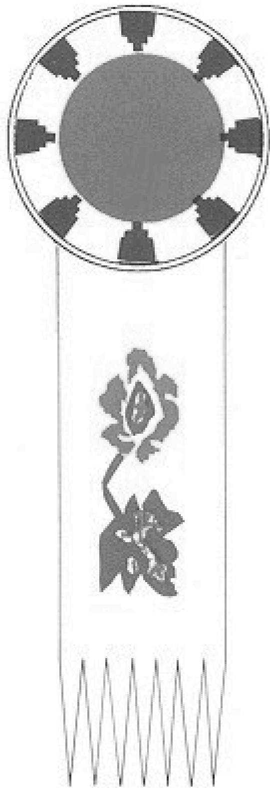
Native Women's Association of Canada



ABORIGINAL CONSTITUTIONAL DISCUSSIONS

&

TREATY RIGHTS

~ March 1987 ~

First Minster's Conference
on Aboriginal Matters

An NWAC Overview

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AN OVERVIEW OF ABORIGINAL CONSTITUTIONAL DISCUSSIONS AND TREATY ISSUES

1. Preface

In order to gain an understanding of what has occurred since 1981, and what transpired at the final constitutionally-guaranteed First Minister's Conference on Aboriginal Matters in March 1987, the Native Women's Association of Canada has prepared this overview of the process. In part II of this document, an overview of Treaty issues, both within and outside of the constitutional process, is offered.

We hope this booklet will be of assistance to those seeking a general understanding of Aboriginal and Treaty rights, and encourage its usage for educational purposes.

2. Introduction

The possibility of recognizing Aboriginal rights in the Constitution of Canada arose before the repatriation and proclamation (bringing "home") of the Constitution Act in 1982. As Canadians debated the desirability of a Charter of Rights and Freedoms and made-in-Canada Constitution, Aboriginal leaders and supporters began lobbying for a constitutional recognition of rights which heretofore were considered inherent by some or were recognized, in a very limited fashion, by the Indian Act, in treaties, or in certain court decisions.

You should know that "repatriation" was simply bringing home a British Parliamentary resolution approving of the Canadian Constitution Act, and repealing a provision of a British act which required that all Canadian constitutional changes be done in Britain. In reality, the written document called the Constitution Act which we now have, was written and developed exclusively in Canada. However, the schedule to the Constitution which lists other Constitutional documents (i.e. the Royal Proclamation of 1763) are, for the most part, British legal documents and Dominion laws.

3. The Constitution

First of all, what exactly is a constitution and what is the Canadian Constitution Act, 1982?

A Constitution is simply the fundamental law of a nation or state which may be written or unwritten, setting out the nature of government and laying the basic principles of government such as the functions of orders and levels of government (i.e. federal and provincial jurisdiction) .The parts of a constitution which are unwritten are generally referred to as "conventions". These are the usual or customary ways of doing things which have been established after years of practice.

For example, at no place in the Canadian Constitution, before or after repatriation, was the Prime Minister's role specifically mentioned. Nevertheless, she or he has certain responsibilities that have been traditionally established and are considered

constitutional conventions (modeled after British Parliamentary traditions). Constitutional conventions are just as important as written provisions although they are sometimes difficult to interpret and consequently hard to enforce.

You may remember that constitutional conventions were an important issue in 1981 when there was debate in Canada about whether or not the then Prime Minister Trudeau could "unilaterally" (or by himself) have it returned to Canada or whether the provinces had to be consulted. The matter was referred to the Supreme Court of Canada which took the view that although the Prime Minister had no explicit written obligation to consult the provinces, there was a "convention" requiring him to do so. This he then did. Whether or not there is a constitutional "convention" requiring governments to consult Aboriginal peoples on Constitutional amendments is a legal and political question which may be important at some future point if the discussions are resurrected. However, you can appreciate that despite the Constitution Act of 1982, there is a great body of conventions or traditions setting out aspects of Canadian Constitutional practice.

Apart from Conventions, the Canadian Constitution consists of the Constitution Act of 1982 which was amended by a Constitutional Amendment Proclamation in 1983. This Act is comprised of several parts, namely:

Part I	-	The Canadian Charter of Rights and Freedoms
Part II	-	Rights of the Aboriginal Peoples of Canada
Part III	-	Equalization and Regional Disparities
Part IV	-	Constitutional Conferences
Part V	-	Amending Procedure
Part VI	-	Amendment to the Constitution Act, 1867
Part VII	-	General Constitutional Provisions

The written Constitution Act is supplemented by a schedule listing other Constitutional instruments. You can review this at the very end of the Constitution Act. Several of these instruments are significant for Aboriginal peoples. For example, the Manitoba Act of 1870 which provided for certain Metis land rights which were never granted and are now the subject of a major court battle underway in Winnipeg. [Dumont]

Therefore, the Canadian Constitution, through its text, schedule, and conventions, sets out, in theory anyway, the basic principles of Canadian society and government. The preamble to the Constitution contains the statement that Canada "is founded on principles recognizing the supremacy of God and the Rule of Law". Other basic principles such as human rights guarantees and government responsibilities are outlined as you will see when reading the document.

The other main feature of the Constitution of Canada which distinguishes it from ordinary federal or provincial legislation is that it is the supreme law of Canada. In other words, nothing is legally more significant and paramount in Canadian law as is the Constitution Act of 1982. If legislation or government action should conflict with a provision of the Constitution Act it may be declared unconstitutional and a remedy given. The Constitution is, in effect, the scale against which government conduct is weighed and measured in the country.

4. Aboriginal Rights and the Constitution

It is worth noting that any Constitution is in reality only as meaningful and respectful of human rights as is the government and citizens of the day. This point is especially relevant to Aboriginal rights. It should be kept in mind that Aboriginal rights in the Constitution will always be in reality only as significant and useful as governments and the Canadian legal system believe they should be.

When Constitutional repatriation was being discussed in 1981, the Federal government included as part of the draft constitutional accord, a provision for the rights of Aboriginal peoples. The provision recognizing and affirming Aboriginal and Treaty rights was withdrawn in the November 1981 Constitutional Accord but was later reinstated with the addition of the word "existing", following an intense lobby by Aboriginal peoples.

The part of the Accord restoring Aboriginal rights in the Constitution became Part II of the eventual Act. After the 1983 amendment, it now reads as follows:

Section 35:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Metis peoples of Canada.
(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
(4) Notwithstanding any other provision of this act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

5. The Process for Discussion

The initial Constitutional Agreement also provided for, in what became section 37.1 of the Act,[1] a process, with the participation of Aboriginal peoples, to identify and define Aboriginal rights. You may recall that during repatriation there was an intense lobby effort and court action underway in Britain to clarify the crown's responsibility for Aboriginal people and the question of whether the authority for “Indians” in the British North America Act could be transferred to the Government of Canada and whether the responsibility for treaties could similarly be transferred. The English Court of Appeal and the British Parliament, after considerable debate and review, were of the opinion that all responsibility for "Indians" could be transferred to the Canadian Crown and that the jurisdiction for treaties was not a problem because the Court took the view that these

[1] *Section 37.1 States:*

(1) In addition to the conference convened in March, 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

"pre-Confederation" treaties were not agreements between sovereign nations but merely legal contracts between two parties.

6. Participants

Further to the constitutional commitment to discuss Aboriginal rights, a discussion process was established and four First Minister's Conferences were held (in 1982, 1983, 1985, and 1987). The final constitutional conference took place on March 26 and 27, 1987. These meetings spurned a bureaucracy of officials who met to prepare for Ministerial level meetings and Ministers who, in turn, prepared for the meetings of First Ministers. The First Ministers of Canada are the Prime Minister and the Premiers. The Territorial Governments representatives also participated in the process.

At each of the three levels of meetings (officials, ministerial, and first ministers) there were two seats provided for each government's representative and two seats for each of the four national Aboriginal organizations who participated: a total of 34 seats around the table. The Federal government chaired the discussions and the meetings were organized and documentation was assembled through the Office of Aboriginal Constitutional Affairs (OACA) which was set up as a limb of the Office on Federal-Provincial Relations.

7. Aboriginal Representation

The four national Aboriginal organizations invited to participate in Constitutional discussions were:

(i) the National Indian Brotherhood - Assembly of First Nations (AFN) which is essentially the organization of Indian Act bands and Chiefs;

(ii) the Inuit Committee on National Issues (ICNI)[2] which is the spokesbody for an alliance of Inuit organizations, including the Inuit Tapirisat of Canada;

(iii) the Metis National Council which represents the descendants of the historic Metis nation of the Red River Settlement as well as some "non-status Indians"; and

(iv) the Native Council of Canada which represents "non-status Indians", some Metis (persons of mixed - ancestry), and recently extended its membership to "Status Indians" residing off the reserve.

8. Native Women's Association of Canada's Participation

The Native Women's Association of Canada was not a recognized participant in the Constitutional discussion process. In other words, we did not have a seat specifically for us. We did participate initially through the Native Council of Canada (until 1984) and afterwards through the Assembly of First Nations. The President of the Native Women's Association of Canada spoke on several occasions, however, this transpired through another Aboriginal organization's seat (either NCC or AFN). For the 1985 First Minister's Conference, a request was made to the Native Council of Canada and the Metis

[2] *In 1991, the Inuit are represented by Inuit Tapirisat of Canada.*

National Council for positions in their delegations (along with the Assembly of First Nations) .The Native Council of Canada and the Metis National Council were unwilling to allocate positions in their delegations to the Native Women's Association of Canada. The Assembly of First Nations did offer a position in their delegation. As well, the Assembly of First Nations provided one position in their delegation for the President of the Native Women's Association of Canada at the 1987 First Minster's Conference.

9. Quebec's Role in Process

The Government of Quebec participated in the Constitutional discussions on Aboriginal matters in a very limited way. The Government of Quebec was not pleased with the tact that the 1981 Constitutional Accord failed to recognize their desire to have a special right to veto any future amendment with which they did not agree.

Therefore, Quebec has largely rejected the Constitution (except in the economic areas) and was mostly an observer-monitor of the Aboriginal discussion process. This greatly frustrated constitutional discussions because Quebec's involvement is vital in attaining an amendment. By withholding their participation, the support of approximately 20 percent of the population of Canada was lost. The Premier of Quebec was noticeably absent from the 1987 First Minister's Conference on Aboriginal Rights.

Quebec's refusal to participate apparently paid off in the end for them. Just one month after the First Minister's Conference on Aboriginal Rights, the First Ministers met again, however, this time it was to consider Quebec's constitutional concerns.

At this meeting, a constitutional accord was signed (called the Meech Lake Accord) recognizing Quebec as a distinct cultural s9ciety and basically granting them special standing in relation to future constitutional amendments, the Supreme Court and immigration matters.

10. The Amending Formula

What is required to amend or change the constitution?

The Constitution Act of 1982 outlines, in Part V, several different amending procedures. The relevant one, is section 38: that is the general amending procedure. This provision requires the assent or agreement (a resolution of both Houses of Parliament and/or the legislature) of the Federal Parliament and two-thirds of the provinces representing 50 percent of the population. To amend the Constitution to recognize the Aboriginal right of self-government, the support of two-thirds of the provinces (seven) representing 50% of the Canadian population and the support of the Federal government is therefore required. Once the authority for an amendment is given (you may recall the events surrounding the 1983 amendment on, among other things, sexual equality) and the formal amendment is accomplished by a "proclamation issued by the Governor General under the Great Seal of Canada". The whole process must be completed within three years to be valid.

Given the requirements for an amendment, it is obvious why the Province of Quebec's refusal to participate in the discussions on Aboriginal matters was fatal to an amendment.

11. Key Issues in the Discussions

You should have, at this point, an understanding of what the Canadian Constitution is and the process which had been underway since 1982 to identify and define Aboriginal rights. In this second part of the discussion paper, an overview of the issues which were at stake in the discussions and an overview of the 1987 First Minister's Conference is offered.

This information is set out in a general way to acquaint you with the issues and problems. By way of introduction, a brief discussion on the significance of the constitutional forum as a method to identify and define Aboriginal rights follows:

a) What Did it Mean to Discuss our Rights?

At the Constitutional discussion table, the Aboriginal representatives were invited guest they were not voting participants. The governments present were under no obligation whatsoever to conclude agreements on self-government or any other issue. Furthermore, the Aboriginal spokesperson present were not viewed as representatives of sovereign peoples or nations but as representatives of a segment of the Canadian population seeking to clarify their rights and relationship with Canada. Sovereignty or “nationhood” was not an item for discussion. Therefore, the forum was one that was limited to issues over which the levels of Canadian government had jurisdiction or authority and had a willingness or desire to negotiate.

In this context what could be accomplished through Constitutional discussion on Aboriginal rights in Canada either past or present? The optimists of the process argued that anything is better than nothing. Or, by outlining even some limited Aboriginal rights in the Constitution, we would be further ahead than with the current vague Constitutional provisions and therefore enjoy a wider respect for promotion of Aboriginal and treaty rights.

The Canadian governments, in as much as they indicated a willingness to identify Aboriginal rights in the Constitution, were only willing to define them very narrowly - so narrowly in fact that no agreement on even the concept of self-government was possible at the 1987 First Minister's Conference. Governments lacked the political will to place self-government in the Canadian constitution. Nevertheless, the broader right to self-determination, or the international right of “peoples” to freely determine their own political, legal, social and cultural status, means that each "people" or nation in the territory known as Canada, theoretically at least, has a right to decide what its relationship, if any, will be with the Canadian government. This right is unaffected by the Canadian constitutional failure on Aboriginal rights.

b) Agenda Items

The central item which was discussed in the constitutional forum is "self-government". Flowing from this agenda item were a variety of important related issues including the following:

- **i.** land rights
- **ii.** jurisdiction of Aboriginal governments over:
  - education
  - culture
  - child welfare
  - legal system
  - economic development
  - human rights
- **iii.** a process for negotiating self-government agreements
- **iv.** the financing of Aboriginal governments
- **v.** sexual equality in the exercise of all Aboriginal and treaty rights and the right to self-government

c) Self-Government

The issue of the right of self-government was the focus of Constitutional discussions since the 1983 First Minister's Conference. Governments, reluctantly in some cases, came to the realization that self-government was the key issue for resolution in the talks. Initially, they cautioned the notion or idea of self-government and consistently asked "what does it mean?"

Just prior to the 1987 First Minister's Conference, a serious difference of opinion surfaced between the Aboriginal perspective on what the right meant and how it should be protected and the perspective of most governments. This difference in approach stemmed from the fact that all Aboriginal organizations were apparently seeking a clear independent or "free-standing" recognition of the right of self-government.[3]

Free-standing means that the right must be independently enforceable in a court on its own and not be dependent or "contingent" upon individual agreements to be negotiated with each community in the future. Additionally, the Aboriginal approach envisaged a process which would be set out in the Constitution establishing a general framework and commitment to negotiate specific agreements with Aboriginal peoples to settle the various forms which self-government would ultimately take.

There was never enough government support for a complete acceptance of the Aboriginal position to make it a possible amendment at the 1987 First Minister's Conference. Nevertheless, the three Aboriginal Summits leading up to the 1987 First

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[3] *The Aboriginal approach was not always a unified one and understandable so given the divergent histories and cultures which each organization and its constituents represents.*
However, in a letter to the First Ministers dated, February 10, 1987, the leaders of all four of the national Aboriginal organizations wrote: There was unprecedented consensus among us to pursue explicit Constitutional recognition to the right of Aboriginal peoples to self-government.

Minister's Conference, demonstrated a fairly unified approach which was maintained throughout the final discussions in spite of the unlikelihood of success.

Meanwhile, the Federal government's approach, outlined in their “rolling” draft amendment before the 1987 meeting,[4] recognized self-government only as defined by future negotiated agreements which would be constitutionally protected only after the negotiations were completed and approved by the parties. No free-standing right to self-government would be acknowledged or recognized only a process to negotiate agreements. As unacceptable as the Aboriginal proposal was to governments, the Federal proposal was openly rejected by the four Aboriginal organizations. Indeed, it enjoyed a poor reception even among a few of the provincial governments.

d) Compromise Proposal

A compromise proposal was tabled at a ministerial meeting just prior to the 1987 First Minister's Conference by the province of Nova Scotia. This proposal sought to accommodate both a limited inherent right to self-government and a contingent right to negotiate self-government in specific agreements. The Nova Scotia proposal was never discussed at the 1987 First Minister's Conference, despite the express desire to discuss it on the part of all of the Aboriginal organizations.

12. The 1987 First Minister’s Conference

The first day of the meeting closed with an assurance from the Prime Minister that his officials would draft an amendment for consideration for the next day.

The following morning, the federal draft was presented, privately, to the Aboriginal organizations. When the meeting opened, perfunctory remarks were exchanged and the meeting was quickly adjourned to an in camera session where all views could be aired away from the television cameras.

The in camera meeting lasted several hours. When the meeting was called back to order, the Prime Minster stated that no consensus was reached on the federal draft and no agreement could be reached in the discussion. The process failed. Closing remarks were then given by the governments and, finally, by the spokespersons for the Aboriginal organizations.

George Erasmus, the National Chief speaking on behalf of the Assembly of First Nations, placed the responsibility for the failure of the talks with the governments. He stated:

> *We were prepared to come here, we thought, with a realistic position. Some people out there try to paint us as unrealistic. We do not agree that we are. We came here with modest proposals, sincere proposals, and thought that you would recognize that we continue to have an existing right (to self-government).*

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[4] *Which is similar to a Federal-Saskatchewan draft which you may recall was tabled at the 1985 First Minister’s Conference and which was rejected then by some of the Aboriginal organizations (the Assembly of First Nations and the Inuit Committee on National Issues).*

The discussions closed without any commitment that they would be reopened in the future.

13. What Does The Constitution Project?

Given that the constitution discussion process failed to produce an amendment clarifying and protecting Aboriginal rights, just what is now constitutionally protected?

a) Right to Self-Government

Aboriginal organizations, and foremost, the Assembly of First Nations, have always maintained that the right to self-government, as recognized in the Royal Proclamation of 1763, and elsewhere, is an existing right within section 35(1) although it is not explicitly spelled out.

b) The Right to Aboriginal Title

c) Other Aboriginal Rights

Aboriginal rights to hunt, trap, fish, and gather food may also enjoy recognition in the Canadian Constitution. In 1986, the British Columbia Court of Appeal in the “Sparrow Case” held that section 35 (1) should be liberally interpreted and that Aboriginal rights can be enforced before they are identifiable and definable. The Court held that existing Aboriginal rights cannot be extinguished by the Federal government, but can be regulated. Some recent cases have recognized the right as paramount to regulation.

Therefore, if you can identify and demonstrate your Aboriginal right to, for example, fish, the Constitution may protect you from encroachments on that right.

d) Treaty Rights

The recognition of Treaty Rights in the Canadian constitution is an important issue which will be addressed more thoroughly in the next part of this booklet.

Treaty Rights
Part II

14. Treaty Issues in the Constitutional Process

Throughout the five year constitutional process, much of the d1scussion centred around the right of self-government as an inherent Aboriginal right. But, what of Treaties, and Treaty rights? After all, the Constitutional Act of 1982, in section 35 proclaims the recognition and affirmation of “existing aboriginal and Treaty Rights”.

In the weeks and months immediately preceding the final First Minister's Conference on March 26 and 27, 1987, there was lengthy discussion about treaties, but only as a means or process of arriving at self-government arrangements. The Assembly of First Nations reminded the Federal Government and the Provincial Governments that much of Canada's history with respect to relations with ‘Indians’ and the gradual settlement of the country came about as a result of the treaty-making process. The point that was made by the Assembly of First Nations was that there was over 250 years of treaty-making history that had to be acknowledged in the present-day constitutional discussions and that this history could not and should not be conveniently ignored.

In essence, the message which was delivered urged the Federal Government to utilize this treaty-making process with Aboriginal peoples on the basis that:

(1) treaties are essentially of a bilateral nature between two parties as are relations between Aboriginal peoples and Canada (as represented by one federal government and not by eleven provinces);

(2) that the utilization of the treaty-making process by implication recognizes that each party is a self-governing collectivity for a community of peoples; and

(3) that a, treaty is a document or agreement which would establish with precision agreements concerning land and boundaries, the nature and list of powers exercisable by the Aboriginal and non-Aboriginal governments within and outside of the boundaries, the fiscal or financial arrangements between the Aboriginal peoples and non-Aboriginal governments, etc.

It may have appeared that treaties received a lot of consideration during the constitutional discussions. In fact, the opposite is closer to the truth. Treaties, as they presently exist in Canada, did not receive consideration as was being demanded by treaty First Nations from across the country.

You may recall that a number of First Nations communities from across the country, most of whom are treaty bands, boycotted or opposed the First Minister's Conference process. The reasons for the boycott or opposition generally stemmed from reasons that were linked to the treaties issue. Some communities took the position that treaties had not received proper attention and respect that they deserved and furthermore, that the parties involved in the process could not claim the ability to speak on treaties because of a lack of representivity. Other treaty groups took the position that because treaties are bilateral that the First Minister's Conference process was an inappropriate

and improper forum to discuss treaties and treaty rights because the provinces were active participants and had a vote as to any arrangement or amendment that might have arisen.

In any event, the treaties issue had always been on the constitutional agenda dating back to the 1983 accord and more specifically the 1987 First Minister's Conference agenda consisted of two items: namely, self-government and treaties. The discussions never got beyond the first item so the treaties item was not considered.

In the months preceding the First Minister's Conference the Assembly of First Nations moved toward a treaty specific position which would be advanced and discussed at the First Minister's Conference. The development of the treaties position was done largely through the ‘Treaty Rights Unit’ which, in turn, did much of their work based on the input positions expressed by various treaty groups in Manitoba, Ontario and Nova Scotia.

The treaty position took the form of a constitutional amendment that would have committed the federal government to establish a treaty policy and process based on re-examining the existing treaties with a view to renovation, rectifying, modernizing, clarifying or implementing treaties. The goal of re-examination of treaties was to establish the spirit and intent of the treaties as originally understood. In establishing the spirit and intent, it could have arguably been established that treaties, by implication, recognized the self-governing status of each party to the treaty and that lands and resources were meant to be shared where both parties would have benefited from the development of those resources. Special consideration of the provincial governments was provided insofar as their role and participation would be limited to those matters within their jurisdiction and that nothing within the amendment or process would result in a change as to the fundamental nature of treaty-making as between Canada and Aboriginal peoples.

As the treaty position was being developed, questions arose as to the relationship between Aboriginal rights and treaty rights and the consistency of positions which were being advanced on each agenda item. Could a treaty position be reconciled with a self-government position and, in turn, accommodate both treaty and non-treaty Aboriginal peoples?

In the end the integration of the Aboriginal self-government amendment and treaty-specific process was not cause for concern. The Assembly of First Nations constitutional position, as endorsed by treaty and non-treaty communities’ was that the priority had to be the securing of an amendment as to the right of self-government and the securing of a complementary section as to the different processes that could be utilized by the Aboriginal people in securing constitutional agreements either by: (1) new treaty; (2) revisiting and amending existing treaties based on spirit and intent; or (3) land claims agreements.

As a consequence of the failure to reach agreement on the self- government amendment, the First Minister's Conference ended without discussion on the treaties agenda item. Presumably, had the conference parties agreed to move on to the treaties discussion after failure on the self-government amendment, the discussions on this item would have been minimal for several reasons: (1) the Assembly of First Nations would

have stated that their constitutional position on self-government and treaties was a package deal and that the two items were not severable; (2) the Federal government's draft did not address the treaty-specific process and they would have hardly been in a position to offer concrete proposals given the problem of provincial support; and (3) the other Aboriginal representative would have been marginal participants.

For information purposes, and to assist those persons interested in understanding and sorting out the complexities of the relationship between treaty and Aboriginal rights an explanation from a treaty perspective follows:

15. Treaties and Broader Treaty Rights Issues

The word “treaty” is one that has international connotations, in the sense that it is a label that has been used when referring to documents or instruments that establish agreements between two or more independent, sovereign nations or states. A sovereign nation or collective possesses the power to enter into treaties.

In looking back on the early history of Canada prior to colonization and settlement by Europeans, there is proof positive of the fact that Aboriginal peoples inhabited and lived off these lands. Aboriginal peoples were organized societies with distinct languages, cultures, territories, and laws. Naturally, there had to have been some form of government that prescribed the inter-activities between individuals, families, and other tribes.

Basically, we possessed all the characteristics of an independent and sovereign nation. The sovereignty or nationhood of Aboriginal peoples was not one that encompassed all of the different tribes as one, rather each tribal group possessed its own independent and sovereign status.

The early process was one that was utilized by the British Crown and many different and distinct tribes across the country. There can be no doubt that the original status of the treaty was that of international agreements as between the British Crown and the several distinct and independent tribes.

What has occurred over the course of 200 years, is the development by the British and Canadian legal system of a domestic interpretation of the word "treaty" as it applies to Aboriginal people. The legal system has taken an international concept and devised another one that is only applied to First Nations treaties and is used to deny First Nations their rightful international status.

We have seen similar developments having taken place in the united states where the legal system regards the tribes as “sovereign”. The word “sovereignty” also has international connotations in that it is a word used to describe an independent nation or state in the international community. The word sovereignty has been used to describe the character of the tribes in the United States but, only in the sense that they are recognized as possessing some exclusive powers to govern themselves and that those powers do not flow from either the federal or state governments. However, they are not recognized as nations in the international community.

The end result is that there is an application of different standards of interpretation to international terms and concepts when they are applied to Aboriginal peoples. Indian Treaties in Canada are not considered as international treaties nor are they merely regarded as contracts. It has been suggested that Indian treaties are of a special class or of a special nature and not easily classified within existing legal standards-treaties or contracts.

a) Aboriginal and Treaty Rights

It is somewhat inappropriate to speak of treaty rights as those rights that are exclusive to treaty 'Indians' and Aboriginal rights as those rights which are exclusive to non treaty Indians. This perpetuates a fiction that there is a substantial distinction between the two which may damage relations among all Aboriginal peoples across the country and sustain the artificial distinction between treaty and Aboriginal rights which has caused division in the past.

There is a difference, but only of a minor and technical nature. Aboriginal rights are shared by all tribes across the country. Aboriginal rights are those rights that inhere in a collectivity or community of peoples by virtue of their status as the original inhabitants of a specific territory. Where one tribes' territorial boundaries ended another tribes' boundaries began. By virtue of the fact that tribes exist in all territories and regions of this country, it is arguable that Aboriginal title exists or have existed on all lands in Canada.

An Aboriginal right flows to a collectivity of people by virtue of their relationship to the land that they occupy. If a collectivity of peoples occupy a specific land and territorial base, where one did not exist before, then by virtue of their occupation and use of the land, the collectivity acquires an interest as being the original interest. The Indians who existed on the lands prior to the European colonists and settlers were the original inhabitants and possessed the original interest.

An Aboriginal or original interest is transferable either through passage from generation to generation as an inheritance or through a process whereby the collectivity as a whole, relinquishes by consent all or part of their original or Aboriginal interest to another collectivity.

Once an Aboriginal interest is relinquished then the succeeding holder of the interest and the nature of that interest is as a personal or property interest and the Aboriginal or original nature of the interest as to the land ceases to exist or is extinguished. An Aboriginal interest may also cease to exist if the original collectivity that held the interest ceases to exist (i.e. no surviving members of the original collectivity remain).

What kind of rights may flow from an Aboriginal or original interest? In answering this question it is important to understand and remember that the Aboriginal interest is one that inheres to a collectivity of people. So individual rights are secondary to an Aboriginal interest, because it is only those rights and interests that are possessed by the collectivity as a whole that then flow to individuals as being members of the collectivity. If the collectivity relinquishes all or part of the Aboriginal interest it affects all

members equally, an individual may not claim a continuing and complete Aboriginal interest because he or she may not have specifically participated in or consented to relinquishing all or part of the Aboriginal interest.

The nature of the Aboriginal interest may be explained in this manner: as to the land the original interest entitles the collectivity to exclusive occupancy and use -the collectivity has the right to determine who can occupy their lands and territories - the collectivity can also determine what use they wish to make of their land, either for hunting, fishing, trapping or harvesting activities, development and use of the resources (i.e. harvesting, timber, mining and extracting minerals) - and the extent of the territorial interest is determined by the habits and activities of the collectivity, namely, the distances and areas where members of the collectivity have engaged in their traditional activities, like hunting, fishing, trapping and harvesting, -these may roughly be called land and economic rights. In order for the collectivity to function as a cohesive, co-operative and organized society, or tribe, as opposed to a group or collection of individuals, some form of government or governing body is necessary. It would make rules or customs to determine who could be a member of the tribe or who could use and occupy the tribal lands, and what use could be made of the lands. It would determine who speaks on behalf of and represents the entire collectivity when dealing with outside individuals or groups.

However formal or informal this governing or decision-making body is, it still is a system or form of government. This concept is the right of self-government and right to self-determination which is an inherent right because the members of the collectivity have agreed to devise their own system and agreed to abide and live under the system. This right of self-government may be lost or given up by the collectivity. It may be lost in a situation where a tribe is conquered in war. However, absent a situation where it is lost or given up, the right to self-government continues to exist for succeeding generations who may change rules or customs and methods of decision-making, but not the fundamental principle of being able to make the rules, customs or decisions on behalf of the members of the tribe.

Cultural rights such as language. ceremonial practises or worship, marriage, adoption are Aboriginal rights because the traditions arid practises of the tribe are those that were devised and used by the collectivity and their origins are internal. Social rights such as education and health care are Aboriginal rights in the sense that in providing education to members of the tribe, the content and nature of education was according to the customs and traditions of the tribe and the means by which an individual was to survive and be self-sufficient depending on the primary activity of the tribe (either as hunters, harvesters and traders or as agriculturalists). As to health care, the tribe was dependent upon nature for medicine and remedies for curing illness. When we speak of education and health care rights today, the implication is that by virtue of the limited dependency on the lands and environment brought on by the ever increasing settlement and pollution of the lands and environment, the self-sufficiency and self-reliance of the tribe has been greatly undermined and affected by the colonists and settlers whom they agreed to share with and who took the lion's share of the benefits and wealth of the lands and resources to the exclusion of the tribe or collectivity that was dependent on it. In that sense, Aboriginal people or tribes have been deprived of the natural wealth of land and now seek compensation that will ensure that the tribe will survive and cope

with today's society. So it is a matter of compensation for the loss, reliance and dependency on the land that is being expressed when speaking of the right to education and health care.

Treaty rights are those items and provisions that specifically appear within the text or body of a treaty document or those items that were specifically discussed and agreed to during the course of negotiations of a treaty, but may not be specifically mentioned in the treaty document. The rights that appear or are part of a treaty are those pre-existing Aboriginal rights such as hunting, fishing, trapping, harvesting, medicine, education and annuities (based on the benefits accruing from the natural wealth of the land). It is the responsibility of both parties to observe, respect, and acknowledge their treaty obligations.

Items not appearing within the treaty continue to exist as Aboriginal rights. So the non-appearance or recognition of the right of self-government, language, ceremony, education, or health care does not mean that they have been relinquished or taken away.

If the parties saw the necessity of putting something into a treaty in all likelihood they would have, as is the case today with the modern day treaty-making process called land claims agreements which contain many specific provisions. Today's reality is that you have to be very certain given that the situation which people have to cope with is considerably more complex and technical.

The need to reconsider the treaties, as advocated by various tribes, is apparent. However, the reason to re-examine the treaties is not with a view to altering the foundation upon which they were originally entered into, namely, that each party recognized and respected the others government and ability to enter into treaty relations. Rather, the complexities as to government jurisdictions on specific territories and the need to deal with economic realities is the basis on which the re-examination is being advocated.

In the course of this review and explanation of the relationship between Treaty and Aboriginal rights, it is perhaps appropriate to make mention of the status of provisions that appear in government legislation like the Indian Act. Those provisions that appear such as tax exemptions on purchasing of consumer goods or educational assistance are not rights per se as in the context of section 35 of the Constitution Act, 1982. An act or law of the Government of Canada is something which they can pass or repeal at their whim. On the other hand treaty and Aboriginal rights are constitutionally-protected and may not be altered or repealed without some form of consent being provided by Aboriginal people.

16. Status of Treaties, Treaty Rights and Aboriginal Rights

We began this paper by offering a review and explanation of the Constitutional process and much of the first section on treaties focused on the efforts made to get precise and specific amendments to the Constitution Act, 1982. The question which inevitably arises is “why undergo this exercise of Constitutional amendment, if treaty and Aboriginal rights and all that entails is affirmed under section 35”? The simple and short answer to that question is that the theory as to treaty and Aboriginal rights is not what is in reality practised and recognized by the governments and legal systems within Canada.

When the treaty and Aboriginal rights provision were included in the Constitution Act, 1982, it represented a renewal of hope on the part of Aboriginal peoples that the Canadian governments would undertake to re-affirm Aboriginal and Crown relations as had been established throughout the early history of Canada. It was felt that historic duties and obligations would be acknowledged and respected. Moreover, Aboriginal peoples recognized and understood that “constitutional rights” including treaty and Aboriginal rights have superior legal status. The belief was that once treaty and Aboriginal rights were recognized in the Constitution no longer could a Government legislation violate or impede treaty and Aboriginal rights. Neither could that government's policy be used to deny, limit or interfere with Aboriginal self-government.

Through the constitutional discussion process it was hoped that the Aboriginal peoples and governments would agree to the nature and quality of those rights.

The alternative to the constitutional process is litigation or the court process. In this regard Aboriginal peoples have to bear the burden of proving that Aboriginal rights exist and are now protected under section 35. The litigation process is not an attractive alternative for many reasons: (i) in any litigation you have a fifty-fifty prospect of winning or losing; (ii) you are leaving your destiny with the Canadian judiciary and legal system, and (iii) there is already a legal history which does not favour Aboriginal arguments on the meaning of treaty and Aboriginal rights.

17. Conclusion

It is our hope that this booklet has raised many new issues for you to consider and pursue further. Aboriginal and treaty rights, including an understanding of exactly what transpired at the 1987 First Minister's Conference on Aboriginal rights, should be the concern of both Aboriginal and non-Aboriginal people alike. It is only through a greater understanding of our history, customs, and culture that Aboriginal and treaty rights will enjoy wider understanding, recognition and respect.