards, ballast pits or other appurtenances.

5. The Province will further be bound by and will, with respect of any lands or interests in lands to which the Hudson's Bay Company may be entitled, carry out the terms and conditions of the Deed of Surrender from the said Company to the Crown as modified by the *Dominion Lands Act* and the agreement dated the 23rd day of December, 1924, between His Majesty and the said Company, which said Agreement was approved by Order in Council dated the 19th day of December, 1924 (P.C. 2158), and in particular the Province will grant to the Company any lands in the Province which the Company may be entitled to select and may select them from the lists of lands furnished to the Company by the Minister of the Interior under and pursuant to the said agreement of the 23rd day of December, 1924, and will release and discharge the reservation in patents referred to in clause three of the said agreement, in case such release and discharge has not been made prior to the coming into force of this agreement. Nothing in this agreement, or in any agreement varying the same as hereinafter provided, shall in any way prejudice or diminish the rights of the Hudson's Bay Company or affect any right to or interest in land acquired or held by the said Company pursuant to the Deed of Surrender from it to the Crown, the *Dominion Lands Act* or the said agreement of the 23rd day of December, 1924.

School Lands Fund and School Lands

6. Upon the coming into force of this agreement, Canada will transfer to the Province the money or securities constituting that portion of the school lands fund, created under sections twenty-two and twenty-three of the *Act to amend and consolidate the several Acts respecting Public Lands of the Dominion*, being chapter thirty-one of forty-two Victoria, and subsequent statutes, which is derived from the disposition of any school lands within the Province or within that part of the Northwest Territories now included within the boundaries thereof.

7. The school lands fund to be transferred to the Province as aforesaid, and such of the school lands specified in section thirty-seven of the *Dominion Lands Act*, being chapter one hundred and thirteen of the *Revised Statutes of Canada, 1927*, as passed to the administration of the Province, under the terms hereof, shall be set aside and shall continue to be administered by the Province in accordance, *mutatis mutandis*, with the provisions of sections thirty-seven to forty of the *Dominion Lands Act*, for the support of schools organised and carried on therein in accordance with the law of the Province.

Water

8. Canada agrees that the provision contained in section four of the *Dominion Water Power Act*, being chapter two hundred and ten of the *Revised Statutes of Canada, 1927*, that every undertaking under the said Act is declared to be a work for the general advantage of Canada, shall stand repealed as from the date of the coming into force of this agreement in so far as the same applies to undertakings within the Province; nothing in this paragraph shall be deemed to affect the legislative competence of

Fisheries

9. Except as herein otherwise provided, all rights of fishery shall, after the coming into force of this agreement, belong to and be administered by the Province, and the Province shall have the right to dispose of all such rights of fishery by sale, licence or otherwise, subject to the exercise by the Parliament of Canada and its legislative jurisdiction over sea-coast and inland fisheries.

Indian Reserves

10. All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.

11. The provisions of paragraphs one to six inclusive and of paragraph eight of the agreement made between the Government of the Dominion of Canada and the Government of the Province of Ontario on the 24th day of March, 1924, which said agreement was confirmed by Statute of Canada, fourteen and fifteen George the Fifth chapter forty-eight, shall (except so far as they relate to the *Bed of Navigable Waters Act*) apply to the lands included in such Indian reserves as may hereafter be set aside under the last preceding clause as if the said agreement had been made between the parties hereto, and the provisions of the said paragraphs shall likewise apply to the lands included in the reserves heretofore selected and surveyed, except that neither the said lands nor the proceeds of the disposition thereof shall in any circumstances become administrable by or be paid to the Province.

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

Soldier Settlement Lands

13. All interest in Crown lands in the Province upon the security of which any advance has been made under the provisions of the *Soldier Settlement Act*, being chapter 188 of the *Revised Statutes of Canada, 1927*, and amending Acts, shall continue to be vested in and administered by the Government of Canada for the purposes of Canada.

National Parks

14. The Prince Albert National Park shall continue as a national park and the lands included therein as the same are described in Orders made by the Governor in Council on the twenty-fourth day of March, 1927 (P.C. 524), the eighteenth day of October, 1928 (P.C. 1846) and the sixth day of February, 1929 (P.C. 162), together with the mines and minerals (precious and base) in the said park and the royalties incident thereto.

shall continue to be vested in and administered by the Government of Canada as a national park, but in the event of the Parliament of Canada at any time declaring that the said land or any part thereof is no longer required for park purposes, the lands, mines, minerals (precious and base) and the royalties incident thereto, specified in any such declaration, shall forthwith upon the making thereof belong to the Province, and the provisions of paragraph three of this agreement shall apply thereto as from the date of such declaration.

15. The Parliament of Canada shall have exclusive legislative jurisdiction within the whole area included within the outer boundaries of the said park, notwithstanding that portions of the said area may not form part of the park proper; the laws now in force within the said area shall continue in force only until changed by the Parliament of Canada or under its authority, provided, however, that all laws of the Province now or hereafter in force, which are not repugnant to any law or regulation made applicable within the said area by or under the authority of the Parliament of Canada, shall extend to and be enforceable within the same, and that all general taxing Acts passed by the Province shall apply within the same unless expressly excluded from application therein by or under the authority of the Parliament of Canada.

16. The Province will not, by works outside the boundaries of the said park, reduce the flow of water in any of the rivers or streams within the same to less than that which the Minister of the Interior may deem necessary adequately to preserve the scenic beauties of the said park.

17. In the event of its being hereafter agreed by Canada and the Province that any area or areas of land in the Province, in addition to that hereinbefore specified, should be set aside as national parks and be administered by Canada, the foregoing provisions of this agreement on the subject of parks may be applied to such area or areas with such modification as may be agreed upon.

Seed Grain, Etc., Liens

18. Every lien upon every interest in any unpatended land passing to the Province under this agreement, which is now held by Canada as security for an advance made by Canada for seed grain, fodder or other relief, shall continue to be vested in Canada, but the Province will, on behalf of Canada, collect the sums due in respect of such advances, except so far as the same are agreed to be uncollectible, and upon payment of any such advance, any document required to be executed to discharge the lien may be executed by such officer of the Province as may be authorised by any provincial law in that behalf; the Province will account for and pay to Canada all sums belonging to Canada collected hereunder, subject to such deduction to meet the expenses of collection as may be agreed upon between the Minister of the Interior and the Provincial Secretary or such other Minister of the Province as may be designated in that behalf under the laws thereof.

General Reservation to Canada

19. Except as herein otherwise expressly provided, nothing in this agreement shall be interpreted as applying so as to affect or transfer to the administration of the Province (*a*) any lands for which Crown grants have been made and registered under the *Land Titles Act* of the Province and of which His Majesty the King in the right of His Dominion of Canada is, or is entitled to become the registered owner at the date upon which this agreement comes into force, or (*b*) any ungranted lands of the Crown upon which public money of Canada has been expended or which are, at the date upon which this agreement comes into force, in use or reserved by Canada for the purpose of the federal administration.

Historic Sites, Bird Sanctuaries, Etc.

20. The Province will not dispose of any historic site which is notified to it by Canada as such and which Canada undertakes to maintain as an historic site. The Province will further continue and preserve as such the bird sanctuaries and public shooting grounds which have been already established and will set aside such additional bird sanctuaries and public shooting grounds as may hereafter be established by agreement between the Minister of the Interior and the Provincial Secretary or such other Minister of the Province as may be specified under the laws thereof.

Financial Terms

21. In lieu of the provision made by subsection one of section twenty of the *Saskatchewan Act*, Canada will, from and after the date of the coming into force of this agreement, pay to the Province by half-yearly payments in advance, on the first days of January and July in each year, an annual sum based upon the population of the Province as from time to time ascertained by the quinquennial census thereof, as follows:

The sum payable until such population reaches one million two hundred thousand shall be seven hundred and fifty thousand dollars;

And thereafter the sum payable shall be one million one hundred and twenty-five thousand dollars.

22. If at the date of the coming into force of this agreement any payment has been made under subsection one of section twenty of the *Saskatchewan Act* in respect of any half-year commencing before but terminating after the said date, a proportionate part of the payment so made shall be taken as having been made under the provisions hereof.

23. Provision will be made pursuant to section fifty-five of the *Supreme Court Act*, being chapter thirty-five of the *Revised Statutes of Canada, 1927*, to submit for the consideration of the Supreme Court of Canada questions agreed upon between the parties hereto as being appropriate to obtain the judgment of the said Court, subject to appeal to His Majesty in Council in accordance with the usual practice, as to the rights of Canada and the Province respectively, before the first day of September, 1905, in or to the lands, mines or minerals (precious or base), now lying within the boundaries of the Province and as to any alienation by Canada before the said date of any of the said lands, mines or minerals or royalties incident thereto.

24. As soon as final answers to the questions submitted upon the last preceding paragraph have been given, the Government of Canada will appoint three persons to be agreed upon to be Commissioners under Part I of the *Inquiries Act*, to inquire and report whether any, and if any, what consideration, in addition to the sums provided in paragraph twenty-one hereof, shall be paid to the Province in order that the Province may be placed in a position of equality with the other provinces of Confederation with respect to the administration and control of its natural resources either as from the first day of September, 1905, or as from such earlier date, if any, as may appear to be proper having regard to the answers to the questions submitted as aforesaid; such commissioners to be empowered to decide what financial or other considerations are relevant to the inquiry and the report to be submitted to the Parliament of Canada and to the Legislature of Saskatchewan, if by the said report, the payment of any additional consideration is recommended, then, upon agreement between the Governments of Canada and of the Province following the submission of such report, the said Governments will respectively introduce the legislation necessary to give effect to such

Records

25. Canada will, after the coming into force of this agreement, deliver to the Province from time to time at the request of the Province the originals or complete copies of all records in any department of the Government of Canada relating exclusively to dealings with Crown lands, mines and minerals, and royalties derived therefrom within the Province, and will give to the Province access to all other records, documents or entries relating to any such dealings and permit to be copied by the Province any of the documents required by it for the effective administration of the Crown lands, mines, minerals and royalties.

Amendment of Agreement

26. The foregoing provisions of this agreement may be varied by agreement confirmed by concurrent statutes of the Parliament of Canada and the Legislature of the Province.

Reservation of Rights

27. This agreement is signed on behalf of the Province with the reservation on its part that neither the execution thereof nor any statute confirming the same shall affect or prejudice any right the Province may now have to call into question the legislative competence of the Parliament of Canada to enact certain sections of the *Saskatchewan Act* and the *Dominion Lands Acts*.

When Agreement Comes Into Force

28. This agreement is made subject to its being approved by the Parliament of Canada and by the Legislature of the Province of Saskatchewan, and shall take effect on the first day of the calendar month beginning next after the day upon which His Majesty gives His Assent to an Act of the Parliament of the United Kingdom of Great Britain and Northern Ireland confirming the same.

In witness whereof the Honourable Ernest Lapointe, Minister of Justice, and the Honourable Charles Stewart, Minister of the Interior, have hereunto set their hands on behalf of the Dominion of Canada, and the Honourable James Thomas Milton Anderson, Premier and Minister of Education of the Province, and the Honourable Murdoch Alexander MacPherson, Attorney-General thereof, have hereunto set their hands on behalf of the Province of Saskatchewan.

Signed on behalf of the Government of Canada, by the Honourable Ernest Lapointe, Minister of Justice, and the Honourable Charles Stewart, Minister of the Interior, in the presence of	Ernest Lapointe.
O. M. Biggar.	Chas. Stewart.
Signed on behalf of the Province of Saskatchewan by the Honourable James Thomas Milton Anderson, Premier and Minister of Education, and the Honourable Murdoch Alexander MacPherson, Attorney-General, in the presence of	J. T. M. Anderson.
Jas. F. Bryant.	

THE SASKATCHEWAN NATURAL RESOURCES ACT, No. 2

21-22 GEORGE V, CHAPTER 51

An Act to amend The Saskatchewan Natural Resources Act

[*Assented to 3rd August, 1931.*]

HIS MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. This Act may be cited as *The Saskatchewan Natural Resources Act, No. 2*, and *The Saskatchewan Natural Resources Act*, chapter forty-one of the Statutes of 1930 (first session), and this Act may be cited together as *The Saskatchewan Natural Resources Acts*.

2. The agreement set out in the schedule hereto is hereby confirmed and shall take effect according to its terms.

SCHEDULE

MEMORANDUM OF AGREEMENT

Made this 7th day of August, 1930

BETWEEN

THE GOVERNMENT OF THE DOMINION OF CANADA, represented herein by the Honourable Charles Stewart, Minister of the Interior,

Of the first part,

AND

THE GOVERNMENT OF THE PROVINCE OF SASKATCHEWAN, represented herein by the Honourable James Thomas Milton Anderson, Premier of Saskatchewan,

Of the second part.

WHEREAS by paragraph 26 of the agreement made between the parties hereto on the 20th day of March, 1930, it was agreed that the provisions of the said agreement might be varied by agreement confirmed by concurrent statutes of the Parliament of Canada and the Legislature of the Province,

AND WHEREAS it was further provided by certain clauses of the said agreement, more particularly paragraphs 1, 6, 8, 9, 19, 21, 22 and 25, that the relations of the parties thereto should be altered as in the said agreement specified from and after the date of the coming into force thereof, and the date upon which it was then contemplated that it should come into force, as defined by paragraph 28, has now been ascertained as being the 1st day of August, 1930;

AND WHEREAS the Government of the Province has requested that the presently existing powers and rights of each of the parties should continue without alteration until the 1st day of October, 1930, and the parties hereto have agreed accordingly:

NOW THEREFORE This Agreement Witnesseth that:

1. Notwithstanding anything in the said agreement contained, any expression therein contained which defines a date by reference to which the powers or rights of either of the parties are to be altered shall be read as referring to the 1st day of October, 1930, instead of to the 1st day of August in that year.

2. The Government of Canada will recommend to Parliament and the Government of the Province of Saskatchewan will recommend to the Legislature of the said Province such legislation as may be necessary to give effect to this agreement.

IN WITNESS WHEREOF the Honourable Charles Stewart, Minister of the Interior, has hereunto set his hand on behalf of the Dominion of Canada, and the Honourable James Thomas Milton Anderson, Premier of Saskatchewan, has hereunto set his hand on behalf of the said Province.

Signed on behalf of the Government of Canada by the Honourable Charles Stewart, Minister of the Interior, in the presence of:

W. J. F. PRATT.

CHAS. STEWART.

Signed on behalf of the Province of Saskatchewan by the Honourable James Thomas Milton Anderson, Premier of the said Province, in the presence of:

W. W. CORY.

J. T. M. ANDERSON.

Re ESKIMOS.

Supreme Court of Canada, Sir Lyman P. Duff, C.J.C., Cannon, Crocket, Davis, Kerwin and Hudson, JJ. April 5, 1939.

Constitutional Law II—B.N.A. Act, ss. 91(24), 146—Whether Eskimos "Indians."

The exclusive legislative jurisdiction of the Dominion Parliament under s. 91(24) of the B.N.A. Act over Indians extends to Eskimos, who, by well-established usage at the time the B.N.A. Act was enacted, were regarded as Indians throughout British North America, and it is immaterial that there were no Eskimos within the original confederating Provinces, for the B.N.A. Act (s. 146) provided for the inclusion of the Hudson's Bay Co. lands, where the Eskimos then resided.

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Re Eskimos.

Sir Lyman P. Duff, C.J.C.

REFERENCE to Supreme Court of Canada on the question: "Does the term 'Indians' as used in Head 24 of s. 91 of the B.N.A. Act, 1867, include Eskimo inhabitants of the Province of Quebec?" Answered in affirmative.

J. McGregor Stewart, K.C., and *C. P. Plaxton*, K.C., for A.-G. Can.; *A. Desilets*, K.C., and *C. A. Seguin*, K.C., for A.-G. Que.

SIR LYMAN P. DUFF C.J.C.:—The reference with which we are concerned arises out of a controversy between the Dominion and the Province of Quebec touching the question whether the Eskimo inhabitants of that Province are "Indians" within the contemplation of head no. 24 of s. 91 of the *B.N.A. Act* which is in these words, "Indians and Lands Reserved for Indians;" and under the reference we are to pronounce upon that question.

Among the inhabitants of the three Provinces, Nova Scotia, New Brunswick and Canada that, by the immediate operation of the *B.N.A. Act* became subject to the constitutional enactments of that statute there were few, if any, Eskimo. But the *B.N.A. Act* contemplated the eventual admission into the Union of other parts of British North America as is explicitly declared in the preamble and for which provision is made by s. 146 thereof.

The Eskimo population of Quebec, with which we are now concerned, inhabits (in the northern part of the Province) a territory that in 1867 formed part of Rupert's Land; and the question we have to determine is whether these Eskimo, whose ancestors were aborigines of Rupert's Land in 1867 and at the time of its annexation to Canada, are Indians in the sense mentioned.

In 1867 the Eskimo population of what is now Canada, then between four and five thousand in number, occupied, as at the present time, the northern littoral of the continent from Alaska to, and including part of, the Labrador coast within the territories under the control of the Hudson's Bay Co., that is to say, in Rupert's Land and the North-Western Territory which, under the authority given by s. 146 of the *B.N.A. Act* were acquired by Canada in 1871. In addition to these Eskimo in Rupert's Land and the North-Western Territory, there were some hundreds of them on that part of the coast of Labrador (east of Hudson Strait) which formed part of, and was subject to the Government of, Newfoundland.

The *B.N.A. Act* is a statute dealing with British North America, and, in determining the meaning of the word "Indians" in

the statute, we have to consider the meaning of that term as applied to the inhabitants of British North America. In 1867 more than half of the Indian population of British North America were within the boundaries of Rupert's Land and the North-Western Territory; and of the Eskimo population nearly 90% were within those boundaries. It is, therefore, important to consult the reliable sources of information as to the usage of the term "Indian" in relation to the Eskimo in those territories. Fortunately, there is evidence of the most authoritative character furnished by the Hudson's Bay Co. itself.

It will be recalled that the Hudson's Bay Co., besides being a trading company, possessed considerable powers of government and administration. Some years before the passing of the *B.N.A. Act* complaints having been made as to the manner in which these responsibilities had been discharged, a committee of the House of Commons in 1856 and 1857 investigated the affairs of the company. Among the matters which naturally engaged the attention of the Committee was the company's relations with and conduct towards the aborigines; and for the information of the Committee a census was prepared and produced before it by the officers of the company showing the Indian populations under its rule throughout the whole of the North American continent. This census was accompanied by a map showing the "location" of the various tribes and was included in the Report of the Committee; and was made an appendix to the Committee's Report which was printed and published by the order of the House of Commons. It is indisputable that in the census and in the map the "Esquimaux" fall under the general designation "Indians" and that, indeed, in these documents, "Indians" is used as synonymous with "aborigines." The map bears this description,

"An Aboriginal Map of North America denoting the boundaries and locations of various Indian Tribes."

Among these "Indian Tribes" the Eskimo are shown inhabiting the northern littoral of the continent from Labrador to Russian America. In the margin of the map are tables. Two are of great significance. The first of these is headed "Statement of the Indian Tribes of the Hudson's Bay Territories." The tribes "East of the Rocky Mountains" are given as "Blackfeet and Sioux groups comprising eight tribes, Algonquins comprising twelve tribes" and "Esquimaux."

The second is headed "Indian Nations once dwelling East of the Mississippi." The list is as follows:

Algonquin
Dahcotah or Sioux

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Huron Iroquois	
Catawba	(extinct)
Cherokee	
Uchee	(extinct)
Natches	(extinct)
Mobilian	
Esquimaux	
Kolooch	
Athabascan	
Sioux	
Algonquin	
Iroquois	

The census concludes with a summary which is in these words:

The Indian Races shown in detail in the foregoing census may be classified as follows:

Thickwood Indians on the east side of the Rocky Mountains	35,000
The Plain Tribes (Blackfeet, etc.)	25,000
The Esquimaux	4,000
Indians settled in Canada	3,000
Indian in British Oregon and on the North West Coast	80,000
Total Indians	147,000
Whites and half-breeds in Hudson's Bay Territory	11,000
Souls	158,000

As already observed, the appointment of the Committee was due in part at all events to representations made to the Imperial Government respecting the conduct of the Hudson's Bay Co. towards the Indians and the condition of the Indian population was one of the subjects with which the Committee was principally concerned. They were also concerned with representations made by the Government of Canada urging the desirability of transferring to Canada all the territories of the company, at least as far west as the Rocky Mountains. Chief Justice Draper was present at the sittings of the Committee representing the Government of Canada. The Committee, as is well known, reported in favour of the cession to Canada of the districts of the Red River and the Saskatchewan River.

Seven years later, the scheme of Confederation, propounded in the Quebec Resolutions of October 10, 1864, included a declaration that provision should be made "for the admission into the Union on equitable terms of Newfoundland, the North-West Territory, British Columbia, and Vancouver."

This declaration was renewed in the Resolutions of the London Conference in December, 1866, and in the *B.N.A. Act* specific provision was made, as we have seen, in s. 146 for the acquisition of Rupert's Land as well as the North-west Territory and, in 1868, a statute of the Imperial Parliament conferred upon the Queen the necessary powers as respects Rupert's Land.

The *B.N.A. Act* came into force on July 1, 1867, and, in December of that year, a joint address to Her Majesty was voted by the Senate and House of Commons of Canada praying that authority might be granted to the Parliament of Canada to legislate for the future welfare and good government of these regions and expressing the willingness of Parliament to assume the duties and obligations of government and legislation as regards those territories. In the Resolution of the Senate expressing the willingness of that body to concur in the joint address is this paragraph:

"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 provisions for the protection of the Indian Tribes, whose interest and well being are involved in the transfer."

By Order-in-Council of June 23, 1870, it was ordered that from and after July 15, 1870, the North-West Territory and Rupert's Land should be admitted into, and become part of, the Dominion of Canada and that, from that date, the Parliament of Canada should have full power and authority to legislate for the future welfare and good government of the territory. As regards Rupert's Land, such authority had already been conferred upon the Parliament of Canada by s. 5 of the *Rupert's Land Act* of 1868.

The vast territories which by these transactions became part of the Dominion of Canada and were brought under the jurisdiction of the Parliament of Canada were inhabited largely, indeed almost entirely, by aborigines. It appears to me to be a consideration of great weight in determining the meaning of the word "Indians" in the *B.N.A. Act* that, as we have seen, the Eskimo were recognized as an Indian tribe by the officials of the Hudson's Bay Co. which, in 1867, as already observed, exercised powers of government and administration over this great tract; and that, moreover, this employment of the term "Indians" is evidenced in a most unequivocal way by documents prepared by those officials and produced before the Select Committee of the House of Commons which were included in the Report of that Committee which, again, as already mentioned, was printed and published by the order of the House. It is quite clear from the

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material before us that this Report was the principal source of information as regards the aborigines in those territories until some years after Confederation.

I turn now to the Eskimo inhabiting the coast of Labrador beyond the confines of the Hudson's Bay territories and within the boundaries and under the Government of Newfoundland. As regards these, the evidence appears to be conclusive that, for a period beginning about 1760 and extending down to a time subsequent to the passing of the *B.N.A. Act,* they were by governors, commanders-in-chief of the fleet and other naval officers, ecclesiastics, missionaries and traders who came into contact with them, known and classified as Indians.

First, of the official documents. In 1762, General Murray, then Governor of Quebec, who afterwards became first Governor of Canada, in an official report of the state of the Government of Quebec deals under the sixth heading with "Indian nations residing within the government." He introduces the discussion with this sentence: "In order to discuss this point more clearly I shall first take notice of the Savages on the North shore of the River St. Lawrence from the Ocean upwards, and then of such as inhabit the South side of the same River, as far as the present limits of the Government extend on either side of it."

In the first and second paragraphs he deals with the "Savages" on the North Shore and he says: "The first to be met with on this side are the Esquimaux." In the second paragraph he deals with the Montagnais who inhabited a "vast tract" of country from Labrador to the Saguenay.

It is clear that here the Eskimo are classified under the generic term Indian. They are called "Savages," it is true, but so are the Montagnais and so also the Hurons settled at Jeune Lorette. It is useful to note that he speaks in the first paragraph of the Esquimaux as "the wildest and most untamable of any" and mentions that they are "emphatically styled by the other Nations, Savages."

Then there are two reports to His Majesty by the Lords of Trade. The first, dated June 8, 1763, discusses the trade carried on by the French on the coast of Labrador. It is said that they carried on "an extensive trade with the Esquimaux Indians in Oyl, Furs, & ca. [*sic*] (in which they allowed Your Majesty's Subjects no Share)."

In the second, dated April 16, 1765, in dealing with complaints on the part of the Court of France respecting the French fishery on the coast of Newfoundland and in the Gulf of St. Lawrence, their observations on these complaints are based upon information furnished by Commodore Palliser who had been entrusted

with the superintendency of the Newfoundland fishery and the Government of the island. In this report, this sentence occurs: "The sixth and last head of complaint contained in the French Ambassador's letter is, that a captain of a certain French vessel was forbid by your Majesty's Governor from having commerce with the Eskimaux Indians;" and upon that it is observed that the Governor "is to be commended for having forbid the subjects of France to trade or treat with these Indians." "These Indians" are spoken of as inhabitants " . . . who are under the protection of and dependent upon your Majesty."

Then there is a series of proclamations by successive Governors and Commanders-in-Chief in Newfoundland, the first of which was that of Sir Hugh Palliser of July 1, 1764. The proclamation recites, ". . . Advantages would arise to His Majesty's Trading Subjects if a Friendly Intercourse could be Established with the Esquemeaux Indians, Inhabiting the Coast of Labradore . . ." and that the Government "has taken measures for bringing about a friendly communication between the said Indians and His Majesty's subjects."

All His Majesty's subjects are strictly enjoined "to treat them in the most civil and friendly manner."

The next is a Proclamation by the same Governor dated April 8, 1765, which recites the desirability of "friendly intercourse with the Indians on the Coast of Labrador" and that "attempts hitherto made for that purpose have proved ineffectual, especially with the Esquimaux in the Northern Ports without the Straits of Belle Isle" and strictly enjoins and requires "all His Majesty's subjects who meet with any of the said Indians to treat them in a most civil and friendly manner."

On April 10, 1772, Governor Shuldham in a Proclamation of that date requires "all His Majesty's subjects coming upon the coast of Labrador to act towards the Esquimaux Indians in a manner agreeable to the Proclamation issued at St. John's the 8th day of July 1769 respecting the savages inhabiting the coast of Labrador."

In this Proclamation it should be noted that "Esquimaux savages" and "Esquimaux Indians" are used as convertible expressions.

In 1774, the boundaries of Quebec were extended, and the north eastern coast of Labrador and the Eskimo population therein came under the jurisdiction of the Governor of Quebec and remained so until 1809. Nevertheless, the Governor and Commander-in-Chief of Newfoundland, who at the date was Admiral Edwards, acting under the authority of that Order in Council of March 9, 1774, took measures to protect the mission-

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aries of the Unitas Fratrum and their settlements on the coast of Labrador from molestation or disturbance and, on May 14, 1779, Admiral Edwards issued a Proclamation requiring "all His Majesty's subjects coming upon the Coast of Labrador to act towards the Esquimaux Indians justly, humanely and agreeably to these laws, by which His Majesty's subjects are bound." Here again it is to be observed that the word "savages" and "Indians" are used as equivalents.

A further Proclamation by Admiral Edwards on January 30, 1781, employs the same phrases, the Eskimo being described as "Esquimaux savages" and as "Esquimaux Indians."

On May 15, 1774, Governor Campbell, as Governor and Commander-in-chief, issued a Proclamation in terms identical with that of 1781.

On December 3, 1821, a Proclamation was issued by Governor Hamilton as Governor and Commander-in-Chief of Newfoundland (now again including the Labrador coast) relating to a "fourth settlement" by the Moravian missionaries requiring all His Majesty's subjects "to act towards the missionaries and the Esquimaux Indians justly and humanely."

There are other official documents. In a report in 1798 by Captain Crofton, addressed to Admiral Waldegrave, Governor and Commander-in-Chief of Newfoundland, the phrase "Esquimaux Indians" occurs several times and the Eskimo are plainly treated as coming under the designation "Indians."

A report to Lord Dorchester, Governor and Commander-in-Chief of Quebec, Nova Scotia, New Brunswick and their dependencies, in 1788, upon an application by George Cartwright for a grant of land at Touktoke Bay on the coast of Labrador by a special Committee of the Council appointed to consider the same refers to the applicant's exertions in "securing friendly intercourse with the Eskimaux Indians and his success in bringing about a friendly intercourse between that nation and the Mountaineers."

Evidence as to subsequent official usage is adduced in a letter of 1824 from the Advocate General of Canada to the Assistant Civil Secretary on some matter of a criminal prosecution in which "Esquimaux Indians" are concerned; and in a report of 1869 by Judge Pinsent of the Court of Labrador to the Governor of Newfoundland in which this sentence occurs: "In this number about 300 Indians and half-breeds of the Esquimaux and Mountaineer races are included."

Reports from missionaries and clergymen are significant. I refer particularly to two. There is a communication in 1821 by the Unitas Fratrum sent to Admiral Hamilton, Governor and

Commander-in-Chief of Newfoundland and Labrador, on a visit by H.M.S. "Clinker" to their settlements. In this the Eskimo are mentioned as "Eskimaux Indians" and "Esquimaux Tribes" and the report concludes with a table giving the numbers of "Esquimaux Indians who have embraced the Christian religion" at the various stations.

In 1849, a report from the Bishop of Newfoundland was printed and published in London for the Society for the Propagation of the Gospel by the Bishop of London with a prefatory letter and seems to have been put into circulation through Rivingtons and other booksellers. Extracts from this report, which describes a visit to Labrador, are produced in the Quebec case, and as these passages exemplify in a remarkable way the use of the term Indian, as designating the Eskimo inhabitants of Labrador as well as other classes of Indians there, it is right, I think, to reproduce them in full:

"p. 17.—At St. Francis Harbour, where we next stopped, we celebrated the Lord's Supper, as there were several members of the Church from Newfoundland fishing in the neighbourhood; and the agent and his lady also communicated, (Mr. and Mrs. Saunders). Several Esquimaux Indians were here admitted into the Church, and married. One of them afterwards accompanied us as pilot to Sandwich Bay.

"I was obliged very reluctantly to leave the Church ship at St. Francis Harbour (the wind blowing in), and proceeded in a boat twenty-five miles to the Venison Islands, where I remained three days on shore, before the Hank could join us, and, with Mr. Hoyles, was very kindly entertained by Mr. Howe, Messrs. Slade's agent. Here all the females are either Esquimaux or mountaineer Indians, or descended from them. With the exception of Mrs. Saunders, there is not an Englishwomen on the coast, from Battle Harbour to Sandwich Bay; all, or nearly all, are Indians (Esquimaux or mountaineer), or half Indians, and of course the children are the same mixed race."

"p. 40.—Wednesday, August 2.—The wind blew so strong last night, with heavy rain, that our captain, who was on shore, could not return to the ship. I had intended to proceed this morning, but, partly on account of the high sea, and partly because there was yet work to be done here, I was persuaded to delay my departure. I went on shore with my Chaplains after breakfast; and while I remained at the house of Mr. Ellis, the merchant of Newfoundland, they visited an Englishman, who was married, or united, to a poor Indian woman, an Esquimaux, and who we understood, had children to be baptized. . . .

"p. 49.—Mr. Bendle also informed us of the character &c.,

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of the Indians who dwell in or resort to his neighbourhood. There are three distinct tribes—the Micmacs, Mountaineers and Esquimaux. The first two are generally Roman Catholics, but the Esquimaux owe their instruction and conversion to the Moravian Missionaries. These Missionaries (on the Labrador coast) have four stations and establishments, the nearest about 400 miles to the north of Battle Harbour, and the most distant nearly 400 miles farther, or 800 miles from this place. There are three families of the Moravians at each of their stations, who live together in a stone house, and have large trading concerns in fish, &c., with the Esquimaux. . . .

"p. 63.—Tuesday, August 15.—The wind came round again to the westward this morning, but was very light. We got under way at ten o'clock, and did not reach the Seal Islands till five. Mr. Howe kindly furnished a pilot. Here, as in every other harbour, are several vessels from Newfoundland. Messrs. Hunt also keep a small 'crew' here; that is, a few men dwelling together to prosecute the fishery in the summer and kill seals in the winter. Five Englishmen remained together here last winter, who killed 500 seals. In the first three months of the year they are in the woods, to cut timber and firewood. Besides this crew, the only residents are Indians (Esquimaux) and half Indians, who live together, crowded in two huts, with an Englishman who has taken one of the half Indian women as his wife. Guided by the skipper of Mr. Hunt's crew, we visited these Indians. Nearly all (twenty out of twenty-three) crowded together in one small hut, with our two guides, Messrs. Harvey and Hoyles, and myself. A strange group, or crowd, we were. Indians will compress into the smallest possible compass; but still we were brought into painfully close proximity. . . .

"p. 68.—A few years ago the Esquimaux woman, generally wore a cloak, or cape, of seal-skin, with the hair outwards, the tail hanging down behind, and the flippers on their arms; but now all rejoice in European dresses, shawls and gowns of many colours. The only remains of Indian dress is the sealskin boot, which even the smallest children wear; it is of great use in the snow, being quite impervious to wet. In the race of mixed blood, or Anglo-Esquimaux, the Indian characteristics very much disappear, and the children are both lively and comely.

"p. 69.—The afternoon service commenced soon after three o'clock, and was not concluded till seven o'clock, in consequence of the number to be christened and added to the Church. I admitted six adults myself, who were able to answer for themselves; three were Esquimaux. All made the proper answers

correctly and seriously, and not the least so the poor Indians.''

Having regard to the well established usage of designating the Esquimaux of Labrador as Indians or Esquimaux Indians, evidenced by the Proclamations of the Governors of Newfoundland, and other official and unofficial documents, one finds little difficulty in appreciating the significance of the phraseology of the correspondence, in 1879, between Sir John A. Macdonald and Sir Hector Langevin on the subject of the Eskimo on the north shore of the St. Lawrence. The phrase ''Esquimaux Indians'' is employed in this correspondence as it had been employed for a hundred years in official and other documents to designate the Labrador Esquimaux. In 1882, three years after the date of this correspondence, the sale of intoxicating liquors to ''Esquimaux Indians'' was prohibited by an Act of the Legislature of Newfoundland.

Newfoundland, including the territory inhabited by these Labrador Eskimo was, as already pointed out, one of the British North American Colonies the union of which with Canada was contemplated by the *B.N.A. Act*. Thus it appears that, through all the territories of British North America in which there were Eskimo, the term ''Indian'' was employed by well established usage as including these as well as the other aborigines; and I repeat the *B.N.A. Act*, in so far as it deals with the subject of Indians must, in my opinion, be taken to contemplate the Indians of British North America as a whole.

As against this evidence, the Dominion appeals to the Royal Proclamation of 1763 as furnishing the clue to the true meaning and application of the term ''Indians'' in s. 91. The Indians therein referred to are said to be the same type of aborigines as are described in that Proclamation as ''the several nations or tribes of Indian with whom We are connected and who lived under Our protection.''

First, it is said that the terms ''nation'' and ''tribe'' are not employed in relation to the Eskimo. That is a proposition which finds no support in the documents produced dealing with the Labrador Eskimo; and, as regards the Eskimo inhabiting the Hudson's Bay Co.'s territories, they, as already pointed out, are (in the tables in the margin of the Hudson's Bay Co.'s aboriginal map) included in the statement of ''Indian tribes'' in those territories and they are in the list of ''Indian nations'' once dwelling east of the Mississippi.

Then it is said they were never ''connected'' with the British Crown or ''under the protection'' of the Crown. I find some difficulty in affirming that the Eskimo and other Indians ruled by the Hudson's Bay Co., under either charter or license from

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the Crown, were never under the protection of the Crown, and in understanding how, especially in view of the Proclamations cited, that can be affirmed of the Esquimaux of north-eastern Labrador. I cannot give my adherence to the principle of interpretation of the *B.N.A. Act* which, in face of the ample evidence of the broad denotation of the term "Indian" as employed to designate the aborigines of Labrador and the Hudson's Bay territories as evidenced by the documents referred to, would impose upon that term in the *B.N.A. Act* a narrower interpretation by reference to the recitals of and the events leading up to the Proclamation of 1763. For analogous reasons I am unable to accept the list of Indian tribes attached to the Instructions to Sir Guy Carleton as controlling the scope of the term "Indians" in the *B.N.A. Act*. Here it may be observed parenthetically that if this list of tribes does not include Eskimo, as apparently it does not, neither does it appear to include the Montagnais Indians inhabiting the north shore of the St. Lawrence east of the Saguenay or the Blackfeet or the Cree or the Indians of the Pacific Coast.

Another argument advanced by counsel for the Crown is based upon the supposed contrast between the language used in arts. 31 and 32 of the Instructions to Sir Guy Carleton and that used in relation to the Eskimo in art. 37. It has already been pointed out that, in the official documents relating to the Labrador Eskimo, the words "savages" and "Indians" are used convertibly; that in General Murray's Report in 1762 the Montagnais, the Hurons and the Eskimo are all spoken of as "savages;" and in art. 31 of Sir Guy Carleton's instructions, the term "savages" is applied to the Indians of Illinois, the straits of Detroit, Michilmackinak and Gaspe; and, in art. 32, the term "savages" is applied to the Indians affected by the Royal Proclamation in 1763 and within the scope of the plan of 1764. I can find nothing in the language of these Instructions which militates against the inference which, as already explained, seems to me to arise from the documents mentioned above having relation to the Labrador Eskimo.

Nor do I think that the fact that British policy in relation to the Indians, as evidenced in the Instructions to Sir Guy Carleton and the Royal Proclamation of 1763, did not contemplate the Eskimo (along with many other tribes and nations of British North American aborigines) as within the scope of that policy is either conclusive or very useful in determining the question before us. For that purpose, for construing the term "Indians" in the *B.N.A. Act* in order to ascertain the scope of the provisions of that Act defining the powers of the Parliament of Can-

ada, the Report of the Select Committee of the House of Commons in 1857 and the documents relating to the Labrador Eskimo are, in my opinion, far more trustworthy guides.

Nor can I agree that the context (in head no. 24) has the effect of restricting the term "Indians." If "Indians" standing alone in its application to British North America denotes the aborigines, then the fact that there were aborigines for whom lands had not been reserved seems to afford no good reason for limiting the scope of the term "Indians" itself.

For these reasons I think the question referred to us should be answered in the affirmative.

CANNON J.:—The question referred to us for hearing and consideration pursuant to s. 55 of the *Supreme Court Act*, R.S.C. 1927, c. 35 is: Does the term "Indians" as used in Head 24 of s. 91 of the *B.N.A. Act*, 1867, include Eskimo inhabitants of the Province of Quebec? I answer the question in the affirmative.

In the evidence given by Sir George Simpson before the Select Committee of the Hudson Bay Co., it appears that in 1857, the Eskimos were included amongst the so-called Indian races classified in the census prepared by the company and the report of the Committee must have been known to the Legislature at Westminster in 1867.

The correspondence between Sir John Macdonald and Sir Hector Langevin with reference to the relief to be given to the Montagnais and Eskimo Indians of the Lower St. Lawrence would show that these two Fathers of the Confederation always understood that the English word "Indians" was to be construed and translated as "sauvages" which admittedly did include *all* the aborigines living within the territories in North America under British authority, whether Imperial, Colonial, or subject to the administrative powers of the Hudson Bay Co.

I do not insist on these two points which have been well treated by my brother Kerwin with whom I agree. I would like to add the following considerations.

As to the exact meaning of the word "Indians" at the time of Confederation, I believe that we have in the official documents "respecting the Proposed Union of the British North American Provinces" presented to both houses of Parliament of the United Kingdom, on February 8, 1867, all we need to form an opinion of the significance of this word and its scope.

In the English Text of the Report of the Resolutions adopted at a Conference of Delegates from the Provinces of Canada, Nova Scotia and New Brunswick, and the Colonies of Newfoundland and Prince Edward Island, held at the City of Quebec, October 10, 1864, as the basis of a proposed Confederation of those Provinces and Colonies, Resolution 29 reads as follows:

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the peace, welfare and good Government of the Federated Provinces (saving the Sovereignty of England), and especially Laws respecting the following subjects:

1.—
2.—
3.—
. . . .
29. Indians and Lands Reserved for the Indians."

The official French translation of this resolution, as I find it in "Débats Parlementaires sur la Question de la Confédération des Provinces de l'Amerique Britannique du Nord," imprimés par Ordre de la Législature par Hunter, Rose et Lemieux, Imprimeurs, Parlementaires, 1865, follows:

"29. Le parlement général aura le pouvoir de faire des lois pour la paix, le bien-être et le bon gouvernement des provinces fédérées (sans, toutefois, pouvoir porter atteinte à la souveraineté de l'Angleterre), et en particulier sur les sujets suivants:

1.—
2.—
3.—
. . . .
29.—Les *Sauvages* et les terres réservées pour les Sauvages."

The petition to the Queen passed on March 13, 1865, by the Legislature reproduces, as to this sub-paragraph, word for word the Quebec resolutions, and the French translation also gives to the General Parliament under s. 29,—"Les Sauvages et les terres réservées pour les Sauvages."

This, I think, disposes of the very able argument on behalf of the Dominion that the word "Indians" in the *B.N.A. Act* must be taken in a restricted sense. The Upper and Lower Houses of Upper and Lower Canada petitioners to the Queen, understood that the English word "Indians" was equivalent to or equated the French word "Sauvages" and included all the present and future aborigines native subjects of the proposed Confederation of British North America, which at the time was intended to include Newfoundland.

The official French version of the *B.N.A. Act* also translates "Indians" by "Sauvages." See Statute du Canada 1er Parlement, 31 Victoria, 1867-1868, Imprimé par Malcolm Cameron, Imprimeur de Sa Très Excellente Majesté la Reine—Ottawa, 1867, Page 24, Section 91, sous-paragraphe 24.

I therefore, according to statute, certify that the above contains my opinion upon the question referred to us with the reasons for my answer.

CROCKET J.:—I am of opinion that the question submitted to

us should be answered in the affirmative for the reasons stated by my Lord the Chief Justice and my brothers Cannon and Kerwin.

DAVIS J., concurs with SIR LYMAN P. DUFF C.J.C.

KERWIN J.:—The question should be answered in the affirmative. In my opinion, when the Imperial Parliament enacted that there should be confided to the Dominion Parliament power to deal with "Indians and lands reserved for the Indians," the intention was to allocate to it authority over all the aborigines within the territory to be included in the Confederation. The fact that there were no Eskimos within the boundaries of the Provinces that first constituted the Dominion is beside the point as provision was made by the *B.N.A. Act* to include the greater part, if not all, of the territory belonging to the Hudson's Bay Co. And whether the Eskimos as now known emigrated directly from Asia or inhabited the interior of America (originally coming from Asia) and subsequently migrated north, matters not, however interesting it may be to follow the opinions of those who have devoted time and study to that question.

From the date of the visit of Champlain to this country in 1625 when he discovered "une nation de sauvages qui habitent ces pays, que s'appellent Exquimaux," and of Radisson who in an account of his travels and experiences refers to "Indians called Esquimos;" through the reports of the missionaries and the correspondence between France and New France, the Indians are referred to as "sauvages" and the Eskimos as "sauvages esquimaux." Later we find by referring to such books as might be expected to be known to the Fathers of Confederation and to the British Parliament statements indicating that the Eskimos was considered as one of the Indian tribes. The following is a partial list of such books:—

1855.—Webster's American Dictionary of the English language defines the Esquimaux: "A nation of Indians inhabiting the northwestern parts of North America."

1855.—Adrien Guibert in his Geographical Dictionary classifies the Eskimos among the Indians of America.

1856.—In "The Indian Races of North and South America," Charles de Wolf Brownell, an American author, speaks of the Esquimaux Indians and devotes a chapter to the study of their manners and personal appearance.

1857.—In the "Gazetteer of the World," published in London by A. Fullerton & Co., the Eskimos are dealt with as Indians, who are the aboriginal people of the New Continent; mentions are made of Eskimos in opposition to "common Indian" and to "other Indians."

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1857.—In an Imperial Blue Book is a Report from the Select Committee on the Hudson's Bay Co. in which the Eskimos are enumerated among the Indians, are classified with the Indian races and are shown on a map denoting the boundaries and locations of various Indian tribes.

1857.—In the evidence given before a Select Committee of the House of Commons (Imperial), appointed to consider the state of the British Possessions in North America, Sir George Simpson, Governor of the territories of the Hudson's Bay Co., includes the Eskimos in the Indian population.

1869.—In an "Esquisse sur le Nord-Ouest de l'Amerique" by Mgr. Tache, Bishop of St. Boniface, Manitoba, reference is made to the aboriginal tribes being called Indians (Sauvages) and the Esquimaux are dealt with at length as one of the five linguistic Indian families.

A word should be added as to Webster's Dictionary, Counsel for the Dominion pointed out that in the 1913 edition of Webster's New International Dictionary, as well as the 1923, 1925, and 1927 editions, "Indians" is defined as being "a member of any of the aboriginal American stocks excepting the Eskimauan." However, in the earlier 1855 edition, then known as the American Dictionary of the English Language, appears the following: " 'Indian,' M.A. General name of any native of the Indies; as an East Indian or West Indian. It is particularly applied to any native of the American continent."

In the 1865 edition of what had then become the Dictionary of the English Language, "Indians" were defined as "Indians are the aboriginal inhabitants of America so called originally from the idea on the part of Columbus and the early navigators of the identity of America with India." It was only in the 1913, 1923 and 1927 editions that the earlier definition was departed from while in the 1934 edition of Webster's international Dictionary, "Indian" is defined as follows:

"Indian 5. A member of the aboriginal American race; an American, or Red, Indian; an Amerind . . . . About 75 linguistic families or stocks are recognized in North America, and about 75 more in South America and the West Indies. Some stocks comprise many tribes speaking distinct, but related, languages. The 16 stocks listed below occupied more than half the area of the continent and comprised a large majority of the Indians at the time of the discovery of North America, Algonquian, Athapasoan, *Eskimauan*, Iroquoian, Mayan, Muskhegian, Siouian, and Uto-Aztocan."

It is true that in the New English (Oxford) Dictionary, Volume 5, under the heading "Indian" appears the following:

"A. . . .

"2. Belonging or relating to the race of original inhabitants of America and the West Indies.

"B. . . . .

"2. A member of any of the aboriginal races of America or the West Indies; an American Indian.

"The Eskimos, in the extreme north, are usually excluded from the term; as are sometimes the Patagonians and Fuegians in the extreme south."

There are also a few other publications to which our attention has been called where "Indians" and "Esquimaux" are differentiated but the majority of authoritative publications, and particularly those that one would expect to be in common use in 1867, adopt the interpretation that the term "Indians" includes all the aborigines of the territory subsequently included in the Dominion.

As pointed out in a memorandum of November 1, 1918, by the Deputy Superintendent General of Indian Affairs to the Minister, the Eskimos had never been mentioned in any legislation up to that time but by c. 47 (s. 1) of 14-15 Geo. V., assented to July, 1924, s. 4 of the *Indian Act*, c. 81, R.S.C. 1906, was amended by adding thereto the following subsection: "(2) The Superintendent General of Indian Affairs shall have charge of Eskimo affairs."

This was afterwards repealed and even if the repeal had never occurred perhaps no argument could be adduced from the provisions of the amending statute but it is significant that in 1879 a letter from the Very Reverend Edmond Langevin to the Postmaster General of Canada, referring to the necessitous condition of "the Montagnais and Esquimaux Indians on the north coast of the St. Lawrence below the Saguenay" was sent by the addressee to Sir John A. Macdonald as Superintendent General of Indian Affairs with the following covering letter:

"Ottawa, 20 January, 1879.

"The enclosed letter from the Very Reverend Edmond Langevin, Vicar General of Rimouski, calls my attention to the position of the Montagnais and Esquimaux Indians on the north coast of the St. Lawrence, below the Saguenay. He says that the amount that used to be given to these Indians was seventy eight cents a head, and that now it is only thirty eight cents. These poor people are starving they can't cultivate the land, which in that region is hardly cultivable, and have had no provision made for them by the Government, and he requires on their behalf that we should come to their help. Will you kindly see that they are treated as well as we treat the Indians of our

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new territories. Of course I leave the whole matter in your hands."

The matter referred to was commented upon by the Deputy Superintendent General of Indian Affairs in the following report:

"To the Right Hon. Sir John. A. Macdonald, K.C.B.
Supt. General of Indian Affairs

"Ottawa, 24 jany, 1879.

"With reference to the letter of the 20th Instant (placed Herewith) from the Honourable Hector Langevin, enclosing a letter of the 13th Instant, from the Very Reverend Edmond Langevin, of Rimouski, in the Province of Quebec, relative to the insufficient relief given to the Montagnais and Esquimaux Indians of the Lower St. Lawrence, the undersigned has the honor to report that frequent representations to the same effect have been made to the Department and that last year he endeavoured to induce the then Superintendent General of Indian Affairs to ask Parliament for a larger grant, but that when the proposed estimates for the year 1878-79 were submitted to Council for revision, the proposed increase of $2000. to the Parliamentary Grant for these Indians was struck out.

"The present Government has however sanctioned the Supplementary Estimates for 1878-9 which will be submitted to Parliament at the approaching session being anticipated by granting the said sum of $2000.00, and the undersigned has moreover increased the grant for those Indians by that amount in the proposed estimates for the year 1879-80, with the hope that the Government will sanction and Parliament confirm the same.

"All respectfully submitted,

"L. Van Koughnet, Deputy Supt. General of Indian Affairs."

That so soon after Confederation the position of Eskimos should be treated in this manner is significant. It not only more than counter balances any reference made later as to the Department's attitude but, to my mind, is conclusive as to what was in the minds of those responsible for the drafting of the Resolutions leading to the passing of the *B.N.A. Act*, at that time and shortly thereafter.

Special attention should also be paid to the report of the Select Committee on the Hudson's Bay Co. to the Houses of Parliament of Great Britain and Ireland, presented in 1857. As appears from the Imperial Blue Books on Affairs Relating to Canada, the Committee reported:

"It is a matter of great difficulty to obtain reliable information respecting the Indian population, their migratory habits, and the vast extent of country over which they are spread, mis-

leading the calculations, and rendering it almost impracticable to prepare a satisfactory census. The following estimates have been compiled with great care, from a mass of documents and the actual personal knowledge of several of the Company's officers, tested by comparison with published statements, especially those presented to Government in 1846 by Messrs. Warre and Vavasour, and those of Colonel Lefroy, R.A., contained in a paper read before the Canadian Institute."

The estimates referred to are headed "Establishments of the Hudson's Bay Company in 1856 and number of Indians frequenting them." After a long list of the names of the posts and localities and of the number of Indians frequenting each post is appended the following:

Add Whites and half breeds in Hudson's Bay Territory, not included	6,000
Add Esquimaux not enumerated	4,000
Total	158,960

The *Indian Races* shown in detail in the foreging Census may be classified as follows:

Thickwood Indians on the east side of the Rocky Mountains	35,000
The Plain Tribes (Blackfeet, &c)	25,000
The Esquimaux	4,000
Indians settled in Canada	3,000
Indian in British Oregon and on the North-west Coast	80,000
Total Indians....	147,000
Whites and half-breeds in Hudson's Bay Territory	11,000
Souls.....	158,000

The Esquimaux, it will be seen, are included among the Indian races and this is based apparently upon the evidence of Sir George Simpson, which had been taken before the Committee. Questions 1062 and 1472, together with the answers, are as follows:

"1062. Mr. Cregson: What mode have you of ascertaining of the population of the Indians?—We have lists of the Indians belonging to various posts; we have compared and checked them with the report of the Government officers who went to Vancouver's Island some years ago, as regards the tribes to the west of the mountains, and with Colonel Lefroy's lists, as regards those on the east side, and we have arrived at this estimate of the population."

"1472. Mr. Roebuck: Will you state the total? The Indians,

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east of the mountains, 55,000; West of the mountains, 80,000; Esquimaux, 4,000."

While counsel for the Dominion sought to draw from the answer to Q. 1472 the inference that Sir George Simpson had not treated the Esquimaux as one of the Indian tribes, I think the answer is not susceptible of that interpretation and it is certainly not the one that the Committee adopted.

After considering the reports of missionaries, explorers, agents, cartographers and geographers, included in the cases submitted on behalf of the Dominion and Province of Quebec, I do not believe anything further may be usefully added. The weight of opinion favours the construction which I have indicated is the proper one of head 24 of s. 91 of the *B.N.A. Act* but the deciding factor, in my view, is the manner in which the subject was considered in Canada and in England at or about the date of the passing of the Act.

HUDSON J., concurs with SIR LYMAN P. DUFF C.J.C.

Question answered in affirmative.

[PRIVY COUNCIL.]

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July 12, 13, 17, 19, 20, 24, 26; Dec. 12.

ST. CATHERINE'S MILLING AND LUMBER COMPANY . . . . . } DEFENDANTS;

AND

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR ONTARIO } PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867, *s.* 109—*Lands reserved to the Indians—Rights of the Province.*

Sect. 109 of the B. N. A. Act of 1867 gives to each Province the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, subject to such rights as the Dominion can maintain under sects. 108 and 117.

Attorney-General of Ontario v. *Mercer* (8 App. Cas. 767) followed.

By royal proclamation in 1763 possession was granted to certain Indian tribes of such lands, "parts of our dominions and territories," as, not having been ceded to or purchased by the Crown, were reserved, "for the present," to them as their hunting grounds. The proclamation further enacted that all purchases from the Indians of lands reserved to them must be made on behalf of the Crown by the governor of the colony in which the lands lie, and not by any private person.

In 1873 the lands in suit, situate in Ontario, which had been in Indian occupation until that date under the said proclamation, were, to the extent of the whole right and title of the Indian inhabitants therein, surrendered to the Government of the Dominion for the Crown, subject to a certain qualified privilege of hunting and fishing:—

Held, that by force of the proclamation the tenure of the Indians was a personal and usufructuary right dependent upon the goodwill of the Crown; that the lands were thereby, and at the time of the union, vested in the Crown, subject to the Indian title, which was "an interest other than that of the Province in the same," within the meaning of sect. 109.

Held also, that by force of the said surrender the entire beneficial interest in the lands subject to the privilege was transmitted to the Province in terms of sect. 109. The Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the Province therein.

APPEAL from a judgment of the Supreme Court, dated June 20, 1887 (Ritchie, C.J., Fournier, Henry, and Taschereau, JJ.,

* *Present*:—THE EARL OF SELBORNE, LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR RICHARD COUCH.

Strong and Gwynne, JJ., dissenting), which affirmed a judgment of the Chancery Division of the High Court of Justice for Ontario (June 10, 1885).

The question in the appeal was whether certain lands admittedly situated within the boundaries of Ontario belonged to that Province or to the Dominion of Canada. The appellants cut timber on the lands, which are Crown lands, without authority from the Ontario Government, which accordingly sued for an injunction and damages. The appellants justified by setting up a licence from the Dominion Government dated 1st of May, 1883. The Courts in Canada decided in favour of the Province. The order of Her Majesty in Council granting special leave to appeal provided that the Dominion should be at liberty to intervene in the appeal.

The circumstances out of which the dispute as to title arose are set out in the judgment of their Lordships.

Sir *R. E. Webster*, A.G., and *Gore*, for the Attorney-General for the Dominion.

McCarthy, Q.C. (Canada), and *Jeune*, Q.C., for the appellants.

Mowat, Q.C. (*Attorney-General for Ontario*), and *Blake*, Q.C. (Sir *Horace Davey*, Q.C., and *Haldane*, with them), for the respondents.

Sir *R. E. Webster*, A.G., and *McCarthy*, Q.C., contended that the judgment of the Supreme Court should be reversed. It lay on the respondent to make good the title of the Province to these lands. Previous to the treaty of the 3rd of October, 1873, the lands in suit, and the whole area of which they formed part, were occupied by a tribe of the Ojibbeway Indians, who by that treaty ceded the whole area in manner as therein mentioned to the Government of the Dominion. The provincial Government were no party to this treaty, and it was admitted that no surrender had been made of Indian title except to the Dominion. Reference was made to the British North America Act, 1867, sect. 91, sub-sect. 24, which gives to the Dominion exclusive legislative authority over "Indians and lands reserved for the Indians" as compared with sect. 92, sub-sect. 5, which assigns "the manage-

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ment and sale of public lands belonging to the Province, and of the timber and wood thereon" to the legislative authority of the Province. Also to sects. 109 and 117, and to *Attorney-General of Ontario* v. *Mercer* (1).

Documentary evidence was referred to, to shew the nature and character of the Indian title. It was contended that the effect of it was to shew that from the earliest times the Indians had, and were always recognised as having, a complete proprietary interest, limited by an imperfect power of alienation. British and Canadian legislation was referred to, to shew that such complete title had been uniformly recognised: see Royal Proclamation October 7, 1763, held by Lord Mansfield in *Campbell* v. *Hall* (2) to have the same force as a statute, under which the lands in suit were reserved to the Indians in absolute proprietary right; 43 Geo. 3, c. 138; 1 & 2 Geo. 4, c. 66; 17 Geo. 3, c. 7 (Quebec); 10 Geo. 4, c. 3 (Upper Canada); 7 Will. 4, c. 118; 2 Vict. c. 15, and 12 Vict. c. 9 (Upper Canada); 13 & 14 Vict. c. 74 (U. C.); 14 & 15 Vict. c. 51 (U. C.); 16 Vict. c. 91 (U. C.); 20 Vict. c. 26 (U. C.). The proclamation in 1763 was uniformly acted on and recognised by the Government as well as the legislature, and was regarded by the Indians as their charter. It was not superseded by the Quebec Act (14 Geo. 3, c. 83, imperial statute); but it was held by the Supreme Court of the United States to be still in force in 1823: see *Johnson* v. *McIntosh* (3). Reference was also made to *The Cherokee Nation* v. *The State of Georgia* (4) and *Worcester* v. *The State of Georgia* (5); *United States* v. *Clarke* (6); *Mitchel* v. *United States* (7); *The State of Georgia* v. *Canatoo*, reported in a note to Kent's Commentaries, vol. iii., p. 378; *Ogden* v. *Lee* (8); *Fellows* v. *Lee* (9); *Gaines* v. *Nicholson* (10); Chitty's Prerog. of the Crown, p. 29. Reference was also made to the case of *The Queen* v. *Symonds* (June, 1847), in Parliamentary Papers, 1860, vol. xlvii., p. 47 (Colonies New Zealand), where also there was said to be a report of a Select Committee of the House of Commons on the Treatment of the

(1) 8 App. Cas. 767.
(2) 1 Cowp. 204.
(3) 8 Wheaton, 543.
(4) 5 Peters, 1.
(5) 6 Peters, 515.
(6) 9 Peters, 168.
(7) 9 Peters, 711.
(8) 6 Hills, 546.
(9) 5 Denio, 628.
(10) 9 Howard, 356.

Aborigines in British Settlements. Also to a report in Appendix I. to Journals, House of Assembly, Canada, 1847, headed "Title to Lands and Tenure of Land."

The absolute title being in the Indians was ceded by them, subject to certain reservations, for valuable consideration to the Dominion, and the treaty to that effect did not enure to the benefit of the Province in any way. The Province could not claim property in the land except by virtue of the Act of 1867, and as regards that Act the lands did not belong to the Province prior thereto within sect. 109; they were not in 1867 public property which the Province could retain under sect. 117; they were not public lands of the Province within sect. 92, sub-sect. 5.

Mowat, Q.C., and *Blake*, Q.C., for the respondent, contended that both before and after the treaty of 1873 the title to the lands in suit was in the Crown and not in the Indians. The lands being within the limits of the Province, the beneficial interest therein passed to the Province under the Act of 1867, and the Dominion obtained thereunder no such interest as it claims in this suit. Even if they were lands reserved for the Indians within the meaning of the Act the Dominion gained thereunder only a power of legislating in respect to them, it did not gain ownership or a right to become owner by purchase from the Indians. Under sect. 109, whether reserved to the Indians or not the land goes to the Province subject to any interest on the part of the Indians. See also sect. 108 and sect. 91, sub-sect. 9. With regard to the alleged absolute title of the Indians to which the Dominion is said to have succeeded by treaty, no such title existed on their part either as against the King of France before the conquest or against the Crown of England since the conquest. Their title was in the nature of a personal right of occupation during the pleasure of the Crown, and it was not a legal or an equitable title in the ordinary sense. For instance, the Crown made grants of land in every part of British North America both before and after the proclamation of 1763 without any previous extinguishment of the Indian claim. The grantees in those cases had to deal with the Indian claims, but the legal validity of the grants themselves was undeniably recognised both in the Canadian and

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the American Courts. As regards that proclamation it was argued that it was not intended to divest, and did not divest, the Crown of its absolute title to the lands, and the reservation, upon which so much argument has been rested, was expressed to last only "for the present and until Our further pleasure be known." Further, as regards the lands now in suit the proclamation was superseded by the Imperial Act of 1774, known as the Quebec Act, which added that land to the Province. It was not the intention of that Act to give to the Indians any new right over and above the interest which they possessed under the proclamation, and which was a mere licence terminable at the will of the Crown. With regard to the effect of purchases from the Indians, reference was made to *Meigs* v. *McClung's Lessee* (1) and *Clark* v. *Smith* (2).

With regard to the application of the British North American Act and the construction to be placed upon it, it was submitted that that Act should be on all occasions interpreted in a large, liberal, and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words. The general scheme, purpose, and intent of the Act should be borne in mind. The scheme is to create a federal union consisting of several entities. The purpose was at the same time to preserve the Provinces, not as fractions of a unit, but as units of a multiple. The Provinces are to be on an equal footing. The ownership and development of Crown lands and the revenues therefrom are to be left to the Province in which they are situated. As to legislative powers, it is the residuum which is left to the Dominion; as to proprietary rights, the residuum goes to the Provinces. Where property is intended to go to the Dominion it is specifically granted, even though legislative authority over it may already have been vested in the Dominion. It is contrary to the spirit of the Act to hold that the grant of legislative power over lands reserved for the Indians carried with it by implication a grant of proprietary right.

Sir *R. E. Webster*, A.G., replied:—

Upon the question whether the old province of Canada had any right to the lands in suit at the date of the Act of 1867 which

(1) 9 Cranch, 11

(2) 13 Peters, 195.

passed thereunder, certain legislative duties had been conferred on the province with regard to Indians, and a certain power of bargaining with regard to Indian lands; but no proprietary right had been given: see 2 Vict. c. 15 (U.C.), which was held to apply to unsurrendered lands in *The Queen* v. *Strong* (1), and *Little* v. *Keating* (2). There is a series of statutes which shews that prior to 1867 the Province had nothing but some slight legislative rights over the land: see 3 & 4 Vict. c. 35, s. 54; 12 Vict. c. 9; 13 & 14 Vict. c. 74; Cons. Stat. 22 Vict. (U.C.) c. 81; 23 Vict. c. 61, s. 54. The whole course of legislation before 1867 was that the proceeds of the Indian lands should be kept for the Indians, and not go to the Province. [LORD SELBORNE:—This is the first suggestion to that effect.] Reference was then made to the later Dominion Acts, 31 Vict. c. 42, ss. 6, 7, 8, 10, 11, especially 25; 39 Vict. c. 18; 43 Vict. c. 28. The Crown lands were dealt with by 23 Vict. c. 2; the Indian lands by 23 Vict. c. 151. Reference was made to *Vanvleck* v. *Stewart* (3); *Fegan* v. *McLean* (4), as shewing that the Indians had the right to cut and sell timber in the special reserves, and appropriate the proceeds.

1888
Dec. 12.

The judgment of their Lordships was delivered by

LORD WATSON:—

On the 3rd of October, 1873, a formal treaty or contract was concluded between commissioners appointed by the Government of the Dominion of Canada, on behalf of Her Majesty the Queen, of the one part, and a number of chiefs and headmen duly chosen to represent the Salteaux tribe of Ojibbeway Indians, of the other part, by which the latter, for certain considerations, released and surrendered to the Government of the Dominion, for Her Majesty and her successors, the whole right and title of the Indian inhabitants whom they represented, to a tract of country upwards of 50,000 square miles in extent. By an article of the treaty it is stipulated that, subject to such regulations as may be made by the Dominion Government, the Indians are to have right to pursue their avocations of hunting and fishing through-

(1) Upp. Can. Rep. 1 Ch. 392.
(2) 6 Upp. Can. Rep. Q. B. (O.S.) 265.
(3) 19 Upp. Can. Rep. Q. B. 489.
(4) 29 Upp. Can. Rep. Q. B. 202.

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out the surrendered territory, with the exception of those portions of it which may, from time to time, be required or taken up for settlement, mining, lumbering, or other purposes.

Of the territory thus ceded to the Crown, an area of not less than 32,000 square miles is situated within the boundaries of the Province of Ontario; and, with respect to that area, a controversy has arisen between the Dominion and Ontario, each of them maintaining that the legal effect of extinguishing the Indian title has been to transmit to itself the entire beneficial interest of the lands, as now vested in the Crown, freed from incumbrance of any kind, save the qualified privilege of hunting and fishing mentioned in the treaty.

Acting on the assumption that the beneficial interest in these lands had passed to the Dominion Government, their Crown Timber Agent, on the 1st of May, 1883, issued to the appellants, the St. Catherine's Milling and Lumber Company, a permit to cut and carry away one million feet of lumber from a specified portion of the disputed area. The appellants having availed themselves of that licence, a writ was filed against them in the Chancery Division of the High Court of Ontario, at the instance of the Queen on the information of the Attorney-General of the Province, praying—(1) a declaration that the appellants have no rights in respect of the timber cut by them upon the lands specified in their permit; (2) an injunction restraining them from trespassing on the premises and from cutting any timber thereon; (3) an injunction against the removal of timber already cut; and (4) decree for the damage occasioned by their wrongful acts. The Chancellor of Ontario, on the 10th of June, 1885, decerned with costs against the appellants, in terms of the first three of these conclusions, and referred the amount of damage to the Master in Ordinary. The judgment of the learned Chancellor was unanimously affirmed on the 20th of April, 1886, by the Court of Appeal for Ontario, and an appeal taken from their decision to the Supreme Court of Canada was dismissed on the 20th of June, 1887, by a majority of four of the six judges constituting the court.

Although the present case relates exclusively to the right of

to the appellant company, yet its decision necessarily involves the determination of the larger question between that government and the province of Ontario with respect to the legal consequences of the treaty of 1873. In these circumstances, Her Majesty, by the same order which gave the appellants leave to bring the judgment of the Court below under the review of this Board, was pleased to direct that the Government of the Dominion of Canada should be at liberty to intervene in this appeal, or to argue the same upon a special case raising the legal question in dispute. The Dominion Government elected to take the first of these courses, and their Lordships have had the advantage of hearing from their counsel an able and exhaustive argument in support of their claim to that part of the ceded territory which lies within the provincial boundaries of Ontario.

The capture of Quebec in 1759, and the capitulation of Montreal in 1760, were followed in 1763 by the cession to Great Britain of Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any previous time been held or acquired by the Crown of France. A royal proclamation was issued on the 7th of October, 1763, shortly after the date of the Treaty of Paris, by which His Majesty King George erected four distinct and separate Governments, styled respectively, Quebec, East Florida, West Florida, and Grenada, specific boundaries being assigned to each of them. Upon the narrative that it was just and reasonable that the several nations and tribes of Indians who lived under British protection should not be molested or disturbed in the "possession of such parts of Our dominions and territories as, not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds," it is declared that no governor or commander-in-chief in any of the new colonies of Quebec, East Florida, or West Florida, do presume on any pretence to grant warrants of survey or pass any patents for lands beyond the bounds of their respective governments, or "until Our further pleasure be known," upon any lands whatever which, not having been ceded or purchased as aforesaid, are reserved to the said Indians or any of them. It was further declared "to be Our Royal will, for the present, as aforesaid, to reserve under Our

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sovereignty, protection, and dominion, for the use of the said Indians, all the land and territories not included within the limits of Our said three new Governments, or within the limits of the territory granted to the Hudson's Bay Company." The proclamation also enacts that no private person shall make any purchase from the Indians of lands reserved to them within those colonies where settlement was permitted, and that all purchases must be on behalf of the Crown, in a public assembly of the Indians, by the governor or commander-in-chief of the colony in which the lands lie.

The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the British North America Act, 1867), by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which the Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and

pleasure of the sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

By an Imperial statute passed in the year 1840 (3 & 4 Vict. c. 35), the provinces of Ontario and Quebec, then known as Upper and Lower Canada, were united under the name of the Province of Canada, and it was, inter alia, enacted that, in consideration of certain annual payments which Her Majesty had agreed to accept by way of civil list, the produce of all territorial and other revenues at the disposal of the Crown arising in either of the united Provinces should be paid into the consolidated fund of the new Province. There was no transfer to the Province of any legal estate in the Crown lands, which continued to be vested in the Sovereign; but all moneys realized by sales or in any other manner became the property of the Province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the Province, the title still remaining in the Crown. That continued to be the right of the Province until the passing of the British North America Act, 1867. Had the Indian inhabitants of the area in question released their interest in it to the Crown at any time between 1840 and the date of that Act, it does not seem to admit of doubt, and it was not disputed by the learned counsel for the Dominion, that all revenues derived from its being taken up for settlement, mining, lumbering, and other purposes would have been the property of the Province of Canada. The case maintained for the appellants is that the Act of 1867 transferred to the Dominion all interest in Indian lands which previously belonged to the Province.

[illegible] which created the Federal Government

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repealed the Act of 1840, and restored the Upper and Lower Canadas to the condition of separate Provinces, under the titles of Ontario and Quebec, due provision being made (sect. 142) for the division between them of the property and assets of the United Province, with the exception of certain items specified in the fourth schedule, which are still held by them jointly. The Act also contains careful provisions for the distribution of legislative powers and of revenues and assets between the respective Provinces included in the Union, on the one hand, and the Dominion, on the other. The conflicting claims to the ceded territory maintained by the Dominion and the Province of Ontario are wholly dependent upon these statutory provisions. In construing these enactments, it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.

Sect. 108 enacts that the public works and undertakings enumerated in Schedule 3 shall be the property of Canada. As specified in the schedule, these consist of public undertakings which might be fairly considered to exist for the benefit of all the Provinces federally united, of lands and buildings necessary for carrying on the customs or postal service of the Dominion or required for the purpose of national defence, and of "lands set apart for general public purposes." It is obvious that the enumeration cannot be reasonably held to include Crown lands which are reserved for Indian use. The only other clause in the Act by which a share of what previously constituted provincial revenues and assets is directly assigned to the Dominion is sect. 102. It enacts that all "duties and revenues" over which the respective legislatures of the United Provinces had and have power of appropriation, "except such portions thereof as are by this Act reserved to the respective legislatures of the Provinces, or are raised by them in accordance with the special powers conferred upon them by this Act," shall form one consolidated fund, to be appropriated for the public service of Canada. The extent to

which duties and revenues arising within the limits of Ontario, and over which the legislature of the old Province of Canada possessed the power of appropriation before the passing of the Act, have been transferred to the Dominion by this clause, can only be ascertained by reference to the two exceptions which it makes in favour of the new provincial legislatures.

The second of these exceptions has really no bearing on the present case, because it comprises nothing beyond the revenues which provincial legislatures are empowered to raise by means of direct taxation for Provincial purposes, in terms of sect. 92 (2). The first of them, which appears to comprehend the whole sources of revenue reserved to the provinces by sect. 109, is of material consequence. Sect. 109 provides that "all lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick, at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same." In connection with this clause it may be observed that, by sect. 117, it is declared that the Provinces shall retain their respective public property not otherwise disposed of in the Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country. A different form of expression is used to define the subject-matter of the first exception, and the property which is directly appropriated to the Provinces; but it hardly admits of doubt that the interests in land, mines, minerals, and royalties, which by sect. 109 are declared to belong to the Provinces, include, if they are not identical with, the "duties and revenues" first excepted in sect. 102.

The enactments of sect. 109 are, in the opinion of their Lordships, sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the excep-

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sect. 108, or might assume for the purposes specified in sect. 117. Its legal effect is to exclude from the "duties and revenues" appropriated to the Dominion, all the ordinary territorial revenues of the Crown arising within the Provinces. That construction of the statute was accepted by this Board in deciding *Attorney-General of Ontario* v. *Mercer* (1), where the controversy related to land granted in fee simple to a subject before 1867, which became escheat to the Crown in the year 1871. The Lord Chancellor (Earl Selborne) in delivering judgment in that case said (2): "It was not disputed, in the argument for the Dominion at the bar, that all territorial revenues arising within each Province from 'lands' (in which term must be comprehended all estates in land), which at the time of the union belonged to the Crown, were reserved to the respective Provinces by sect. 109; and it was admitted that no distinction could, in that respect, be made between lands then ungranted, and lands which had previously reverted to the Crown by escheat. But it was insisted that a line was drawn at the date of the union, and that the words were not sufficient to reserve any lands afterwards escheated which at the time of the union were in private hands, and did not then belong to the Crown. Their Lordships indicated an opinion to the effect that the escheat would not, in the special circumstances of that case, have passed to the Province as "lands;" but they held that it fell within the class of rights reserved to the Provinces as "royalties" by sect. 109.

Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873, *Attorney-General of Ontario* v. *Mercer* (1) might have been an authority for holding that the Province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the union. But that was not the character of the Indian interest. The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to "any interest other than that of the Province in the same," within the meaning of sect. 109; and must now belong to Ontario in terms

of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.

In the course of the argument the claim of the Dominion to the ceded territory was rested upon the provisions of sect. 91 (24), which in express terms confer upon the Parliament of Canada power to make laws for "Indians, and lands reserved for the Indians." It was urged that the exclusive power of legislation and administration carried with it, by necessary implication, any patrimonial interest which the Crown might have had in the reserved lands. In reply to that reasoning, counsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of shewing that the expression "Indian reserves" was used in legislative language to designate certain lands in which the Indians had, after the royal proclamation of 1763, acquired a special interest, by treaty or otherwise, and did not apply to land occupied by them in virtue of the proclamation. The argument might have deserved consideration if the expression had been adopted by the British Parliament in 1867, but it does not occur in sect. 91 (24), and the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

Their Lordships are, however, unable to assent to the argument for the Dominion founded on sect. 92 (24). There can be no à priori probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the Provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

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By the treaty of 1873 the Indian inhabitants ceded an released the territory in dispute, in order that it might be opene up for settlement, immigration, and such other purpose as to H Majesty might seem fit, "to the Government of the Dominion Canada," for the Queen and Her successors for ever. It w argued that a cession in these terms was in effect a conveyanc to the Dominion Government of the whole rights of the Indian with consent of the Crown. That is not the natural import o the language of the treaty, which purports to be from beginnin to end a transaction between the Indians and the Crown; an the surrender is in substance made to the Crown. Even if it language had been more favourable to the argument of th Dominion upon this point, it is abundantly clear that the com missioners who represented Her Majesty, whilst they had ful authority to accept a surrender to the Crown, had neither autho rity nor power to take away from Ontario the interest which ha been assigned to that province by the Imperial Statute of 1867.

These considerations appear to their Lordships to be sufficien for the disposal of this appeal. The treaty leaves the Indians n right whatever to the timber growing upon the lands which the gave up, which is now fully vested in the Crown, all revenue derivable from the sale of such portions of it as are situate withi the boundaries of Ontario being the property of that Provinc The fact, that it still possesses exclusive power to regulate th Indians' privilege of hunting and fishing, cannot confer upo the Dominion power to dispose, by issuing permits or otherwis of that beneficial interest in the timber which has now passed t Ontario. Seeing that the benefit of the surrender accrues to hi Ontario must, of course, relieve the Crown, and the Dominion, all obligations involving the payment of money which wer undertaken by Her Majesty, and which are said to have been i part fulfilled by the Dominion Government. There may be othe questions behind, with respect to the right to determine to wh extent, and at what periods, the disputed territory, over whic the Indians still exercise their avocations of hunting and fishing is to be taken up for settlement or other purposes, but none o these questions are raised for decision in the present suit.

Their Lordships will therefore humbly advise Her Majest

that the judgment of the Supreme Court of Canada ought to be affirmed, and the appeal dismissed. It appears to them that there ought to be no costs of the appeal.

Solicitors for appellants: *Johnston, Harrison, & Powell.*

Solicitors for Attorney-General for Ontario: *Freshfields & Williams.*

Solicitors for Attorney-General for the Dominion: *Bompas, Bischoff, Dodgson, & Coxe.*

Regina v. Sparrow

[Indexed as: R. v. Sparrow]

Supreme Court of Canada, Dickson C.J.C., McIntyre, Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ. May 31, 1990.*

Constitutional law — Aboriginal rights — Constitution Act, 1982, guaranteeing "existing" aboriginal and treaty rights — Indian band issued with food fishing licence — Licence containing restriction on length of net to be used — Accused member of band but using net in violation of terms of licence — Evidence establishing that band had aboriginal right to fish for food but such rights subject to regulation — Guarantee to existing aboriginal rights applying to rights which had not been extinguished — Rights which had merely been regulated not extinguished — Aboriginal right to fish for food not absolute — Right subject to regulations which may be justified by government — Burden on Indians to show that regulation prima facie interference with aboriginal rights — For government to then show valid legislative objective and that regulation in keeping with allocation of priority to Indian food fishery subject only to valid conservation measures — Constitution Act, 1982, ss. 35, 52 — British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4, 12, 27 — Constitution Act, 1867, ss. 91(12), (24).

The accused was charged under s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, with the offence of fishing with a drift-net longer than permitted by the terms of an Indian food fishing licence which had been issued to the band of which he was a member. In 1984, when the charge arose, the Indian food fishing licence issued to the band restricted the length of drift-nets to 25 fathoms. The accused was a member of the Musqueam Band and attempted to lead evidence to establish that the regulation was invalid because the band had an aboriginal right to fish for food, particularly salmon, in the area which could not be limited in the terms set out in the licence. The evidence adduced indicated that the Musqueam have a history as an organized society going back long before the coming of the white man to British Columbia and that the taking of salmon from the area in question was an integral part of their life and had continued to be so to the present. The trial judge held that as a matter of law the accused could possess no aboriginal right to fish because unless an Indian in British Columbia can invoke a special treaty or proclamation or contract in support he cannot claim an aboriginal right which would come within the scope of s. 35 of the *Constitution Act, 1982*. Section 35(1) of the *Constitution Act, 1982*, provides that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". An appeal by the accused to the summary conviction appeal court was dismissed. A further appeal by the accused to the British Columbia Court of Appeal was allowed and a new trial ordered on the basis that the evidence had established an aboriginal right in the Musqueam to fish for food in the area. A new trial was required, however, since the evidence was not sufficient to determine whether the regulation in question was a justifiable limit on the aboriginal rights as guaranteed by s. 35(1).

On further appeal by the accused and cross-appeal by the Crown to the Supreme Court of Canada, **held**, the appeal and cross-appeal should be dismissed and the order for a new trial affirmed.

The term "existing" in s. 35(1) of the *Constitution Act, 1982*, makes it clear that

*McIntyre J. took no part in the judgment.

the aboriginal rights to which the section applies are those that were in existence when the *Constitution Act, 1982*, came into effect. Thus extinguished rights are not revived by the *Constitution Act*. However, the term "existing aboriginal rights" cannot be read so as to incorporate the specific manner in which the rights were regulated before 1982. The term "existing" means unextinguished rather than exercisable at a certain time in history. The rights are, moreover, affirmed in a contemporary form rather than in their primeval simplicity and vigour. The evidence adduced in this case clearly established that the accused was fishing in ancient tribal territory where his ancestors had fished from time immemorial and, thus, that the accused at the relevant time was exercising an existing aboriginal right. While this right had been progressively restricted and regulated by federal legislation it had not been extinguished. In this context, an aboriginal right can be extinguished only if it is shown that the sovereign's intention was clear and plain to extinguish an aboriginal right. There is nothing in the *Fisheries Act* or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. Accordingly, the Crown had failed to discharge its burden of proving extinguishment.

It was not possible to determine on the record in this case the full scope of the existing aboriginal right, the case not having been presented on the footing of an aboriginal right to fish for commercial or livelihood purposes. Accordingly, for the purposes of this case the application of s. 35(1) should be on the basis of an aboriginal right to fish for food and social and ceremonial purposes. In interpreting s. 35(1) it is to be borne in mind that the government has responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trustlike, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. While s. 35(1) is not subject to s. 1 of the *Canadian Charter of Rights and Freedoms*, this does not mean that any law or regulation affecting aboriginal rights will be automatically of no force and effect. Legislation affecting the exercise of aboriginal rights will none the less be valid if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1). The words "recognition and affirmation" in s. 35(1) incorporate the fiduciary relationship between the aboriginal peoples and the government and so import some restraint on the exercise of the sovereign power. Rights that are recognized and affirmed are not, however, absolute. Federal legislative powers continue including the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. This federal power must, however, be reconciled with the federal duty towards the aboriginals and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.

In determining the validity of a federal regulation in light of the s. 35(1) guarantee, the first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1). To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), the questions to be asked are whether the limitation is unreasonable, whether the regulation imposes undue hardship, and whether the regulation denies to the holders of the right their preferred means of exercising

that right. The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation. In this case, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. It is not, however, a question of merely whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather, the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right.

If a *prima facie* interference were found then the analysis would move to the issue of justification. The court must first determine whether there is a valid legislative objective. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource would, for example, be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves or other objectives found to be compelling and substantial. Regulations could be justified on the basis of conservation and resource management. If a valid legislative objective is found, then the court must consider the special trust relationship between the government and aboriginal peoples and the responsibility of the government vis-à-vis aboriginals. The nature of the constitutional protection afforded by s. 35(1) demands that there be a link between the question of justification and the allocation of priorities in the fishery. The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to the Indian food fishery. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. In this case, a new trial was required to allow findings of fact according to this test. The accused would bear the initial burden of showing that the net length restriction constituted a *prima facie* infringement of the collective aboriginal right to fish for food. If an infringement were found, the onus would shift to the Crown which would have to demonstrate that the regulation was justifiable. To that end, the Crown would have to show that there was no underlying unconstitutional objective such as shifting more of the resource to a user group that ranks below the Musqueam. Further it would have to show that the regulation sought to be imposed is required to accomplish the needed limitation.

A.-G. Can. v. A.-G. Ont., [1898] A.C. 700, **apld**

R. v. Agawa (1988), 43 C.C.C. (3d) 266, 53 D.L.R. (4th) 101, 65 O.R. (2d) 505, [1988] 3 C.N.L.R. 73, 28 O.A.C. 201; *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227, 34 O.R. (2d) 360 [leave to appeal to S.C.C. refused O.R. *loc. cit.*, [1981] 2 S.C.R. xi, 40 N.R. 539*n*]; *R. v. Denny* (1990), 55 C.C.C. (3d) 322, 94 N.S.R. (2d) 253, [1990] 2 C.N.L.R. 115, 9 W.C.B. (2d) 438, **folld**

R. v. Derriksan (1976), 31 C.C.C. (2d) 575*n*, 71 D.L.R. (3d) 159*n*, [1976] 6 W.W.R 480*n*, 16 N.R. 231*n*, **distd**

Calder v. A.-G. B.C. (1970), 13 D.L.R. (3d) 64, 74 W.W.R. 481; affd 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1; *Jack v. The Queen* (1979), 48 C.C.C. (2d) 246, 100 D.L.R. (3d) 193, [1980] 1 S.C.R. 294, [1979] 5 W.W.R. 364, 28 N.R. 162; *Guerin v. The Queen* (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, 20 E.T.R. 6, 36 R.P.R. 1, 55 N.R. 161; *Nowegijick v. The Queen* (1983), 144 D.L.R. (3d) 193, [1983] 1 S.C.R. 29, [1983] C.T.C. 20, 83 D.T.C. 5041, 46 N.R. 41, **consd**

Other cases referred to

R. v. Eninew (1984), 12 C.C.C. (3d) 365, 10 D.L.R. (4th) 137, 32 Sask. R. 237, 11 C.R.R. 180; affg 7 C.C.C. (3d) 443, 1 D.L.R. (4th) 595, 28 Sask. R. 168, 8 C.R.R. 1; *Ontario (Attorney-General) v. Bear Island Foundation* (1984), 15 D.L.R. (4th) 321, 49 O.R. (2d) 353 [affd 588 D.L.R. (4th) 117, 68 O.R. (2d) 394, [1989] 2 C.N.L.R. 73, 32 O.A.C. 66, 4 R.P.R. (2d) 252, 14 A.C.W.S. (3d) 107; *R. v. Hare and Debassige* (1985), 20 C.C.C. (3d) 1, [1985] 3 C.N.L.R. 139; *Steinhauer v. The Queen* (1985), 63 A.R. 381, 15 C.R.R. 175; *Martin v. The Queen* (1985), 65 N.B.R. (2d) 21, 17 C.R.R. 375; *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* (1979), 107 D.L.R. (3d) 513, [1980] 1 F.C. 518, [1980] 5 W.W.R. 193; *R. v. Wesley* (1932), 58 C.C.C. 269, [1932] 4 D.L.R. 774, [1932] 2 W.W.R. 337, 26 Alta. L.R. 433; *Prince and Myron v. The Queen*, [1964] 3 C.C.C. 2, [1964] S.C.R. 81, 41 C.R. 403, 46 W.W.R. 121; *R. v. Sutherland, Wilson and Wilson* (1980), 53 C.C.C. (2d) 289, 113 D.L.R. (3d) 374, [1980] 2 S.C.R. 451, [1980] 5 W.W.R. 456, 7 Man. R. (2d) 359, 35 N.R. 361; *Simon v. The Queen* (1985), 23 C.C.C. (3d) 238, 24 D.L.R. (4th) 390, [1985] 2 S.C.R. 387, 71 N.S.R. (2d) 15, 62 N.R. 366; *Johnson v. M'Intosh*, 8 Wheaton 543 (1823); *Canadian Pacific Ltd. v. Paul* (1988), 53 D.L.R. (4th) 487, [1988] 2 S.C.R. 654, 91 N.B.R. (2d) 43, [1989] 1 C.N.L.R. 47, 1 R.P.R. (2d) 105, 89 N.R. 325, 13 A.C.W.S. (3d) 1; *Pasco v. C.N.R.* (1985), 69 B.C.L.R. 76, [1986] 1 C.N.L.R. 35; *Reference re Language Rights under the Manitoba Act, 1870* (1985), 19 D.L.R. (4th) 1, [1985] 1 S.C.R. 721, [1985] 4 W.W.R. 385, 35 Man. R. (2d) 83, 59 N.R. 321 [supplementary reasons 26 D.L.R. (4th) 767*n*, [1985] 2 S.C.R. 347, [1986] 1 W.W.R. 289]; *Kruger and Manuel v. The Queen* (1977), 34 C.C.C. (2d) 377, 75 D.L.R. (3d) 434, [1978] 1 S.C.R. 104, [1977] 4 W.W.R. 300, 15 N.R. 495

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 33
Constitution Act, 1867, ss. 91(12), (24)
Constitution Act, 1930
Constitution Act, 1982, ss. 35, 52
Fisheries Act, R.S.C. 1970, c. F-14, ss. 34 [am. R.S.C. 1970, c. 17 (1st Supp.), s. 4; 1985, c. 31, s. 7], 61(1) [rep. & sub. 1976-77, c. 35, s. 18] — now R.S.C. 1985, c. F-14, ss. 43, 79
Quebec Boundary Extension Act, 1912, S.C. 1912, c. 45

Rules and regulations referred to

British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4 [am. SOR/85-290, s. 1], 12, 27 [am. SOR/85-290, s. 5; SOR/85-742, s. 1]
Salmon Fishery Regulations for British Columbia, 1878

APPEAL by the accused and CROSS-APPEAL by the Crown from a judgment of the British Columbia Court of Appeal, 32 C.C.C. (3d) 65, 36 D.L.R. (4th) 246, [1987] 2 W.W.R. 577, 9 B.C.L.R. (2d) 300, allowing an appeal by the accused from a dismissal of his appeal from his conviction for breach of s. 61(1) of the *Fisheries Act* (Can.) and ordering a new trial.

M.R.V. Storrow, Q.C., *L.F. Harvey* and *J. Lysyk*, for accused.
T.R. Braidwood, Q.C., and *J.E. Dorsey*, for the Crown.

H.A. Slade, *A. Pape* and *L. Mandell*, for intervenor, National Indian Brotherhood/The Assembly of First Nations.

C. Harvey, for intervenor, B.C. Wildlife Federation et al.

J.K. Lowes, for intervenor, Fisheries Council of British Columbia.

I. Donald, Q.C., for intervenor, United Fishermen and Allied Workers' Union.

J.T.S. McCabe, Q.C. and *M. Hélie*, for intervenor, Attorney-General of Ontario.

R. Morin and *R. Décary*, Q.C., for intervenor, Attorney-General of Quebec.

E.R.A. Edwards, Q.C., and *H.R. Eddy*, for intervenor, Attorney-General of British Columbia.

K.J. Tyler and *R.G. Richards*, for intervenor, Attorney-General of Saskatchewan.

R.J. Normey, for intervenor, Attorney-General of Alberta.

S.R. Stevenson, for intervenor, Attorney-General of Newfoundland.

The judgment of the court was delivered by

DICKSON C.J.C. and LA FOREST J.:—This appeal requires this court to explore for the first time the scope of s. 35(1) of the *Constitution Act, 1982*, and to indicate its strength as a promise to the aboriginal peoples of Canada. Section 35(1) is found in Part II of that Act, entitled "Rights of the Aboriginal Peoples of Canada", and provides as follows:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The context of this appeal is the alleged violation of the terms of the Musqueam food fishing licence which are dictated by the *Fisheries Act*, R.S.C. 1970, c. F-14, and the regulations under that Act. The issue is whether Parliament's power to regulate fishing is now limited by s. 35(1) of the *Constitution Act, 1982*, and, more specifically, whether the net length restriction in the licence is inconsistent with that provision.

Facts

The appellant, a member of the Musqueam Indian Band, was charged under s. 61(1) of the *Fisheries Act* of the offence of fishing with a drift-net longer than that permitted by the terms of the band's Indian food fishing licence. The fishing which gave rise to the charge took place on May 25, 1984, in Canoe Passage which is part of the area subject to the band's licence. The licence, which

had been issued for a one-year period beginning March 31, 1984, set out a number of restrictions including one that drift-nets were to be limited to 25 fathoms in length. The appellant was caught with a net which was 45 fathoms in length. He has throughout admitted the facts alleged to constitute the offence, but has defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the band's licence is inconsistent with s. 35(1) of the *Constitution Act, 1982*, and therefore invalid.

The courts below

Goulet Prov. Ct. J., who heard the case, first referred to the very similar pre-Charter case of *R. v. Derriksan* (1976), 31 C.C.C. (2d) 575*n*, 71 D.L.R. (3d) 159*n*, [1976] 6 W.W.R. 480*n* (S.C.C.), where this court held that the aboriginal right to fish was governed by the *Fisheries Act* and regulations. He then expressed the opinion that he was bound by *Calder v. A.-G. B.C.* (1970), 13 D.L.R. (3d) 64, 74 W.W.R. 481 (B.C.C.A.), which held that a person could not claim an aboriginal right unless it was supported by a special treaty, proclamation, contract or other document, a position that was not disturbed because of the divided opinions of the members of this court on the appeal which affirmed that decision (34 D.L.R. (3d) 145 [1973] S.C.R. 313, [1973] 4 W.W.R. 1). Section 35(1) of the *Constitution Act, 1982*, thus had no application. The alleged right here was not based on any treaty or other document but was said to have been one exercised by the Musqueam from time immemorial before European settlers came to this continent. He, therefore, convicted the appellant, finding it unnecessary to consider the evidence in support of an aboriginal right.

An appeal to Lamperson J. of the County Court of Vancouver was dismissed for similar reasons, [1986] B.C.W.L.D. 599.

The British Columbia Court of Appeal, 32 C.C.C. (3d) 65, 36 D.L.R. (4th) 246, 9 B.C.L.R. (2d) 300, found that the courts below had erred in deciding that they were bound by the Court of Appeal decision in *Calder*, *supra*, to hold that the appellant could not rely on an aboriginal right to fish. Since the pronouncement of the Supreme Court of Canada judgment, the Court of Appeal's decision has been binding on no one. The court also distinguished *Calder* on its facts.

The court then dealt with the other issues raised by the parties. On the basis of the trial judge's conclusion that Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished

"from time immemorial", it stated that, with the other circumstances, this should have led to the conclusion that Mr. Sparrow was exercising an existing aboriginal right. It rejected the Crown's contention that the right was no longer existing by reason of its "extinguishment by regulation". An aboriginal right could continue, though regulated. The court also rejected textual arguments made to the effect that s. 35 was merely of a preambular character, and concluded that the right to fish asserted by the appellant was one entitled to constitutional protection.

The issue then became whether that protection extended so far as to preclude regulation (as contrasted with extinguishment which did not arise in this case) of the exercise of that right. In its view, the general power to regulate the time, place and manner of all fishing, including fishing under an aboriginal right, remains. Parliament retained the power to regulate fisheries and to control Indian lands under s. 91(12) and (24) of the *Constitution Act, 1867*, respectively. Reasonable regulations were necessary to ensure the proper management and conservation of the resource, and the regulations under the *Fisheries Act* restrict the right of all persons including Indians. The court observed, at p. 95:

> Section 35(1) of the *Constitution Act, 1982*, does not purport to revoke the power of Parliament to act under heads 12 or 24. The power to regulate fisheries, including Indian access to the fisheries continues, subject only to the new constitutional guarantee that the aboriginal rights existing on April 17, 1982, may not be taken away.

The court rejected arguments that the regulation of fishing was an inherent aspect of the aboriginal right to fish and that such regulation must be confined to necessary conservation measures. The right had always been and continued to be a regulated right. The court put it this way, at p. 95:

> The aboriginal right which the Musqueam had was, subject to conservation measures, the right to take fish for food and for the ceremonial purposes of the band. It was in the beginning a regulated, albeit self-regulated, right. It continued to be a regulated right, and on April 17, 1982, it was a regulated right. It has never been a fixed right, and it has always taken its form from the circumstances in which it has existed. If the interests of the Indians and other Canadians in the fishery are to be protected then reasonable regulations to ensure the proper management and conservation of the resource must be continued.

The court then went on to particularize the right still further. It was a right for a purpose, not one related to a particular method. Essentially, it was a right to fish for food and associated traditional band activities [at p. 96]:

> The aboriginal right is not to take fish by any particular method or by a net of any particular length. It is to take fish for food purposes. The breadth of the

right should be interpreted liberally in favour of the Indians. So "food purposes" should not be confined to subsistence. In particular, this is so because the Musqueam tradition and culture involves a consumption of salmon on ceremonial occasions and a broader use of fish than mere day-to-day domestic consumption.

That right, the court added, has not changed its nature since the enactment of the *Constitution Act, 1982*. What has changed is that the Indian food fishery right is now entitled to priority over the interests of other user groups, and that that right, by reason of s. 35(1) cannot be extinguished.

The Court of Appeal found that the trial judge's findings of facts were insufficient to lead to an acquittal. Observing that the conviction was based on an erroneous view of the law and could not stand, the court further remarked upon the existence of unresolved conflicts in the evidence, including the question whether a change in the fishing conditions was necessary to reduce the catch to a level sufficient to satisfy reasonable food requirements, as well as for conservation purposes.

The appeal

Leave to appeal to this court was then sought and granted. On November 24, 1987, the following constitutional question was stated:

> "Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence dated March 30, 1984, issued pursuant to the *British Columbia Fishery (General) Regulations*, SOR/84-248, and the *Fisheries Act*, R.S.C. 1970, c. F-14, inconsistent with s. 35(1) of the *Constitution Act, 1982*?"

The appellant appealed on the ground that the Court of Appeal erred (1) in holding that s. 35(1) of the *Constitution Act, 1982*, protects the aboriginal right only when exercised for food purposes and permits restrictive regulation of such rights whenever "reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest", and (2) in failing to find the net length restriction in the band's food fish licence was inconsistent with s. 35(1) of the *Constitution Act, 1982*.

The respondent Crown cross-appealed on the ground that the Court of Appeal erred in holding that the aboriginal right had not been extinguished before April 17, 1982, the date of commencement of the *Constitution Act, 1982*, and in particular in holding that, as a matter of fact and law, the appellant possessed the aboriginal right to fish for food. In the alternative, the

respondent alleged, the Court of Appeal erred in its conclusions respecting the scope of the aboriginal right to fish for food and the extent to which it may be regulated, more particularly in holding that the aboriginal right included the right to take fish for the ceremonial purposes and societal needs of the band and that the band enjoyed a constitutionally protected priority over the rights of other people engaged in fishing. Section 35(1), the respondent maintained, did not invalidate legislation passed for the purpose of conservation and resource management, public health and safety and other overriding public interests such as the reasonable needs of other user groups. Finally, it maintained that the conviction ought not to have been set aside or a new trial directed because the appellant failed to establish a *prima facie* case that the reduction in the length of the net had unreasonably interfered with his right by preventing him from meeting his food fish requirements. According to the respondent, the Court of Appeal had erred in shifting the burden of proof to the Crown on the issue before the appellant had established a *prima facie* case.

The National Indian Brotherhood Assembly of First Nations intervened in support of the appellant. The Attorneys-General of British Columbia, Ontario, Quebec, Saskatchewan, Alberta and Newfoundland supported the respondent, as did the British Columbia Wildlife Federation and others, the Fishery Council of British Columbia and the United Fishermen and Allied Workers Union.

The regulatory scheme

The *Fisheries Act*, s. 34, confers on the Governor in Council broad powers to make regulations respecting the fisheries, the most relevant for our purposes being those set forth in the following paragraphs of that section:

> 34. . . .
>
> (*a*) for the proper management and control of the seacoast and inland fisheries;
>
> (*b*) respecting the conservation and protection of fish;
>
> (*c*) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish;
>
> . . . . .
>
> (*e*) respecting the use of fishing gear and equipment;
>
> (*f*) respecting the issue, suspension and cancellation of licences and leases;
>
> (*g*) respecting the terms and conditions under which a lease or licence may be issued;

Contravention of the Act and the regulations is made an offence

Acting under its regulation-making powers, the Governor in Council enacted the *British Columbia Fishery (General) Regulations*, SOR/84-248. Under these regulations (s. 4), everyone is, *inter alia*, prohibited from fishing without a licence, and then only in areas and at the times and in the manner authorized by the Act or regulations. That provision also prohibits buying, selling, trading or bartering fish other than those lawfully caught under the authority of a commercial fishing licence. Section 4 reads:

> 4(1) Unless otherwise provided in the Act or in any Regulations made thereunder in respect of the fisheries to which these Regulations apply or in the *Wildlife Act* (British Columbia), no person shall fish except under the authority of a licence or permit issued thereunder.
>
> (2) No person shall fish for any species of fish in the Province or in Canadian fisheries waters of the Pacific Ocean except in areas and at times authorized by the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply.
>
> (3) No person who is the owner of a vessel shall operate that vessel or permit it to be operated in contravention of these Regulations.
>
> (4) No person shall, without lawful excuse, have in his possession any fish caught or obtained contrary to the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply.
>
> (5) No person shall buy, sell, trade or barter or attempt to buy, sell, trade or barter fish or any portions thereof other than fish lawfully caught under the authority of a commercial fishing licence issued by the Minister or the Minister of Environment for British Columbia.

The regulations make provision for issuing licences to Indians or a band "for the sole purpose of obtaining food for that Indian and his family and for the band", and no one other than an Indian is permitted to be in possession of fish caught pursuant to such a licence. Subsections 27(1) and (4) of the Regulations read:

> 27(1) In this section "Indian food fish licence" means a licence issued by the Minister to an Indian or a band for the sole purpose of obtaining food for that Indian and his family or for the band.
>
> . . . . . .
>
> (4) No person other than an Indian shall have in his possession fish caught under the authority of an Indian food fish licence.

As in the case of other licences issued under the Act, such licences may, by s. 12 of the regulations, be subjected to restrictions regarding the species and quantity of fish that may be taken, the places and times when they may be taken, the manner in which they are to be marked and, most important here, the type of gear and equipment that may be used. Section 12 reads as follows:

> 12(1) Subject to these Regulations and any regulations made under the Act

in respect of the fisheries to which these Regulations apply and for the proper management and control of such fisheries, there may be specified in a licence issued under these Regulations

(a) the species of fish and quantity thereof that is permitted to be taken;

(b) the period during which and the waters in which fishing is permitted to be carried out;

(c) the type and quantity of fishing gear and equipment that is permitted to be used and the manner in which it is to be used;

(d) the manner in which fish caught and retained for educational or scientific purposes is to be held or displayed;

(e) the manner in which fish caught and retained is to be marked and transported; and

(f) the manner in which scientific or catch data is to be reported.

(2) No person fishing under the authority of a licence referred to in subsection (1) shall contravene or fail to comply with the terms of the licence.

Pursuant to these powers, the Musqueam Indian Band, on March 31, 1984, was issued an Indian food fishing licence as it had since 1978 "to fish for salmon for food for themselves and their family" in areas which included the place where the offence charged occurred, the waters of Ladner Reach and Canoe Passage therein described. The licence contained time restrictions as well as the type of gear to be used, notably "One Drift net twenty-five (25) fathoms in length".

The appellant was found fishing in the waters described using a drift-net in excess of 25 fathoms. He did not contest this, arguing instead that he had committed no offence because he was acting in the exercise of an existing aboriginal right which was recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

Analysis

We will address first the meaning of "existing" aboriginal rights and the content and scope of the Musqueam right to fish. We will then turn to the meaning of "recognized and affirmed", and the impact of s. 35(1) on the regulatory power of Parliament.

"Existing"

The word "existing" makes it clear that the rights to which s. 35(1) applies are those that were in existence when the *Constitution Act, 1982*, came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982*. A number of courts have taken the position that "existing" means being in actuality in 1982: *R. v. Eninew* (1983), 7 C.C.C. (3d) 443 at p. 446 1 D.L.R. (4th) 595, 28 Sask. R. 168 (Sask. Q.B.), affirmed 12 C.C.C. (3d) 365, 10 D.L.R. (4th) 137, 32 Sask. R. 237

(Sask. C.A.); see also *Ontario (Attorney-General) v. Bear Island Foundation* (1984), 15 D.L.R. (4th) 321, 49 O.R. (2d) 353 (H.C.J.); *R. v. Hare and Debassige* (1985), 20 C.C.C. (3d) 1 [1985] 3 C.N.L.R. 139 (Ont. C.A.); *Steinhauer v. The Queen* (1985), 63 A.R. 381, 15 C.R.R. 175 (Alta. Q.B.); *Martin v. The Queen* (1985), 65 N.B.R. (2d) 21, 17 C.R.R. 375 (N.B.Q.B.); *R. v. Agawa* (1988), 43 C.C.C. (3d) 266, 53 D.L.R. (4th) 101, 28 O.A.C. 201.

Further, an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations. Blair J.A. in *Agawa, supra*, had this to say about the matter, at p. 283:

> Some academic commentators have raised a further problem which cannot be ignored. The *Ontario Fishery Regulations* contain detailed rules which vary for different regions in the province. Among other things, the regulations specify seasons and methods of fishing, species of fish which can be caught and catch limits. Similar detailed provisions apply under the comparable fisheries regulations in force in other provinces. These detailed provisions might be constitutionalized if it were decided that the existing treaty rights referred to in s. 35(1) were those remaining after regulation at the time of the proclamation of the *Constitution Act, 1982*.

As noted by Blair J.A., academic commentary lends support to the conclusion that "existing" means "unextinguished" rather than exercisable at a certain time in history. Professor Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727 at pp. 781-2, has observed the following about reading regulations into the rights:

> This approach reads into the Constitution the myriad of regulations affecting the exercise of aboriginal rights, regulations that differed considerably from place to place across the country. It does not permit differentiation between regulations of long-term significance and those enacted to deal with temporary conditions, or between reasonable and unreasonable restrictions. Moreover, it might require that a constitutional amendment be enacted to implement regulations more stringent than those in existence on 17 April 1982. This solution seems unsatisfactory.

See also Professor McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 Sup. Ct. L. Rev. 255, at p. 258 (*q.v.*); Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee" (1987), 22 U.B.C. Law Rev. 207.

The arbitrariness of such an approach can be seen if one considers the recent history of the federal regulation in the context of the present case and the fishing industry. If the *Constitution Act, 1982*, had been enacted a few years earlier, any right held by the Musqueam Band, on this approach, would have

been constitutionally subjected to the restrictive regime of personal licences that had existed since 1917. Under that regime, the Musqueam catch had, by 1969, become minor or non-existent. In 1978, a system of band licences was introduced on an experimental basis which permitted the Musqueam to fish with a 75-fathom net for a greater number of days than other people. Under this regime, from 1977 to 1984, the number of band members who fished for food increased from 19 persons using 15 boats, to 64 persons using 38 boats, while 10 other members of the band fished under commercial licences. Before this regime, the band's food fish requirement had basically been provided by band members who were licensed for commercial fishing. Since the regime introduced in 1978 was in force in 1982, then, under this approach, the scope and content of an aboriginal right to fish would be determined by the details of the band's 1978 licence.

The unsuitability of the approach can also be seen from another perspective. Ninety-one other tribes of Indians, comprising over 20,000 people (compared with 540 Musqueam on the reserve and 100 others off the reserve) obtain their food fish from the Fraser River. Some or all of these bands may have an aboriginal right to fish there. A constitutional patchwork quilt would be created if the constitutional right of these bands were to be determined by the specific regime available to each of those bands in 1982.

Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights", *ibid.* at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.

The aboriginal right

We turn now to the aboriginal right at stake in this appeal. The Musqueam Indian Reserve is located on the north shore of the Fraser River close to the mouth of that river and within the limits of the City of Vancouver. There has been a Musqueam village there for hundreds of years. This appeal does not directly concern the reserve or the adjacent waters, but arises out of the band's right to fish in another area of the Fraser River estuary known as Canoe Passage in the South Arm of the river, some 16 kilometres (about 10 miles) from the reserve. The reserve and those waters

are separated by the Vancouver International Airport and the Municipality of Richmond.

The evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day. Much of the evidence of an aboriginal right to fish was given by Dr. Suttles, an anthropologist, supported by that of Mr. Grant, the band administrator. The Court of Appeal thus summarized Dr. Suttles' evidence, at pp. 72-3:

> Dr. Suttles was qualified as having particular qualifications in respect of the ethnography of the Coast Salish Indian people of which the Musqueams were one of several tribes. He thought that the Musqueam had lived in their historic territory, which includes the Fraser River estuary, for at least 1,500 years. That historic territory extended from the north shore of Burrard Inlet to the south shore of the main channel of the Fraser River including the waters of the three channels by which that river reaches the ocean. As part of the Salish people, the Musqueam were part of a regional social network covering a much larger area but, as a tribe, were themselves an organized social group with their own name, territory and resources. Between the tribes there was a flow of people, wealth and food. No tribe was wholly self-sufficient or occupied its territory to the complete exclusion of others.
>
> Dr. Suttles described the special position occupied by the salmon fishery in that society. The salmon was not only an important source of food but played an important part in the system of beliefs of the Salish people, and in their ceremonies. The salmon were held to be a race of beings that had, in "myth times", established a bond with human beings requiring the salmon to come each year to give their bodies to the humans who, in turn, treated them with respect shown by performance of the proper ritual. Towards the salmon, as toward other creatures, there was an attitude of caution and respect which resulted in effective conservation of the various species.

While the trial for a violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right, and the evidence was not extensive, the correctness of the finding of fact of the trial judge "that Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished from time immemorial in that part of the mouth of the Fraser River for salmon" is supported by the evidence and was not contested. The existence of the right, the Court of Appeal tells us, "was not the subject of serious dispute". It is not surprising, then, that, taken with other circumstances, that court should find that "the judgment appealed from was wrong in . . . failing to hold that Sparrow at the relevant time was exercising an existing aboriginal right".

In this court, however, the respondent contested the Court of Appeal's finding, contending that the evidence was insufficient to

discharge the appellant's burden of proof upon the issue. It is true that for the period from 1867 to 1961, the evidence is scanty. But the evidence was not disputed or contradicted in the courts below and there is evidence of sufficient continuity of the right to support the Court of Appeal's finding, and we would not disturb it.

What the Crown really insisted on, both in this court and the courts below, was that the Musqueam Band's aboriginal right to fish had been extinguished by regulations under the *Fisheries Act*.

The history of the regulation of fisheries in British Columbia is set out in *Jack v. The Queen* (1979), 48 C.C.C. (2d) 246, especially at pp. 258 *et seq.*, 100 D.L.R. (3d) 193, [1980] 1 S.C.R. 294, and we need only summarize it here. Before the province's entry into Confederation in 1871, the fisheries were not regulated in any significant way, whether in respect of Indians or other people. The Indians were not only permitted but encouraged to continue fishing for their own food requirements. Commercial and sport fishing were not then of any great importance. The federal *Fisheries Act* was only proclaimed in force in the province in 1876, and the first *Salmon Fishery Regulations for British Columbia* were adopted in 1878, and were minimal.

The 1878 regulations were the first to mention Indians. They simply provided that the Indians were at all times at liberty, by any means other than drift-nets or spearing, to fish for food for themselves, but not for sale or barter. The Indian right or liberty to fish was thereby restricted, and more stringent restrictions were added over the years. As noted in *Jack v. The Queen*, *supra*, at p. 259:

> The federal Regulations became increasingly strict in regard to the Indian fishery over time, as first the commercial fishery developed and then sport fishing became common. What we can see is an increasing subjection of the Indian fishery to regulatory control. First, the regulation of the use of drift nets, then the restriction of fishing to food purposes, then the requirement of permission from the Inspector and, ultimately, in 1917, the power to regulate even food fishing by means of conditions attached to the permit.

The 1917 regulations were intended to make still stronger the provisions against commercial fishing in the exercise of the Indian right to fish for food: see P.C. 2539 of Sept. 22, 1917. The Indian food fishing provisions remained essentially the same from 1917 to 1977. The regulations of 1977 retained the general principles of the previous 60 years. An Indian could fish for food under a "special licence" specifying method, locale and times of fishing. Following an experimental programme to be discussed later, the 1981 regulations provided for the entirely new concept of a band food fishing

licence, while retaining comprehensive specification of conditions for the exercise of licences.

It is this progressive restriction and detailed regulation of the fisheries which, respondent's counsel maintained, have had the effect of extinguishing any aboriginal right to fish. The extinguishment need not be express, he argued, but may take place where the sovereign authority is exercised in a manner "necessarily inconsistent" with the continued enjoyment of aboriginal rights. For this proposition, he particularly relied on *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.); *Calder v. A.-G. B.C.* (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1; *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* (1979), 107 D.L.R. (3d) 513, [1980] 1 F.C. 518, [1980] 5 W.W.R. 193 (T.D.), and *Ontario (Attorney-General) v. Bear Island Foundation, supra.* The consent to its extinguishment before the *Constitution Act, 1982*, was not required; the intent of the sovereign could be effected not only by statute but by valid regulations. Here, in his view, the regulations had entirely displaced any aboriginal right. There is, he submitted, a fundamental inconsistency between the communal right to fish embodied in the aboriginal right, and fishing under a special licence or permit issued to individual Indians (as was the case until 1977) in the discretion of the Minister and subject to terms and conditions which, if breached, may result in cancellation of the licence. The *Fisheries Act* and its regulations were, he argued, intended to constitute a complete code inconsistent with the continued existence of an aboriginal right.

At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished. The distinction to be drawn was carefully explained, in the context of federalism, in the first fisheries case, *A.-G. Can. v. A.-G. Ont.*, [1898] A.C. 700. There, the Privy Council had to deal with the interrelationship between, on the one hand, provincial property, which by s. 109 of the *Constitution Act, 1867*, is vested in the provinces (and so falls to be regulated *qua* property exclusively by the provinces) and, on the other hand, the federal power to legislate respecting the fisheries thereon under s. 91(12) of that Act. The Privy Council said the following in relation to the federal regulation (at pp. 712-3):

> . . . the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An

> enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected.

In the context of aboriginal rights, it could be argued that, before 1982, an aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute. As Mahoney J. stated in *Baker Lake*, *supra*, at p. 551:

> Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right.

See also *Ontario (Attorney General) v. Bear Island Foundation*, *supra*, at pp. 407-8. That in Judson J.'s view was what had occurred in *Calder*, *supra*, where, as he saw it, a series of statutes evinced a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, including aboriginal title. But Hall J. in that case stated (at p. 210) that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and *that intention must be 'clear and plain'*" (emphasis added). The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

There is nothing in the *Fisheries Act* or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.

We would conclude then that the Crown has failed to discharge its burden of proving extinguishment. In our opinion, the Court of Appeal made no mistake in holding that the Indians have an existing aboriginal right to fish in the area where Mr. Sparrow was fishing at the time of the charge. This approach is consistent with ensuring that an aboriginal right should not be defined by incorporating the ways in which it has been regulated in the past.

The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner.

The British Columbia Court of Appeal in this case held that the aboriginal right was to fish for food purposes, but that purpose was not to be confined to mere subsistence. Rather, the right was found to extend to fish consumed for social and ceremonial activities. The Court of Appeal thereby defined the right as protecting the same interest as is reflected in the government's food fish policy. In limiting the right to food purposes, the Court of Appeal referred to the line of cases involving the interpretation of the Natural Resources Agreements and the food purpose limitation placed on the protection of fishing and hunting rights by the *Constitution Act, 1930:* see *R. v. Wesley* (1932), 58 C.C.C. 269, [1932] 4 D.L.R. 774, [1932] 2 W.W.R. 337; *Prince and Myron v. The Queen*, [1964] 3 C.C.C. 2, [1964] S.C.R. 81, 41 C.R. 403; *R. v. Sutherland, Wilson and Wilson* (1980), 53 C.C.C. (2d) 289, 113 D.L.R. (3d) 374, [1980] 2 S.C.R. 451.

The Court of Appeal's position was attacked from both sides. The respondent for its part, argued that, if an aboriginal right to fish does exist, it does not include the right to take fish for the ceremonial and social activities of the band. The appellant, on the other hand, attacked the Court of Appeal's restriction of the right to a right to fish for food. He argued that the principle that the holders of aboriginal rights may exercise those rights according to their own discretion has been recognized by this court in the context of the protection of treaty hunting rights (*Simon v. The Queen* (1985), 23 C.C.C. (3d) 238, 24 D.L.R. (4th) 390, [1985] 2 S.C.R. 387), and that it should be applied in this case such that the right is defined as a right to fish for any purpose and by any non-dangerous method.

In relation to this submission, it was contended before this court that the aboriginal right extends to commercial fishing. While no commercial fishery existed prior to the arrival of European settlers, it is contended that the Musqueam practice of bartering in early society may be revived as a modern right to fish for

commercial purposes. The presence of numerous interveners representing commercial fishing interests, and the suggestion on the facts that the net length restriction is at least in part related to the probable commercial use of fish caught under the Musqueam food fishing licence, indicate the possibility of conflict between aboriginal fishing and the competitive commercial fishery with respect to economically valuable fish such as salmon. We recognize the existence of this conflict and the probability of its intensification as fish availability drops, demand rises and tensions increase.

Government regulations governing the exercise of the Musqueam right to fish, as described above, have only recognized the right to fish *for food* for over a hundred years. This may have reflected the existing position. However, historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but is also incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy *can*, however, regulate the exercise of that right, but such regulation must be in keeping with s. 35(1).

In the courts below, the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes. Rather, the focus was and continues to be on the validity of a net length restriction affecting the appellant's *food fishing licence*. We therefore adopt the Court of Appeal's characterization of the right for the purpose of this appeal, and confine our reasons to the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes.

"Recognized and Affirmed"

We now turn to the impact of s. 35(1) of the *Constitution Act, 1982*, on the regulatory power of Parliament and on the outcome of this appeal specifically.

Counsel for the appellant argued that the effect of s. 35(1) is to deny Parliament's power to restrictively regulate aboriginal fishing rights under s. 91(24) ("Indians and Lands Reserved for the Indians"), and s. 91(12) ("Sea Coast and Inland Fisheries"). The essence of this submission, supported by the intervener, the National Indian Brotherhood Assembly of First Nations, is that the right to regulate is part of the right to use the resource in the band's discretion. Section 35(1) is not subject to s. 1 of the

Canadian Charter of Rights and Freedoms, nor to legislative override under s. 33. The appellant submitted that, if the regulatory power continued, the limits on its extent are set by the word "inconsistent" in s. 52(1) of the *Constitution Act, 1982*, and the protective and remedial purposes of s. 35(1). This means that aboriginal title entails a right to fish by any non-dangerous method chosen by the aboriginals engaged in fishing. Any continuing governmental power of regulation would have to be exceptional and strictly limited to regulation that is clearly not inconsistent with the protective and remedial purposes of s. 35(1). Thus, counsel for the appellant speculated, "in certain circumstances, necessary and reasonable conservation measures *might* qualify" (emphasis added) — where for example such measures were necessary to prevent serious impairment of the aboriginal rights of present and future generations, where conservation could only be achieved by restricting the right and not by restricting fishing by other users, and where the aboriginal group concerned was unwilling to implement necessary conservation measures. The onus of proving a justification for restrictive regulations would lie with the government by analogy with s. 1 of the Charter.

In response to these submissions and in finding the appropriate interpretive framework for s. 35(1), we start by looking at the background of s. 35(1).

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown: see *Johnson v. M'Intosh*, 8 Wheaton 543 (1823) (U.S.S.C.); see also the Royal Proclamation itself (R.S.C., 1985, App. II, No. 1, pp. 4-6); *Calder*, *supra*, *per* Judson J. at p. 156, Hall J. at pp. 195, 208. And there can be no doubt that over the years the rights of the Indians were often honoured in the breach (for one instance in a recent case in this court, see *Canadian Pacific Ltd. v. Paul* (1988), 53 D.L.R. (4th) 487, [1988] 2 S.C.R. 654, 91 N.B.R. (2d) 43. As MacDonald J. stated in *Pasco v. C.N.R.* (1985), 69 B.C.L.R. 76 at p. 79, [1986] 1 C.N.L.R. 35 (S.C.): "We cannot recount with much pride the treatment accorded to the native people of this country."

For many years, the rights of the Indians to their aboriginal lands — certainly as *legal* rights — were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Procla-

mation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For 50 years after the publication of Clement's *The Law of the Canadian Constitution*, 3rd ed. (1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* (1969), although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land . . . are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community". In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument: see the *Quebec Boundary Extension Act, 1912*, S.C. 1912, c. 45. It took a number of judicial decisions and notably the *Calder* case in this court (1973) to prompt a reassessment of the position being taken by government.

In the light of its reassessment of Indian claims following *Calder*, the federal government on August 8, 1973, issued "a statement of policy" regarding Indian lands. By it, it sought to "signify the Government's *recognition and acceptance* of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians", which it regarded "as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests in land in this country". (Emphasis added.): see *Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People*, August 8, 1973. The remarks about these lands were intended "as an expression of acknowledged responsibility". But the statement went on to express, for the first time, the government's willingness to negotiate regarding claims of aboriginal title, specifically in British Columbia, Northern Quebec, and the Territories, and this without regard to formal supporting documents. "The Government", it stated, "is now ready to negotiate with authorized representatives of these native peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or

benefit will be provided to native peoples in return for their interest."

It is obvious from its terms that the approach taken towards aboriginal claims in the 1973 statement constituted an expression of a policy, rather than a legal position: see also Canada, Department of Indian Affairs and Northern Development, *In All Fairness: A Native Claims Policy — Comprehensive Claims* (1981), pp. 11-2; Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 726 at p. 730. As recently as *Guerin v. The Queen* (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, the federal government argued in this court that any federal obligation was of a political character.

It is clear, then, that s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. We are, of course, aware that this would, in any event, flow from the *Guerin* case, *supra*, but for a proper understanding of the situation, it is essential to remember that the *Guerin* case was decided after the commencement of the *Constitution Act, 1982*. In addition to its effect on aboriginal rights, s. 35(1) clarified other issues regarding the enforcement of treaty rights: see Sanders, "Pre-existing Rights: The Aboriginal Peoples of Canada", Beaudoin and Ratushny (eds.), *The Canadian Charter of Rights and Freedoms*, 2nd ed., especially at p. 730.

In our opinion, the significance of s. 35(1) extends beyond these fundamental effects. Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95, says the following about s. 35(1), at p. 100:

> . . . the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

The approach to be taken with respect to interpreting the

meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. Here, we will sketch the framework for an interpretation of "recognized and affirmed" that, in our opinion, gives appropriate weight to the constitutional nature of these words.

In *Reference re Language Rights under the Manitoba Act, 1870* (1985), 19 D.L.R. (4th) 1, [1985] 1 S.C.R. 721, [1985] 4 W.W.R. 385, this court said the following about the perspective to be adopted when interpreting a constitution, at p. 19:

> The constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitution Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.

The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. When the Court of Appeal below was confronted with the submission that s. 35 has no effect on aboriginal or treaty rights and that it is merely a preamble to the parts of the *Constitution Act, 1982*, which deal with aboriginal rights, it said the following, at p. 87:

> This submission gives no meaning to s. 35. If accepted, it would result in denying its clear statement that existing rights are hereby recognized and affirmed, and would turn that into a mere promise to recognize and affirm those rights sometime in the future . . . To so construe s. 35(1) would be to ignore its language and the principle that the constitution should be interpreted in a liberal and remedial way. We cannot accept that that principle applies less strongly to aboriginal rights than to the rights guaranteed by the Charter, particularly having regard to the history and to the approach to interpreting treaties and statutes relating to Indians required by such cases as *Nowegijick v. The Queen et al.* (1983), 144 D.L.R. (3d) 193, [1983] 1 S.C.R. 29 . . .

In *Nowegijick v. The Queen* (1983), 144 D.L.R. (3d) 193 at p. 198, [1983] 1 S.C.R. 29, [1983] C.T.C. 20, the following principle that should govern the interpretation of Indian treaties and statutes was set out: ". . . treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."

In *R. v. Agawa, supra*, Blair J.A. stated that the above

principle should apply to the interpretation of s. 35(1). He added the following principle to be equally applied, at pp. 215-6:

> The second principle was enunciated by the late Associate Chief Justice MacKinnon in *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, 62 C.C.C. (2d) 227 (Ont. C.A.). He emphasized the importance of Indian history and traditions as well as the perceived effect of a treaty at the time of its execution. He also cautioned against determining Indian right "in a vacuum". The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration. He said at p. 367 O.R., p. 235 C.C.C.:
>
> > "The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned."
>
> This view is reflected in recent judicial decisions which have emphasized the responsibility of government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation: see *Guerin v. the Queen* (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, 59 B.C.L.R. 301 (S.C.C.).

In *Guerin, supra*, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the band at the surrender meeting. This court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227, 34 O.R. (2d) 360 (C.A.), ground a general guiding principle for s. 35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

We agree with both the British Columbia Court of Appeal below and the Ontario Court of Appeal that the principles outlined above, derived from *Nowegijick, Taylor and Williams* and *Guerin*, should guide the interpretation of s. 35(1). As commentators have noted, s. 35(1) is a solemn commitment that must be given meaningful content: Lyon, *Ibid.*; *Pentney, ibid.*; Schwartz, "Unstarted Business: Two Approaches to Defining s. 35 — 'What's in the Box?' and 'What Kind of Box?'", ch. XXIV, in *First Principles, Second Thoughts* (Montreal: Institute for Research on

Public Policy, 1986); Slattery, *ibid.*, and Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 Am. J. of Comp. Law 361.

In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the Charter, it is true that s. 35(1) is not subject to s. 1 of the Charter. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will none the less be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

There is no explicit language in the provision that authorizes this court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick*, *supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*, *supra*.

We refer to Professor Slattery's "Understanding Aboriginal Rights", *ibid.*, with respect to the task of envisioning a s. 35(1) justificatory process. Professor Slattery, at p. 782, points out that a justificatory process is required as a compromise between a "patchwork" characterization of aboriginal rights whereby past regulations would be read into a definition of the rights, and a characterization that would guarantee aboriginal rights in their original form unrestricted by subsequent regulation. We agree with him that these two extreme positions must be rejected in favour of a justificatory scheme.

Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too

well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

The constitutional recognition afforded by the provision, therefore, gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

In these reasons, we will outline the appropriate analysis under s. 35(1) in the context of a regulation made pursuant to the *Fisheries Act*. We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

Section 35(1) and the regulation of the fisheries

Taking the above framework as guidance, we propose to set out the test for *prima facie* interference with an existing aboriginal right and for the justification of such an interference. With respect to the question of the regulation of the fisheries, the existence of s. 35(1) of the *Constitution Act, 1982*, renders the authority of *R. v. Derricksan, supra*, inapplicable. In that case, Laskin C.J.C., for this court, found that there was nothing to prevent the *Fisheries Act* and the regulations from subjecting the alleged

aboriginal right to fish in a particular area to the controls thereby imposed. As the Court of Appeal in the case at bar noted, the *Derricksan* line of cases established that, before April 17, 1982, the aboriginal right to fish was subject to regulation by legislation and subject to extinguishment. The new *constitutional* status of that right enshrined in s. 35(1) suggests that a different approach must be taken in deciding whether regulation of the fisheries might be out of keeping with constitutional protection.

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake. Our earlier observations regarding the scope of the aboriginal right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin*, *supra*, at p. 339, referred to as the "*sui generis*" nature of aboriginal rights: see also Little Bear, "A Concept of Native Title", [1982] 5 Can. Legal Aid Bul. 99.

While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. For example, it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised.

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Secondly, does the regulation impose undue hardship? Thirdly, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue

does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.

If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

The Court of Appeal below held, at p. 96, that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource *or in the public interest*" (emphasis added). We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.

The justification of conservation and resource management, on the other hand, is surely uncontroversial. In *Kruger and Manuel v. The Queen* (1977), 34 C.C.C. (2d) 377, 75 D.L.R. (3d) 434, [1978] 1 S.C.R. 104, the applicability of the *Wildlife Act*, S.B.C. 1966, c. 55, to the appellant members of the Penticton Indian Band was considered by this court. In discussing that Act, the following was said about the objective of conservation (at p. 382):

> Game conservation laws have as their policy the maintenance of wildlife resources. It might be argued that without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource. The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by

the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former.

While the "presumption" of validity is now outdated in view of the constitutional status of the aboriginal rights at stake, it is clear that the value of conservation purposes for government legislation and action has long been recognized. Further, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin, supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modern fishery inevitably blurs with the efficient allocation and management of this scarce and valued resource. The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource. There is a clear need for guidelines that will resolve the allocational problems that arise regarding the fisheries. We refer to the reasons of Dickson J. in *Jack v. The Queen, supra*, for such guidelines.

In *Jack*, the appellants' defence to a charge of fishing for salmon in certain rivers during a prohibited period was based on the alleged constitutional incapacity of Parliament to legislate such as to deny the Indians their right to fish for food. They argued that art. 13 of the British Columbia Terms of Union imposed a constitutional limitation on the federal power to regulate. While we recognize that the finding that such a limitation had been imposed was not adopted by the majority of this Court, we point out that this case concerns a different constitutional promise that asks this Court to give a meaningful interpretation to recognition and affirmation. That task requires equally meaningful guidelines responsive to the constitutional priority accorded aboriginal

rights. We therefore repeat the following passage from *Jack*, at p. 261:

> Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and necessary conservation measures have been recognized and given effect to. They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.
>
> I agree with the general tenor of this argument . . . With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen, subject to the practical difficulties occasioned by international waters and the movement of the fish themselves. But any limitation upon Indian fishing that is established for a valid conservation purpose overrides the protection afforded the Indian fishery by art. 13, just as such conservation measures override other taking of fish.

The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities. While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established. The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

The decision of the Nova Scotia Court of Appeal in *R. v. Denny*, judgment rendered March 5, 1990 (unreported) [since reported 55 C.C.C. (3d) 322, 94 N.S.R. (2d) 253, [1990] 2 C.N.L.R. 115], addresses the constitutionality of the Nova Scotia Micmac Indians' right to fish in the waters of Indian Brook and the Afton River, and does so in a way that accords with our understanding of the constitutional nature of aboriginal rights and the link between allocation and justification required for government regulation of the exercise of the rights. Clarke C.J.N.S., for a unanimous court, found that the *Nova Scotia Fishery Regulations* enacted pursuant

to the federal *Fisheries Act* were in part inconsistent with the constitutional rights of the appellant Micmac Indians. Section 35(1) of the *Constitution Act, 1982*, provided the appellants with the right to a top priority allocation of any surplus of the fisheries resource which might exist after the needs of conservation had been taken into account. With respect to the issue of the Indians' priority to a food fishery, Clarke C.J.N.S. noted that the official policy of the federal government recognizes that priority. He added the following, at pp. 22-3 [p. 339 C.C.C.]:

> I have no hesitation in concluding that factual as well as legislative and policy recognition must be given to the existence of an Indian food fishery in the waters of Indian Brook, adjacent to the Eskasoni Reserve, and the waters of the Afton River after the needs of conservation have been taken into account . . .
>
> . . . . .
>
> To afford user groups such as sports fishermen (anglers) a priority to fish over the legitimate food needs of the appellants and their families is simply not appropriate action on the part of the federal government. It is inconsistent with the fact that the appellants have for many years, and continue to possess an aboriginal right to fish for food. The appellants have, to employ the words of their counsel, a "right to share in the available resource". This constitutional entitlement is second only to conservation measures that may be undertaken by federal legislation.

Further, Clarke C.J.N.S. found that s. 35(1) provided the constitutional recognition of the aboriginal priority with respect to the fishery, and that the regulations, in failing to guarantee that priority, were in violation of the constitutional provision. He said the following, at p. 25 [pp. 340-1 C.C.C.]:

> Though it is crucial to appreciate that the rights afforded to the appellants by s. 35(1) are not absolute, the impugned regulatory scheme fails to recognize that this section provides the appellants with a priority of allocation and access to any surplus of the fisheries resource once the needs of conservation have been taken into account. Section 35(1), as applied to these appeals, provides the appellants with an entitlement to fish in the waters in issue to satisfy their food needs, where a surplus exists. To the extent that the regulatory scheme fails to recognize this, it is inconsistent with the Constitution. Section 52 mandates a finding that such regulations are of no force and effect.

In light of this approach, the argument that the cases of *R. v. Hare and Debassige*, *supra*, and *R. v. Eninew*, *supra*, stand for the proposition that s. 35(1) provides no basis for restricting the power to regulate must be rejected, as was done by the Court of Appeal below. In *Hare and Debassige*, which addressed the issue of whether the *Ontario Fishery Regulations*, C.R.C. 1978, c. 849, applied to members of an Indian band entitled to the benefit of the Manitoulin Island Treaty which granted certain rights with

available, and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

Application to this case — Is the net length restriction valid?

The Court of Appeal below found that there was not sufficient evidence in this case to proceed with an analysis of s. 35(1) with respect to the right to fish for food. In reviewing the competing expert evidence, and recognizing that fish stock management is an uncertain science, it decided that the issues at stake in this appeal were not well adapted to being resolved at the appellate court level.

Before the trial, defence counsel advised the Crown of the intended aboriginal rights defence and that the defence would take the position that the Crown was required to prove, as part of its case, that the net length restriction was justifiable as a necessary and reasonable conservation measure. The trial judge found s. 35(1) to be inapplicable to the appellant's defence, based on his finding that no aboriginal right had been established. He therefore found it inappropriate to make findings of fact with respect to either an infringement of the aboriginal right to fish or the justification of such an infringement. He did, however, find that the evidence called by the appellant

> . . . casts some doubt as to whether the restriction was necessary as a conservation measure. More particularly, it suggests that there were more appropriate measures that could have been taken if necessary; measures that would not impose such a hardship on the Indians fishing for food. That case was not fully met by the Crown.

According to the Court of Appeal, the findings of fact were insufficient to lead to an acquittal. There was no more evidence before this court. We also would order a retrial which would allow findings of fact according to the tests set out in these reasons.

The appellant would bear the burden of showing that the net length restriction constituted a *prima facie* infringement of the collective aboriginal right to fish for food. If an infringement were

NOWEGIJICK v. THE QUEEN et al.

Supreme Court of Canada, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ. January 25, 1983.

Income tax — Exemption — Indians exempt from taxation in respect of personal property situate on reserves — Indian employee of company having head office and administrative office on reserve — Work done off reserve — Whether income from employment personal property situated on reserve — Whether income exempt from taxation — Indian Act, R.S.C. 1970, c. I-6, s. 87(b) — Income Tax Act, 1970-71-72 (Can.), c. 63.

Indians — Income tax — Exemptions — Indians exempt from taxation in respect of personal property situate on reserves — Indian employee of company having head office and administrative office on reserve — Work done off reserve — Whether income from employment personal property situated on reserve — Whether income exempt from taxation — Indian Act, R.S.C. 1970, c. I-6, s. 87(b) — Income Tax Act, 1970-71-72 (Can.), c. 63.

Section 87(*b*) of the *Indian Act*, R.S.C. 1970, c. I-6, which exempts from taxation "the personal property of an Indian . . . situated on a reserve" and provides that "no Indian . . . is subject to taxation in respect of . . . any" such property, applies so as to exempt from taxation under the *Income Tax Act*, 1970-71-72 (Can.), c. 63, the income earned by an Indian as an employee of a company having its head office and administrative office on the reserve, even though his work for the company is done off the reserve. The reserve is the *situs* of the salary received because it is the residence of the company and it is there that the wages are payable.

To be valid, exemptions to tax laws should be clearly expressed. However, treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian. If the statute contains language that can reasonably be construed to confer tax exemption, that construction is to be favoured over a more technical construction which might be available to deny exemption.

"Income" is "property". A tax on income is in reality a tax on property itself. If income can be said to be property, taxable income cannot be any less so. Taxable income is, by definition in s. 2(2) of the *Income Tax Act*, "his income for the year minus the deductions permitted by Division C". Section 87 of the *Indian Act* creates an exemption for both persons and property. For this reason it does not matter that the taxation of employment income may be characterized as a tax on persons, as opposed to a tax on property.

Re Minister of National Revenue and Iroquois of Caughnawaga (1977), 73 D.L.R. (3d) 414, [1977] 2 F.C. 269, [1977] C.T.C. 49, 77 D.T.C. 5127, 15 N.R. 377, **overd**

Bachrach et al. v. Nelson et al. (1932), 182 N.E. 909, **apld**

R. v. National Indian Brotherhood (1978), 92 D.L.R. (3d) 333, [1979] 1 F.C. 103, [1975] C.T.C. 680, 78 D.T.C. 6488; *McLeod v. Minister of Customs & Excise*, [1926] 3 D.L.R. 531, [1926] S.C.R. 457; *Kerr v. Superintendent of Income Tax et al.*, [1942] 4 D.L.R. 289, [1942] S.C.R. 435; *Sura v. Minister of National Revenue* (1961), 32 D.L.R. (2d) 282, [1962] S.C.R. 65, [1962] C.T.C. 1, 62 D.T.C. 1005; *Alworth et al. v. Minister of Finance* (1977), 76 D.L.R. (3d) 99, [1978] 1 S.C.R. 447, [1977] 4 W.W.R. 268, 15 N.R. 405; *Re A.-G. B.C. and Canada Trust Co. et*

al. (1980), 112 D.L.R. (3d) 592, [1980] 2 S.C.R. 466, [1980] 5 W.W.R. 591, [1980] C.T.C. 338, 7 E.T.R. 93, 32 N.R. 326 *sub nom. Ellett's Estate v. A.-G. B.C. et al.*, **distd**

Other cases referred to

R. v. National Indian Brotherhood (1978), 92 D.L.R. (3d) 333, [1979] 1 F.C. 103, [1975] C.T.C. 680, 78 D.T.C. 6488; *Jones v. Meehan* (1899), 175 U.S. 1; *Greyeyes v. The Queen* (1978), 84 D.L.R. (3d) 196, [1978] 2 F.C. 385, 78 D.T.C. 6043, [1978] C.T.C. 91; *Harel v. Deputy Minister of Revenue of Quebec* (1977), 80 D.L.R. (3d) 556, [1978] 1 S.C.R. 851, [1977] C.T.C. 441, 77 D.T.C. 5438

Statutes referred to

Income Tax Act, 1970-71-72 (Can.), c. 63, ss. 2(1), (2), 5(1), 153(1)
Indian Act, R.S.C. 1952, c. 148, s. 86(2)
Indian Act, R.S.C. 1970, c. I-6, ss. 83, 87 (am. 1981, c. 47, s. 25)

APPEAL by the plaintiff from a judgment of the Federal Court of Appeal, [1980] 1 F.C. 462, [1979] C.T.C. 441, 79 D.T.C. 5354, reversing a judgment of Mahoney J., [1979] 2 F.C. 228, [1979] C.T.C. 195, 79 D.T.C. 5115, in favour of the plaintiff in an action to set aside a notice of assessment under the *Income Tax Act*, 1970-71-72 (Can.), c. 63.

Micha Menczer, for appellant.
Wilfrid Lefebvre and *Alfred E. N. Caron*, for respondent.
James A. O'Reilly, for intervenant, Grand Council of Crees (of Quebec).
William T. Badcock, for intervenant, National Indian Brotherhood.

The judgment of the court was delivered by

DICKSON J.:—The question is whether the appellant, Gene A. Nowegijick, a registered Indian, can claim by virtue of the *Indian Act*, R.S.C. 1970, c. I-6, an exemption from income tax for the 1975 taxation year.

I

The facts

The facts are few and not in dispute. Mr. Nowegijick is an Indian within the meaning of the *Indian Act* and a member of the Gull Bay (Ontario) Indian Band. During the 1975 taxation year Mr. Nowegijick was an employee of the Gull Bay Development Corporation, a company without share capital, having its head office and administrative offices on the Gull Bay Reserve. All the directors, members and employees of the corporation live on the reserve and are registered Indians.

During 1975 the corporation in the course of its business conducted a logging operation 10 miles from the Gull Bay Reserve. Mr. Nowegijick was employed as a logger and remunerated on a piece-work basis. He was paid bi-weekly by cheque at the head office of the corporation on the reserve.

During 1975, Mr. Nowegijick maintained his permanent dwelling on the Gull Bay Reserve. Each morning he would leave the reserve to work on the logging operations, and return to the reserve at the end of the working day.

Mr. Nowegijick earned $11,057.08 in such employment. His assessed taxable income for the 1975 taxation year was $8,698 on which he was assessed tax of $1,965.80. By notice of objection he objected to the assessment on the basis that the income in respect of which the assessment was made is the "personal property of an Indian . . . situated on a reserve" and thus not subject to taxation by virtue of s. 87 of the *Indian Act*.

Mr. Nowegijick also brought an action in the Federal Court, Trial Division to set aside the notice of assessment. Mr. Justice Mahoney of that court ordered that Mr. Nowegijick's 1975 income tax return be referred back to the Minister of National Revenue for reassessment on the basis that the wages paid him by the Gull Bay Development Corporation were wrongly included in the calculation of his taxable income.

The Crown appealed the decision of Mr. Justice Mahoney. The Federal Court of Appeal allowed the appeal and restored the original assessment.

The proceedings have reached this court by leave. The Grand Council of Crees of Quebec, three Cree organizations, eight Cree bands and their respective chiefs have intervened to make common cause with Mr. Nowegijick.

II

The legislation

Mr. Nowegijick, in his claim for exemption from income tax relies upon s. 87 of the *Indian Act*:

> 87. Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 83, the following property is exempt from taxation, namely:
>
> (*a*) the interest of an Indian or a band in a reserve or surrendered lands; and
>
> (*b*) the personal property of an Indian or band situated on a reserve;
>
> and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (*a*) or (*b*) or is otherwise subject to taxation in respect of any such property; and no

> succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any such property or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, being chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, on or in respect of other property passing to an Indian.

Section 83 of the *Indian Act*, referred to in s. 87 has no application. Subsection 87(2), also mentioned [then s. 86(2), R.S.C. 1952, c. 149], was repealed in 1960 by 1960 (Can.), c. 8, s. 1, although the reference to it in what was formerly s-s. (1) remains.

Stripped to relevant essentials s. 87 reads:

> 87. Notwithstanding any other Act of the Parliament of Canada . . . the following property is exempt from taxation, namely:
>
> (*a*) the interest of an Indian or a band in a reserve or surrendered lands; and
>
> (*b*) the personal property of an Indian or band situated on a reserve;
>
> and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (*a*) or (*b*) or is otherwise subject to taxation in respect of any such property . . .

Further distilled, the section provides that (i) the personal property of an Indian situated on a reserve is exempt from taxation; (ii) no Indian is subject to taxation "in respect of *any*" such property.

It is arguable that the first part of the quoted passage which exempts from taxation (*a*) the "interest of an Indian or a band in a reserve or surrendered lands" and (*b*) the "personal property of an Indian or band situated on a reserve", is concerned with exemption from *direct* taxation of land or personal property by a provincial or municipal authority. The legislative history of the section lends support to such an argument. But the section does not end there. It is to the latter part of the section that our attention should primarily be directed.

The short but difficult question to be determined is whether the tax sought to be imposed under the *Income Tax Act*, 1970-71-72 (Can.), c. 63, upon the income of Mr. Nowegijick can be said to be "in respect of *any*" personal property situated upon a reserve.

We need not speculate upon parliamentary intention, an idle pursuit at best, since the antecedent of s. 87 of the *Indian Act* was enacted long before income tax was introduced as a temporary wartime measure in 1917.

One point might have given rise to argument. Was the fact that the services were performed off the reserve relevant to *situs*? The Crown conceded in argument, correctly in my view, that the *situs*

of the salary which Mr. Nowegijick received was sited on the reserve because it was there that the residence or place of the debtor, the Gull Bay Development Corporation, was to be found and it was there the wages were payable: see Cheshire and North, *Private International Law* 10th ed. (1979), p. 536 *et seq.*, and also the judgment of Thurlow A.C.J. in *R. v. National Indian Brotherhood* (1978), 92 D.L.R. (3d) 333 at p. 338 *et seq.*, [1979] 1 F.C. 103 particularly at p. 109 *et seq.*, [1975] C.T.C. 680.

The other piece of legislation which bears directly on the question before us is the *Income Tax Act*. I would like to refer to several sections. The first is found in Part I, Division A, of the Act, entitled "Liability For Tax". Section 2(1) and (2) provides:

> 2(1) An income tax shall be paid as hereinafter required upon the taxable income for each taxation year of every person resident in Canada at any time in the year.
>
> (2) The taxable income of a taxpayer for a taxation year is his income for the year minus the deductions permitted by Division C.

Thus, income tax is paid upon the taxable income (income minus deductions) of every person resident in Canada.

Section 5(1) of the Act is worth noting. It defines the taxpayer's income from employment as the salary, wages and other remuneration received. The liability is at the point of receipt. The section reads:

> 5(1) Subject to this Part, a taxpayer's income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by him in the year.

The only other section is s. 153(1) which provides that every person paying salary or wages to an employee in a taxation year shall deduct the prescribed amount, and remit that amount to the Receiver-General of Canada on account of the payee's tax for the year.

III

The Federal Court judgments

I turn now to the conflicting views in the Federal Court. The opinion of Mr. Justice Mahoney at trial was expressed in these words [1979] 2 F.C. 228 at p. 230-1, [1979] C.T.C. 195, 79 D.T.C. 5115]:

> The question is whether taxation of the plaintiff in an amount determined by reference to his taxable income is taxation "in respect of" those wages when they are included in the computation of his taxable income. I think that it is.
>
> The tax payable by an individual under the *Income Tax Act* is determined by application of prescribed rates to his taxable income calculated in the prescribed manner. If his taxable income is increased by the inclusion of his

> wages in it, he will pay more tax. The amount of the increase will be determined by direct reference to the amount of those wages. I do not see that such a process and result admits of any other conclusion than that the individual is thereby taxed in respect of his wages.

The Federal Court of Appeal [[1980 1 F.C. 462, [1979] C.T.C. 441, 79 D.T.C. 5354] concluded that the tax imposed on Mr. Nowegijick under the *Income Tax Act* was not taxation in respect of personal property within the meaning of s. 87 of the *Indian Act*. The court, speaking through Mr. Justice Heald, said [at p. 462 F.C.]:

> We are all of the view that there are no significant distinctions between this case and the *Snow* case *Snow v. The Queen* [1979] C.T.C. 227 where this Court held: "section 86 [of the *Indian Act*] contemplates taxation in respect of specific personal property *qua* property and not taxation in respect of taxable income as defined by the *Income Tax Act*, which, while it may reflect items that are personal property, is not itself personal property but an amount to be determined as a matter of calculation by application of the provisions of the Act".

IV

Construction of s. 87 of the Indian Act

Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens.

It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. [It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian.] If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption. In *Jones v. Meehan* (1899), 175 U.S. 1, it was held that:

> Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.

There is little in the cases to assist in the construction of s. 87 of the *Indian Act*. In *R. v. National Indian Brotherhood*, *supra*, the question was as to *situs*, an issue which does not arise in the present case. The appeal related to the failure of the National Indian Brotherhood to deduct and pay over to the Receiver-General of Canada the amount which the defendant was required by the *Income Tax Act* and regulations to deduct from the salaries of its Indian employees. The salaries in question were paid to the employees in Ottawa by cheque drawn on an Ottawa bank. Thurlow A.C.J. said (at p. 338 D.L.R., p. 6491 D.T.C.):

> 300, Tax Commissioner v. Putnam, 227 Mass. 522, 116 N.E. 904, L.R.A. 1917F, 806, Stratton's Independence v. Howbert, 231, U.S. 399, 34 S. Ct. 136, 58 L. Ed. 285, Doyle v. Mitchell Bros. Co., 247 U.S. 179, 38 S. Ct. 467, 62 L. Ed. 1054, Board of Revenue v. Montgomery Gaslight Co., 64 Ala. 269, Greene v. Knox, 175 N.Y. 432, 67 N.E. 910, Hibbard v. State, 65 Ohio St. 574, 64 N.E. 109, 58 L.R.A. 654, Ludlow-Saylor Wire Co. v. Wollbrinck, 275 Mo. 339, 205 S.W. 196, and State v. Pinder, 7 Boyce (30 Del.) 416, 108 A. 43, define what is personal property and in substance hold that money or any other thing of value acquired as gain or profit from capital or labor is property, and that, in the aggregate, these acquisitions constitute income, and, in accordance with the axiom that the whole includes all of its parts, income includes property and nothing but property, and therefore is itself property.

I would adopt this language. A tax on income is in reality a tax on property itself. If income can be said to be property I cannot think that taxable income is any less so. Taxable income is by definition, s. 2(2) of the *Income Tax Act*, "his income for the year minus the deductions permitted by Division C". Although the Crown in para. 14 of its factum recognizes that "salaries" and "wages" can be classified as "personal property" it submits that the basis of taxation is a person's "taxable" income and that such taxable income is not "personal property" but rather a "concept", that results from a number of operations. This is too fine a distinction for my liking. If wages are personal property it seems to me difficult to say that a person taxed "in respect of" wages is not being taxed in respect of personal property. It is true that certain calculations are needed in order to determine the quantum of tax but I do not think this in any way invalidates the basic proposition.

The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject-matters.

Crown counsel submits that the effect of s. 87 of the *Indian Act* is to exempt what can properly be classified as "direct taxation on property" and the judgment of Jackett C.J. in *Re Minister of National Revenue and Iroquois of Caughnawaga* (1977), 73 D.L.R. (3d) 414, [1977] 2 F.C. 269, [1977] C.T.C. 49, is cited. The question in that case was whether the employer's share of unemployment insurance premiums was payable in respect of persons employed by an Indian band at a hospital operated by the band on a reserve. It was argued [at p. 415 D.L.R., p. 270 F.C.] that the premiums were "taxation" on "property" within s. 87 of the *Indian Act*. Chief Justice Jackett held that even if the