

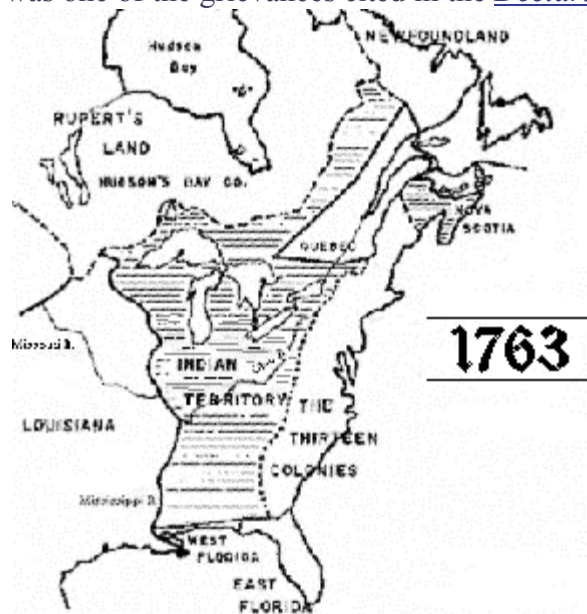
Introduction to Aboriginal Law in Canada

Royal Proclamation of October 7, 1763

This document has been called the "Magna Carta of Indian Rights" and has been held by the courts to have "the force of a statute which has never been repealed". It issued after the *Treaty of Paris* ended the Seven Years War and was intended to organize the governments of Britain's new acquisitions on the mainland of North America. It also issued after Pontiac's Rebellion had begun in the summer of 1763 and was, in part, intended to end "The Great Frauds and Abuses" which had marked the dealings with Indians in respect of their lands west of the Appalachian height of land, especially in the Ohio Valley.

[T]he several Nations or Tribes of Indians with whom we are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them as their Hunting Grounds.

The area described as "Indian Territory" in the map below is a very literal, and not necessarily accurate, depiction of the lands reserved for the Indians by the Royal Proclamation. Abuses continued, however, and in order to compel compliance the territory of Quebec was extended by the The Quebec Act, 1774 down to the Ohio River near Pittsburgh, then downstream to the confluence with the Mississippi and north again to the territory of the Hudson's Bay Company -- Rupert's Land -- at a point then assumed to be southwest of the Lake of the Woods. This measure, however, was both unpopular and unsuccessful. The American Revolution commenced in 1776 and the extension of Quebec's boundaries was one of the grievances cited in the Declaration of Independence.



The Growth of Canada

Two provinces were created in the aftermath of the Revolution -- Upper Canada and New Brunswick -- principally to accommodate loyalist and soldier settlement. Tyendinaga Township, on the Bay of Quinte, and the Grand River Reserve -- six miles on either side of the river from its mouth on Lake Erie to its source above Guelph -- were settled by people of the Six Nations who relocated from upstate New York. Many Iroquois claims are based upon the series of transactions by which these reserves shrank to their present size. Others relate to maladministration of their considerable trust funds over the years.

The new provinces, together with their parent colonies of Quebec and Nova Scotia, were the four provinces which entered Confederation in 1867. Only in Ontario, however, had there been a consistent pattern of purchasing Indian lands by Treaty prior to Confederation. The Robinson Treaties of 1850, in fact, were models for the subsequent "numbered Treaties" which extended from the Great Lakes watershed north to the 60th parallel, into the Mackenzie basin and west to the Continental Divide. Recognizing the desirability of protecting Indian rights from adverse local interests, jurisdiction over Indians was entrusted to the federal government, but a series of court decisions diminished that authority and Canada's powers to administer Indian lands. Indian powers of self-determination and rights to lands and resources were also greatly diminished. For much of our history, it has been said, our constitutional law was not concerned about whether a piece of legislation might visit vicious, corrupt or hurtful acts upon citizens, but whether it was Parliament or a provincial legislature that had the power to enact it.

Canada quickly grew beyond the boundaries of the original four provinces. In 1868, Rupert's Land -- the watershed originally granted to the Hudson's Bay Company two centuries earlier -- was purchased and added to Canada. Adjacent islands and territories were added in 1886. Manitoba was created out of part of Rupert's Land in 1870, with Alberta and Saskatchewan following in 1905. Other parts were added and Quebec in 1896, and to Ontario, Quebec and Manitoba in 1912. Yukon and the Northwest Territories remain largely under federal control although they have their own legislatures. The NWT is to be divided pursuant to the [*Nunavut Agreement*](#) of 1993 which will, when implemented, create two new political units. In the east, Prince Edward Island joined Confederation in 1873; Newfoundland (and Labrador) did not follow suit until 1949. It was the union with British Columbia in 1871, conditional upon early completion of a transcontinental railroad, that prompted a new round of Treaty negotiations with Indian nations.

Indian Treaties

Canada knew something that First Nations did not. The sale of Rupert's Land and the transcontinental railway both involved promises of what were still Aboriginal lands to the Hudson's Bay Company and the railway developers. The railroad itself would open these up for development and sale in turn to settlers. The Treaty process, which successfully implemented in Ontario though little used elsewhere, was extended into Rupert's Land after 1870 to make open the route west and gradually expanded northward as non-Aboriginal needs dictated. These were the "numbered" Treaties: Treaties One through Eleven.

Patterned to great extent after the Robinson Treaties of 1850, the post-Confederation numbered Treaties were very similar to each other in taking cessions of Aboriginal title, promising reserves in proportion to population -- generally one square mile per family of five -- small annuities, the continued exercise of hunting, fishing and trapping rights, ammunition, fishing twine, farm implements and other goods and services. The promise of schools on reserve in many Treaties is seen by First Nations as a commitment to provide education for their children; the promise of a medicine chest in one Treaty has been held by the courts to be a promise of health services. Canada does provide these programs, although it generally denies that there is a Treaty obligation to do so. First Nations also argue for a "spirit and intent" interpretation of the Treaty relationship that implies greater access to, and control over, lands and resources and a general tax exemption; Canada and the provinces argue for a black-letter interpretation of the Treaty documents, denying any commitments beyond the express wording set out within their four corners.

In fact, even that wording was ignored when exigent to do so. The promise of reserve lands was in a number of instances not fulfilled; those that were set apart were coveted and large areas carved out from them, sometimes with the consent of the communities as dictated by the *Indian Act*, sometimes unilaterally and even without compensation; reserve lands that could, under the Treaties, be expropriated by Canada for its own purposes became vulnerable to any municipality or corporation with expropriation powers. Railroad companies expropriated reserve lands freely, sometimes on speculation, and often split communities down the middle by pushing through the main lines.

Canada virtually abandoned its Treaty commitments to ensure First Nations' harvesting rights. In Ontario, for example, all enforcement was left to the provincial government and Canada has never intervened in any court case there to support Treaty rights. In the prairie provinces, the Supreme Court found that First Nations' commercial harvesting rights were extinguished when Canada negotiated the 1930 Natural Resources Transfer Agreements (*Constitution Act, 1930*) without their participation or consent: *Horseman v. The Queen*. Not until 1951 was a provision included in the *Indian Act* to prevent provincial encroachment on Treaty rights -- *R. v. Taylor and Williams* -- but this did not stop many provinces from enforcing anyway and it did not protect Treaty rights from federal regulation of fisheries and migratory birds: *R. v. Derriksan*, *R. v. George*. In one case, the Supreme Court found that a Treaty right had been bargained away by Canada before the Treaty had even been signed: *R. v. Sikyea*.

Somewhat late in the day -- and only after section 35 of the *Constitution Act, 1982* was in place -- the Court came to the view that overly strict interpretation of Treaties would lead to continued injustice. In its 1983 decision in *Nowegijick v. The Queen*, and again in *Simon v. The Queen* in 1985, the Court adopted the following rule of construction:

"treaties and statutes dealing with Indians should be given a fair, large and liberal construction and doubtful expressions resolved in favour of the Indians, in the sense in which they would be naturally understood by the Indians."

Subsequent decisions have substantially eroded that rule. In *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, the majority of the Court observed that, in interpreting statutes, the intention of Parliament is the determining factor, not the views of Indians whose rights might be affected. And, with respect to Treaties, the Court held in *Howard v. The Queen*, [1994] 2 S.C.R. 299, that the rule does not apply in circumstances where Indians are educated and urbanized, speaking in that case of a rural Ontario reserve in 1923 where the residents had a proposed Treaty interpreted to them.

Treaty law suffers from repeated judicial pronouncements that Treaties are *sui generis*: unique in law. This is very much a two-edged sword (the implement that the statue of Justice bears outside the Supreme Court Building instead of the scales). On the one hand, the implicit flexibility has enabled the courts to recognize incomplete Treaty documents and documents that do not appear on their face to be Treaties as giving rise to protected rights: *R. v. White and Bob*, *R. v. Sioui*. On the other hand, the Court has seen itself free to discard any formalities in the Treaty process: the Teme-Augama Anishnawbe were found to have voluntarily ceded their Aboriginal title by adhesion to a Treaty although there had been no meeting to negotiate an adhesion and there was no adhesion document: *A.G. (Ontario) v. Bear Island Foundation*. In *Howard v. The Queen*, the Treaty negotiated by the government commissioners was not the Treaty they had been authorized to negotiate by the Governor in Council and was not ratified by the Governor in Council, but it was held to have extinguished pre-existing Treaty rights. In *Blueberry River Indian Band v. The Queen*, the majority of the Court held that, in the analogous situation of a surrender of reserve lands, it would give effect to the intention of the parties and ignore technical or procedural defects. Intention is an issue of fact which, once determined by a trial court, is not subject to review on appeal unless that finding is egregious.

Treaties in Canada, thanks to section 35 of the *Constitution Act, 1982* now have greater legal protection than ever before, and modern land claims settlements are Treaties for this purpose. At the same time Treaty rights are not immune from legal threat. The historical Treaty process was heavily weighted in favour of government, but Canadian courts have never set aside a Treaty or surrender on that ground. The disregard of formalities in the Treaty process has led to some equivocal documents being recognized as Treaties, but it has resulted in more rights on balance being lost than gained. Such flexibility carries a hefty price tag.

Aboriginal Rights

If Treaty rights were not always secure under Canadian law, Aboriginal rights were virtually non-existent. They could be regulated by any level of government: *R. v. Kruger and Manuel*. Until 1982, there was no recourse and, until 1990, no one knew what recourse there was: *Sparrow v. The Queen*.

Aboriginal title was also tenuous. Knowing that roughly half of Canada was not within any Treaty area, the courts were loath to acknowledge Aboriginal title unless, as part of the decision, there was also a finding that it had been extinguished. It might be said that

the courts favour the view that Aboriginal title is a political issue more than a legal one. Certainly it is a political issue too, with important implications in British Columbia, where Aboriginal title still exists in much of the province, and in Quebec and the Territories where modern land claims settlements have been negotiated on the basis of unextinguished Aboriginal title. Aboriginal title claims have also been advanced in Newfoundland and Labrador, Nova Scotia and New Brunswick.

There is also a special class of Aboriginal title claim, advanced in Treaty areas by Aboriginal groups did not, for any of a number of reasons, take part of the Treaty process. *Bear Island* was such a case; another is the claim of the Lubicon Cree in Alberta. Whatever their origin, a claim based on Aboriginal title is in effect a claim to negotiate a Treaty with the Crown. Certainly this has been the result of those claims which government has recognized and, as noted above, these modern land claims settlements are Treaties for constitutional purposes.

Aboriginal rights, however, is a broader term than Aboriginal title. In *Sparrow*, the Court dealt with Aboriginal fishing rights as independent of Aboriginal title, perhaps mindful of its ruling in *Guerin* that the nature of the Indian title to reserve lands is the same as Indian title to traditional lands. As of January, 1996, there is a case under reserve by the Court which deals with the issue of whether a salmon fishery in British Columbia is part of the lands reserved for the community at the time they were set apart. Other Aboriginal rights may include linguistic, religious and customary practices of many types. There is little law dealing with such rights to date; arguably any customary law which is recognized as creating legal rights or obligations is an Aboriginal right protected by the constitution.

At the present time, however, the focus is on Aboriginal title and this was an issue that came before the courts, somewhat indirectly, very soon after Confederation.

St. Catherines Milling Case

The *Constitution Act, 1867* assigned legislative authority over "Indians and Lands reserved for the Indians" to Parliament (s. 91 (24)), while assigning the property in all Crown lands and resources to the Provinces "subject to any trusts in respect thereof or any interest other than that of the Crown" (s. 109). These two sections came into conflict in the *St. Catherines Milling* case decided by the Judicial Committee of the Privy Council in 1888. This committee of law lords sitting in London, England was Canada's highest court of appeal until 1949.

St. Catherines Milling was a dispute between the Crown in right of Canada and the Crown in right of the Province of Ontario over the control of Crown lands and resources. The issue arose from the grant of a timber berth on Lake Wabigoon in northwestern Ontario near Dryden. The entire area, known as the Northwest Angle, was disputed territory as between Canada and Ontario. The Indian (or Aboriginal) title had been extinguished by Treaty No. 3, concluded by the federal government in 1873 on the assumption that the lands were part of Rupert's Land, acquired from the Hudson's Bay

Company in 1870. A boundary arbitration went to the Privy Council in the mid-1880's and it was determined that the Northwest Angle was, in fact, part of Ontario.

The timber berth in the *St. Catherines Milling* case had been granted by Canada, not by the province. The federal government now attempted to justify this on the basis of the cession or surrender of the Indian title to Canada pursuant to Treaty No. 3. The Privy Council ruled against this assertion of federal jurisdiction over the Treaty lands and confirmed, relying on section 109 of the *Constitution Act, 1867*, the provincial title to the lands and resources. The Aboriginal or Indian title, which was ascribed to the *Royal Proclamation*, had been "an interest other than that of the Province", but:

It appears to [their Lordships] to be sufficient for the purposes of this case that there has been all along vested in the [provincial] Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

As a result, Canada needed provincial consent to establish reserves under Treaty and, more importantly, provincial concurrence to sell reserve lands if they were surrendered for sale pursuant to the provisions of the *Indian Act*. A general federal-provincial agreement to this effect was reached with Ontario in 1924 and amended in 1986.

On the Prairies, Canada retained the administration of Crown lands and resources until the treaties were, for the most part, concluded and railway construction and settlement were complete. Métis claims were addressed in terms of a general land grant in the *Manitoba Act, 1870*, but allegations of impropriety in the implementation of those provisions continue as claims today. As the Treaty process moved west, Métis were given the option of taking Treaty as Indians or receiving Métis "scrip", negotiable paper entitling the bearer to a grant of land. Much of this scrip was bought up by speculators before the ink was dry.

The *Constitution Act, 1930* (Natural Resources Transfer Agreements) transferred the administration of lands and resources from Canada to the provinces of Manitoba, Saskatchewan and Alberta while retaining federal authority to administer Indian reserves for all purposes. Provisions in that Act acknowledged that not all reserve lands promised under Treaty had yet to be set aside, but the lack of a formula to deal with that fact and the lack of any effective enforcement mechanism led to inaction. Only in 1993 was there a settlement agreement dealing with most of the Treaty land entitlement claims in Saskatchewan and negotiations continue, somewhat haphazardly, in Alberta and Manitoba.

In British Columbia, a series of agreements between 1912 and 1936 dealt with the administration of Indian reserve lands in that province, but not with the fundamental issue of Aboriginal title. There are no treaties covering most of British Columbia, the exceptions being the southern part of Vancouver Island (Douglas Treaties) and the eastern slope of the Rockies (Treaty No. 8).

Indian lands agreements with Nova Scotia and New Brunswick were not concluded until 1959. There are no agreements with Newfoundland, Prince Edward Island or Quebec to perfect federal administration of Indian reserve lands upon surrender for sale. This issue has waned in importance in recent years as the likelihood of an absolute surrender of reserve lands by any community is remote. Coincidentally, there are no land cession treaties in these provinces either. There are treaties of "peace and friendship" in Nova Scotia and New Brunswick, but these do not deal in any way with the issue of Aboriginal title.

Early Claims Policy

From the time preceding the *Royal Proclamation* to the present day, the issue of Aboriginal land claims has never gone away. In addition to the fundamental question of Aboriginal title, First Nations lodged regular complaints about Crown management of their lands and assets and infringements of their Treaty rights.

As Canada grew and became more populated, the continuing clamor for increased access to resources and the need for increasing amounts of land for settlement turned what had seemed like an infinite bounty to a limited supply. In their accommodation of European needs, First Nations peoples came to accept relatively small areas of land and promises of continued access to fish, game and other resources in exchange for their consent to sharing their traditional lands. At least this was their understanding; governments had other ideas and Treaty documents used the legal terminology of cession and surrender of their Aboriginal rights. Where there were no Treaties, governments were quite prepared to proceed as though there was no need for Treaties. And where there were Treaties, governments returned to get more land and slowly began to regulate the exercise of rights.

The avarice for land, resources and the use of Indian moneys lies at the heart of most claims. In British Columbia, for example, a special act of Parliament dislodged the Songhees Indians from their reserve across Victoria harbour from the provincial legislature in 1903. Subsequently, many reserves were unilaterally diminished without compensation -- the so-called "cut-off lands" -- as part of a federal provincial accommodation. Elsewhere in Canada, an amendment to the *Indian Act* of the day authorized the Exchequer (now Federal) Court to relocate Indians living on reserves in urban areas: this draconian provision was used only once and repealed in 1951. The need for lands for soldier settlement after World War One led to questionable surrenders of large tracts of reserve land, especially on the prairies. So rarely did such issues find their way to court, and with so little success, the the Supreme Court was prompted in *Sparrow* to observe that for nearly 50 years Aboriginal law as a subject of study, discussion or debate in the legal community, virtually vanished. Government measures were largely responsible for this hiatus.

By the 1920's, the issues described above, and concerns about other conduct that would be difficult to justify, were becoming an embarrassment for government as British Columbia Nations continued to assert their Aboriginal title and Six Nations

representatives had some success in lobbying the League of Nations in respect of their sovereignty. To deal with the latter situation, the traditional -- "Longhouse" -- chiefs were forcibly dislodged in 1924 and an elective system, still divisive today, was put into place. To deal with the more general problem, an amendment to the *Indian Act* made it illegal to raise funds or retain counsel to advance an Indian claim. The section was repealed in 1951.

This policy may have succeeded in limiting claims remedies for a period, but it did not erase the sense of grievance or the actual losses incurred. In the 1940's and again in the early 1960's, parliamentary proposals for the creation of an Indian Claims Commission -- patterned to some degree after the U.S. model -- were advanced, but not implemented.

The 1969 White Paper

Some analysts argue that the beginning of the modern era of Indian policy, and national Indian politics, was the *1969 White Paper* advanced by the relatively new Trudeau government. Based upon a sweeping conceptualization of equality, the White Paper proposed that the treaties be terminated, that Indian status be abolished, that reserve lands be granted to individual members in fee simple, or sold, and that the *Indian Act* and Indian Department be abolished. Indians would be subject to provincial laws in all respects and no longer a federal responsibility.

Claims based on Aboriginal title were seen as "too vague and general to be capable of specific relief": they would not be recognized. Other claims, based on unfulfilled Treaty promises for example, would be settled. An Indian Claims Commission was proposed, and a commissioner actually appointed, but his effectiveness had been undermined in advance by the Policy that created the position. Dr. Lloyd Barber of Saskatchewan continued as commissioner until 1979.

Indian hostility to the White Paper termination policy, which they characterized as genocidal, coalesced into effective regional and national organizations and led to withdrawal of the White Paper a few years later. All subsequent policy proposals have, however, been carefully scrutinized for signs of White Paper thought and for any threat to Aboriginal and Treaty rights. These concerns continue, even though Aboriginal and Treaty rights received constitutional protection in 1982.

The Calder Case

Other analysts suggest that the true beginning of the modern era of Aboriginal policy was the non-decision of the Calder case by the Supreme Court of Canada in 1973. This claim to Aboriginal title and control of the Nass River Valley of northern B.C. had been rejected in the lower courts. In the Supreme Court, however, there was a powerful division of opinion. Three justices, led by Judson J., held that colonial proclamations and legislation had effectively extinguished Aboriginal title in the province. Three justices, led by Hall J., held that Aboriginal title continued. The actual decision was formulated by the seventh justice, Pigeon J., who did not address the merits of either position and ruled

simply that the action failed for want of a *fiat* -- the traditional consent of the Crown to permit an action against the Crown -- from the Lieutenant-Governor.

This decision rattled federal policy-makers. They quickly announced that they would negotiate claims based on Aboriginal title although the legal theory by which the common law would recognize such a title, and identification of the incidents which attached to that title, were and continue to be imperfectly formed in our law. Such claims are referred to in federal parlance as "comprehensive claims". The first comprehensive claim to be settled was that of the James Bay Cree and Northern Quebec Inuit in 1975. The Nishga claim to the Nass River Valley, the subject of the Calder case, has been in negotiation for more than 20 years without a settlement. At the close of 1995, there was a draft settlement agreement on the table but it has yet to be signed.

The next comprehensive claim to go to court was advanced by the Hamlet of Baker Lake in the Northwest Territories. In their case, the Federal Court Trial Division ruled, in 1978, that the title did exist but that it was subject to limitation by inconsistent federal regulation. This legal issue remains unresolved and is once again before the Supreme Court in the *Delgamuukw* case. The Court has granted an adjournment in the latter case and it is not likely to be heard for some time. The trial decision in *Delgamuukw* became somewhat notorious when the trial judge found that traditional Indian life prior to European contact was "nasty, brutish and short".

Creation of the [B.C. Treaty Commission](#) in 1991 opened an opportunity for First Nations in that province to advance and negotiate settlements in respect of their Aboriginal title claims. Over 40 Nations have submitted their claims and it is not possible to say at this time when the first Treaty will be concluded. This is a process which is proceeding slowly.

The future of all claims processes is uncertain as governments exercise greater fiscal restraint in times of slow economic growth overall. These trends tend to obscure the true process of historic reconciliation that claims settlements should represent and make them politically unpopular. Also, legal development of the fiduciary concept adopted in the *Guerin* and *Sparrow* decisions of the Supreme Court of Canada seems to have slowed with the Court's decision in *Blueberry River Indian Band v. The Queen* handed down in December of 1995. Among other inimical findings, the Court imposed a statutory limitation period on the claim. This state of the law will deny the court option to many Aboriginal claimants unless it is changed by federal statute.

Section 35 of the [Constitution Act, 1982](#)

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

Section 35 also provides that the "aboriginal peoples of Canada" include the Indian, Inuit and Métis peoples, that modern land claims agreements are "treaties" and that Aboriginal and Treaty rights are guaranteed equally to men and women. Section 25 of the [Canadian](#)

Charter of Rights and Freedoms provides that it shall not be construed so as to erode Aboriginal and Treaty rights or rights assured under the *Royal Proclamation*.

The issue of what rights were "existing" in 1982, when this provision came into force, was answered by the Supreme Court of Canada in 1990 in *Sparrow v. The Queen*, an Aboriginal fishing rights case from British Columbia. The Court ruled that the rights protected by section 35 were those which had not been extinguished by statute or by consent of the Indians. This ruling overturned some previous decisions which suggested that Aboriginal and Treaty rights had been "frozen" in the form in which they had been regulated prior to 1982. The Court ruled that regulation of a right does not extinguish it.

Aboriginal and Treaty rights can, however, be regulated by competent federal enactment. Where such enactments conflict with protected rights, they must be "justified" by government as part of the balance struck by the Court between "federal power and federal responsibility" in respect of Aboriginal peoples and their constitutional rights.

Aboriginal Status

Canada has only signed treaties with, and set aside reserves for, Indians. The first statute to define Indian status dates back to 1850 and was intended to determine who could use and occupy reserve lands. Under the current Act, it is important to note that "Indian" is defined as a person registered or "entitled to be registered" under the procedures it prescribes. During the federal Treaty period (roughly 1870-1930), Métis who wished to live as and with Indians were given the option of taking Treaty (Indian status) or negotiable land scrip.

Until 1985, all versions of the *Indian Act* provided that, upon marriage, an Indian groom conferred status on his non-Indian wife, while the Indian bride of a non-Indian man lost her status. This provision was challenged as discriminatory under the *Canadian Bill of Rights*, a federal statute enacted in the 1960's and since largely eclipsed by the 1982 *Canadian Charter of Rights and Freedoms*. These discriminatory provisions of the were upheld by the Supreme Court of Canada in the much-criticized *Lavell* decision in 1974. Subsequently, the "marrying out" rule was condemned by the U.N. Human Rights Commission in its *Lovelace* decision in 1980, but still the statute was not changed.

It was the *Constitution Act, 1982* that finally forced change. Section 15, the equality provision of the *Charter*, came into effect in April of 1985 and it was recognized that the differential treatment of Indian men and women would not survive another challenge. Bill C-31, enacted to come into effect before the *Charter*, not only ended any status consequences of marriage (no gain, no loss) but also restored status to those who had previously lost it and their children. Canada greatly underestimated the number of individuals who would become entitled to Indian status and Band membership. The result was a major change in the demographics of some Indian communities, in some cases more than doubling the membership rolls. The *Twinn* case challenged Bill C-31 on the basis of its incursion on tribal rights of self-government, but the Federal Court Trial Division rejected that challenge in 1995. The decision is under appeal.

Other Charter and statutory issues related to status are, at least in part, attributable to Bill C-31. One example is the *Corbiere* case now in the Federal Court of Appeal and challenging the Indian Act provisions which limit voting in Band elections to reserve residents. In the context of the section 15 Charter argument which succeeded at trial, it was necessary to find that off-reserve members constituted a class historically discriminated against under the statutory regime. Under the *Act*, there is a notional entitlement to reside on reserve but not an absolute right: see the B.C. Court of Appeal decision in *Joe v. Findlay*. Prior to Bill C-31, about 40% of Band members lived off-reserve; after Bill C-31 increased the membership, the figure became 60% and it is likely that the apparent denial of voting rights to more than half of the Band was a factor in the trial court's decision.

The question of Aboriginal and Treaty rights must be addressed differently for Inuit and Métis. They have no historical treaties and there has not been any regulation of their entitlement to Aboriginal status. This is a constitutional, not a statutory, issue.

For the Inuit, many issues are being resolved by way of land claims settlements based on the fact that they have never ceded their Aboriginal title to their lands by Treaty. Entitlement as a beneficiary, compensation, self-government measures and a land base are issues commonly dealt with in these comprehensive land claim negotiations. These agreements achieved are, as noted above, become treaties for purposes of constitutional protection of the rights guaranteed to the Inuit parties. The Inuvialuit settlement of the early 1980's was an example of such a settlement; the most comprehensive has been the Nunavut Agreement of 1993 which will, when implemented, effectively divide the Northwest Territories into two new political units.

Métis pose different problems for governments to consider. They have no treaties. They live in provinces for the most part, not in the Territories. Their Aboriginal title is derivative, not original. Their land base, except for some settlements organized under provincial law, is non-existent. All of these issues are obscured by the question of status. Are all people with some Aboriginal blood, but no other status or entitlement, Métis? Are Métis the descendants of the distinctive society in western Canada -- led in the last century by Riel and Dumont -- who did not take Treaty? Or is there some other definition of Métis that will emerge for constitutional and claims purposes? At this time, it is easier to pose these questions than to answer them. And once the question of status is answered, it leads to the main issue of whether there a federal responsibility for in the same sense that there is a federal responsibility for Indians. Canada's position to date has been that there is not, although it has funded Métis organizations and claims research rather generously.

Overall, issues of status are unpopular and, many feel, undemocratic. Maitland wrote that the advance of the common law is "from status to contract", but that is not the experience of Aboriginal law in Canada. Status questions -- with concomitant issues of equality rights -- will continue to arise in the councils of government and the courts for some time to come. All of these issues also arise in terms of claims settlements and discussions

around the "inherent right of self-government". They will, if anything, become more complex in the future.

The Fiduciary Obligation

Canadian courts have been more creative than those of other common law jurisdictions in their development of the concept of fiduciary obligations. Nowhere is this more apparent than in Aboriginal law. In 1950, the Supreme Court stated that Indians and their lands were "a political trust of the highest order", a doctrine that gave rise to no legal consequences in the event of breach. That changed with the 1984 decision of the Court in *Guerin v. The Queen*.

In *Guerin*, the Court examined a surrender of reserve land in the Shaughnessy district of Vancouver for leasing to a golf and country club. It appeared that the original form of lease approved by the Musqueam Band had been altered in significant respects in the formal version to the detriment of the Band. The Court ruled that the *Royal Proclamation*, the special nature of Indian title and the *Indian Act* made the Indians vulnerable to federal discretionary decisions and this formed the basis of a fiduciary duty to act in their best interests. That duty was breached on the facts of the case and a trial judgment for \$10 million was upheld.

The fiduciary concept was extended in the 1990 *Sparrow* decision. The Court ruled that constitutional recognition of Aboriginal and Treaty rights mandated "a trust-like and non-adversarial relationship" between Indians and the federal government. The parameters of this far-reaching decision have yet to be worked out in the context of claims negotiations, federal exercise of regulatory powers, enforcement of regulations, self-government negotiations and an identifiable and consistent standard for government conduct evidencing "the honour of the Crown". The fiduciary relationship is a term that is in danger of becoming a buzzword in all matters relating to Aboriginal peoples, but it does have real legal content and constitutional scope.

Harvesting Rights

In the U.S., Treaty rights in Michigan, Wisconsin and Washington were held by the courts to entitle the Indian tribes to one-half of the fishery in those states, commercial and non-commercial. In the exercise of their "domestic dependent sovereignty", the tribes there either exercise these rights or rent them out to non-Indians. They regulate their part of the fisheries with their own enforcement authorities and tribal courts. In Canada, First Nations are not considered in law to have the same kind of tribal sovereignty and their rights are not given such broad scope.

Treaty harvesting rights were denied any protection against federal regulation as recently as 1976 when the Supreme Court of Canada rejected an appeal in *R. v. Derriksan*. See also the 1960's decisions in *R. v. George* and *R. v. Sikyea*, the latter including an interesting discussion of whether the Crown needed to prove that a dead duck was in fact migratory and not domesticated.

Treaty rights were, however, insulated from provincial regulation by section 88 of the *Indian Act*: see *R. v. Taylor and Williams*, a 1981 decision of the Ontario Court of Appeal.

Since 1982, however, constitutional affirmation of Aboriginal and Treaty rights has made a big difference. In *Sparrow*, the Court stopped well short of allocating a fixed percentage of the fishery, in that case the salmon fishery on the lower Fraser River, to Indians. Instead, the Court directed that, to be constitutionally valid, fishery regulations must make provision for a priority allocation to the Aboriginal fishery. In practice, this means that, in a given fishery, the first priority is conservation: ensuring that sufficient fish escape to regenerate the stock next year. The next priority, which is allocated if any fish are to be caught at all, is the Aboriginal fishery (whether this includes a commercial fishery is the subject of cases currently under review in the Supreme Court). When this Aboriginal need is met, the next allocation goes to the non-Indian commercial fishery and, if fish are still there to be caught, the last priority is the sports fishery. The Aboriginal fishery is the first to be allocated and last to be regulated.

Sparrow dealt with a fishery based on Aboriginal rights: the common law and constitutional recognition of long-time user by specific Aboriginal peoples. While the case suggests, at one point, that an Aboriginal commercial fishery is not protected, Treaty fisheries require a different analysis. In a 1988 decision, *Agawa v. The Queen*, the Ontario Court of Appeal upheld the Treaty right of Indians in the Robinson Huron Treaty area to fish for commercial purposes. This was based upon the Treaty guarantee of the full right to "fish in the waters ... as they had before". Once it was proven that the Indians engaged in a commercial fishery prior to entering Treaty in 1850, the commercial right became a Treaty right. The distinction between the two types of rights is based on the Court's reluctance to acknowledge commercial harvesting prior to European contact in the case of Aboriginal rights, while treaties are obviously special compacts entered into after contact and addressing rights and arrangements as of the time they are negotiated. As in *Agawa*, these can include commercial and other uses. See also the 1990 decision of the Supreme Court in *Horseman v. The Queen* for the same principle, but with a further variation of rights after the Treaty was signed.

There is no priority allocation scheme in the harvesting laws, federal or provincial, in effect in Ontario. Yet governments continue to prosecute Treaty Indians based on their interpretation of what Aboriginal and Treaty rights mean. There is no clearer example in Canada today of governments flagrantly disregarding established law to assuage public opinion and powerful lobbies. At the same time, there is little doubt that some segments of the non-Aboriginal majority are prone to the type of racist confrontations that followed on recognition of Treaty rights in Wisconsin and Washington. In these situations, Mill's theory of utilitarian democracy as the greatest good for the greatest number breaks down, to the detriment of minority rights.

A number of Aboriginal harvesting issues are now before the Supreme Court of Canada, notably 5 Indian hunting and fishing cases from B.C. In each of those cases, the lower courts limited *Sparrow* and it will be of considerable interest to see if the Court follows

suit. The cases were argued before the Court in November of 1995 and judgments have been reserved.

Laws of General Application

Where Treaty rights and special legislation are not in issue, section 88 of the *Indian Act* provides that Indians are subject to provincial laws of general application. Such laws include, for example, compulsory auto insurance, seatbelt and safety helmet legislation, occupational health and safety laws, employment laws and labour laws.

Where Treaty rights are abrogated, the courts have in the past excluded the application of provincial laws automatically: e.g., *R. v. Taylor and Williams* (Ont. C.A.) and *R. v. Simon* (S.C.C.). In *R. v. Sioui*, however, the Supreme Court suggested that section 88 merely imposed an onus on the Crown to show why provincial laws could not accommodate the exercise of Treaty rights. On this point, the Court was seriously out of step with all previous authority, including its own decisions.

Another point on which there may be some erosion of section 88 is in respect of provincial laws regulating the use of reserve land. The prevailing theory is that the section deals with the conduct of Indians, not with lands reserved for the Indians. But in *R. v. Dick*, the Court stated that provincial laws were ousted only on the basis of operative inconsistency and not on the basis of subject matter. This opened the door for provincial arguments, which the Court has yet to approve, that provincial laws can apply in respect of reserve lands: see, e.g., *Derrickson v. Derrickson*. Section 88 does not have any impact on federal laws: *R. v. George*. In many circumstances on reserve, federal law will supervene as in the case of environmental regulation and labour organization where the Band or First Nation is the employer. Federal law has also been held to oust general provincial law in matters relating to the use and occupation of reserve land; for example, a court cannot apply provincial statutes to dispose of a matrimonial home on reserve in the face of ministerial discretion to approve allotments and transfers of reserve land under the *Indian Act*: *Derrickson v. Derrickson*. What is frequently done in such cases is to award a financial payment in respect of the matrimonial home which is deemed to be paid if an appropriate transfer of interest in the matrimonial home is voluntarily effected.

There is also an increasing tendency to accommodate special Aboriginal needs within provincial statutes. An excellent example of this is the *Child and Family Service Act* (Ontario) which entitles First Nations to representation in protection proceedings and gives a preferred choice of Indian placements in cases dealing with status Indians. These provisions were included in the mid-1980's to terminate the decades-long "baby grab" which placed thousands of Indian children in non-Indian homes, frequently in non-Canadian homes.

The issues involved in the application of laws in a complex federal constitutional scheme -- which cannot be said to be fully developed in respect of Aboriginal matters -- are too many and too complex to be dealt with here. Suffice it to say that Indian reserves are not "enclaves" where general laws do not apply: *Four B Manufacturing v. United Garment*

Workers. A person could no more practice medicine or law on a reserve without proper qualifications under provincial law than elsewhere in Ontario. It is, however, important to ensure that provincial law has not been superseded in a given case by federal statute or by competent Band by-law. More importantly, one must ensure that provincial law does not have the effect of abrogating, or infringing upon, an existing Aboriginal or Treaty right. The Supreme Court has said that provincial laws cannot do this: *Sparrow v. The Queen*, also *Claxton v. Saanichton Marina Ltd* (B.C.C.A.).

Reserve Lands

There are nearly 2300 Indian reserves in Canada, approximately half of them in British Columbia. They are occupied and, to some extent, governed by over 600 First Nations or Bands. The largest reserve in area is the Blood Reserve in southern Alberta. The largest in population is the Six Nations Reserve near Brantford, Ontario. They are all governed by the *Indian Act* and, especially by its land provisions, although only about half of the communities actually apply those provisions in allotting reserve lands to members. Where the statutory provisions are not used, individual land tenure is either unregulated or governed by custom and consensus.

Generally speaking, non-Indians cannot live on, or otherwise use or occupy, Indian reserve land unless:

- * the community has "surrendered" it to the Crown for sale and the non- Indian has an agreement with the Crown to purchase the land
- * the community has "designated" it for leasing and the individual has entered into a proper lease
- * the Minister has leased it for the benefit of an individual Indian locatee
- * the Minister has granted a permit for more limited use (there is a case going before the Supreme Court of Canada to determine the extent of rights the Minister can grant under permit), or
- * the non-Indian is the child of a member.

All other occupation by non-Indians is a trespass. Agreements with individual Indians or Bands to use and occupy reserve land are void, preserving the exclusive right of the Crown to deal with Indians in respect of their lands as originally set out in the *Royal Proclamation*. Except as noted below, reserve lands cannot be mortgaged, pledged or otherwise used as security for financing.

Reserve lands are not subject to seizure under legal process. They are subject to taxation by the First Nation itself, and to regulation, zoning and other competent laws made by Chief and Council. All of the above is governed by the *Indian Act*.

Taxation

Contrary to popular belief, Aboriginal peoples are not generally exempt from taxation. The exemptions which do exist extend only to Indians, and then only in relation to reserve lands and to personal property of Indians situated on reserve. The relevant statutory exemptions are found in the *Indian Act*. Several provincial statutes also make special provision for the exemption of Indians and Indian lands from various types of taxation, but these must always be measured against the federal act. If a provincial law would have the effect of imposing a tax where the federal act would provide an exemption, the provincial law is invalid.

In some situations, provincial law is more generous in its application. In Ontario, for example, non-Indian lessees of reserve land are exempted, under provincial law, from municipal taxation. In British Columbia, they are taxed. In Ontario and Manitoba, non-reserve lands held in trust for a Band are exempt from municipal taxation even though the prevailing federal view is that such lands are not deemed to be reserves by section 36 of the *Indian Act*. While I believe the federal view to be wrong on that particular point, these situations illustrate the general rule that provincial taxing laws can broaden exemptions for Indians but not limit exemptions prescribed by federal law.

Employment income earned on reserve, for example, is not subject to income taxation if the employee is a status Indian. This exemption is based on an interpretation of section 89 of the *Indian Act* which generally exempts all "personal property of an Indian situated on a reserve". Income has been held -- not without dispute -- to be personal property. So has electricity supplied by a utility. Questions have arisen with respect to *situs*; for example, income from employment where the employer was based on reserve has been held to be exempt even though the actual work was done off-reserve: *Nowegijick v. The Queen*. The reasoning in that case was that the income was a debt owed by the employer and payable at its office on reserve. This made the fact that the work was actually done off reserve irrelevant, a result that gave rise to several employee leasing companies based on reserve and assigning work to employees in off-reserve locations.

In *Williams v. The Queen*, benefits paid under an unemployment insurance forestry project were exempt even though the cheque originated with a government department off-reserve. This later, case expanded the number of factors the courts will review in determining whether or not personal property is exempt from taxation. It implies that, in many situations, income that would have been exempt from tax under *Nowegijick*, may now be subject to a different analysis leading to a different result. Business plans and legal opinions developed prior to 1992 should be reviewed in light of the *Williams* case.

Pension benefits paid after retirement by an insurance company off reserve in respect of employment on reserve have received mixed treatment (sometimes held taxable, sometimes not). Under *Williams* these are likely exempt, but they illustrate the point that almost any payment or service to Indians or First Nations is arguably exempt if there is a reserve connection. There is a lot of policy in the area of Indian taxation and comparatively little law. For various reasons at various times, a few words put into the

Indian Act at a time when most modern forms of taxation did not exist have been stretched virtually out of shape to address situations unthought of by the Parliament which enacted them.

It is an understatement to say that this is a highly charged political issue. As 1995 opened, Revenue Canada offices in Toronto were being occupied by Aboriginal people protesting the introduction of new taxation guidelines that would expand the number of Indian employees subject to income tax. The common sentiment among First Nations is that such taxation is a breach of Treaty and Aboriginal rights as well as an erosion of exemptions historically acknowledged. On the legal front, it is apparent that it will take at least one more round of litigation to clarify these issues, a danger when the current Supreme Court has shown itself to be largely unsympathetic in Aboriginal tax matters.

Personal property on reserve is also exempt from provincial sales tax and G.S.T. Governments will frequently challenge, however, off-reserve purchases. The general rule is that goods purchased off-reserve to be consumed on reserve (e.g., take-out meals, furniture, etc.) are exempt. The fact that a reserve resident might use a car, for example, largely off-reserve does not make its purchase a taxable transaction. Similarly, services -- including professional services -- provided to a First Nation are considered to be provided on reserve and are not subject to G.S.T. These exemptions do not extend to Indians who live off-reserve if they do not consume the goods or services on reserve. Law and practice can, however, be very different.

There are additional exemptions for various commodities purchased by Indians. In Ontario, for example, provincial gasoline taxes and (notoriously) tobacco taxes are not imposed when these are purchased by Indians on reserve. Indian businesses traditionally object to collecting taxes in respect of purchases by non-Indians and these frequently, but not necessarily legally, go unrecorded. Most provinces have implemented quota systems to shorten the supply of tax-free cigarettes in First Nations communities, a clear effort to stem what is seen as widespread bootlegging of them off-reserve. It is fair to say that the high level of tax on tobacco products makes the distribution of untaxed tobacco a lucrative business.

Questions regularly arise in connection with importation of goods. Indians base their right to bring goods across the border duty-free on the 1792 Jay Treaty. In 1956, the Supreme Court of Canada ruled that this Treaty (and the confirming 1815 Treaty of Ghent) did not avail since neither had been implemented by domestic legislation: *Francis v. The Queen*. This too is a contentious and perennially current issue. Aboriginal peoples argue that their rights know no borders and regular border-crossings are held to assert these rights.

Business Problems

Financing for business and other purposes has long proved difficult because real and personal property of Indians or Bands located on reserve cannot be used as security or collateral: it is exempt from seizure by anyone other than an Indian or a Band. The same

is true of Band bank accounts and other property that is notionally "on reserve". While this fact, and the tax exemptions noted above, make it attractive for Indians to deal with banks and trust companies with branches on reserve land, it has made it almost impossible to get large amounts of venture capital without government, a corporation or a joint venturer guaranteeing loans. Only in recent years have banks actively sought out this business.

There are a few exceptions to the general rule preventing security being given:

- * A leasehold interest in land which has been designated by the community for leasing purposes can be mortgaged after a 1988 amendment to the *Indian Act* (this amendment may not apply to locatee leases issued under s. 58 in respect of reserve lands which have not been designated for leasing)

- * Personal property purchased under a conditional sales contract can be seized since ownership remains with the vendor until payment is completed

- * Indians or Bands can execute against property and may act as assignees for value, or as trustees, for a non-Indian financier

- * Indian borrowers may be required by financing groups to incorporate since a corporation is not an "Indian" and corporate property is not exempt from seizure (the corporation, however, is also taxable)

Even making creative use of these exceptions, Indians and Bands have traditionally had little access to capital markets. Historically, the sale or lease of land has proved to be the only real source of capital funding for communities. For this reason, there is serious concern about creating more exceptions because of the limited land base on most reserves and the unwillingness to put what land remains at risk. There are a fortunate few First Nations who derive significant income from oil and gas deposits on reserve: a half dozen such communities have vastly more money in their trust accounts than all of the other First Nations combined. Others, like Squamish and Musqueam in B.C. and Sarcee in Alberta, are close to or within urban settings which greatly enhances their leasing and other commercial opportunities. Location, then, can be a significant advantage but the basic law of Aboriginal business is the same and financing is always a problem.

Timing is also problematic. A community designation of land for leasing or business purposes involves a referendum process that may take two years to complete. Business development on reserve can be a cumbersome and frustrating proposition. A dozen or so First Nations are currently negotiating with Canada for a nation-to-nation agreement that will confirm their local control over lands and resources and this will put them in a much better position to take timely advantage of business opportunities. This initiative is a response to the fact that the *Indian Act* strikes an unhealthy balance between protectionism and enterprise that is increasingly unworkable in the modern world. That Act, it should be noted again, does not affect Inuit or Métis or their lands.

While there are certainly powerful arguments to be made in favour of special tax and other considerations to promote business development in Aboriginal communities, the courts have shown no tendency to recognize such advantages based on Aboriginal and Treaty rights. The Supreme Court, for example, seems to consider that, as Aboriginal peoples move into the commercial mainstream, they operate under the same laws and restrictions as non-Aboriginals: *Williams v. The Queen*, *Mitchell v. Peguis Band*. And, as noted above, corporations have no Aboriginal or Treaty rights because they have no Aboriginal status, even if all the principals are themselves Aboriginal.

The example of large, and extremely popular and profitable, casino developments on some U.S. reservations has led many Canadian First Nations to look at gaming enterprises as a source of revenue and employment. In the U.S., the concept of tribal sovereignty immunizes gaming operations from state legislation, although they are subject to a generally permissive act of Congress. Canada regulates gambling by way of the *Criminal Code* and the courts have not recognized any exemption from the relevant provisions on the basis of self-government, Aboriginal or Treaty rights. Gambling is illegal unless a licence is obtained from the provincial government, which is a permitted interdelegation of powers.

In Ontario, the Chippewas of Rama have secured a licence for a casino from the provincial government on the basis that revenues will be shared with other First Nations. There are also two current developments of on-reserve charitable gaming facilities: these are effectively rented out to licensed charities to conduct bingo and casino nights on site. There is no indication that governments will soon encourage or permit on-reserve gaming in Canada to the extent that industry has taken root in the U.S.

Aboriginal Claims

Governments have been seriously dealing with Aboriginal claims for about 20 years. There are two broad classifications under which claims can be negotiated with the federal government:

* Comprehensive Claims, which are those based on Inuit or Indian Aboriginal title which has not been extinguished, meaning generally large claims in respect of traditional lands which are not subject to treaties. There have been major settlements of this kind in the north, but British Columbia remains a major and unresolved source of comprehensive claims.

* Specific Claims, which are those involving breaches of Treaty promises, improper alienation of reserve or surrendered lands, loss of Band funds and other breaches of fiduciary duty to Indians. Government has settled almost 100 of the 6-700 claims that fall into this category.

There are published policies outlining how government deals with these two categories of claims. Government has also acknowledged "claims of a third kind": a catchall category for claims which do not fit into either of the above policies. There is no policy defining

what types of claims these might be or how they are dealt with. Government's approach to claims has been heavily criticized by Aboriginals and non-Aboriginals alike.

Claims are generally, and not necessarily accurately, considered to be lucrative files for lawyers and consultants. This can be true in the case of significant settlements which are quickly concluded. Most claims have proven resilient to early settlement -- if they are negotiated at all -- and the lengthy negotiating process is generally funded by government on a less than regal scale. Particularly in the case of specific claims, where the federal government is the defendant, the judge of liability, the arbiter of compensation and the funder of the negotiation process, it has taken major budget increases to achieve a reasonable level of settlements. And the federal government is not the only government involved.

Because alienated lands and resources, once relieved of the Indian title, fall under provincial jurisdiction, provincial governments must also become involved in settlements which involve a return of lands or resources to Indians. This fact has frustrated many negotiations although there seems to be a greater provincial willingness to participate in recent years. Here again, the return of Crown resources to First Nations has provoked reaction in the non-Aboriginal community. The recent land entitlement claim settlement with the Mississauga No. 8 community near Blind River is an example of a solution hotly contested by other residents of the area. This gives rise to concern that provinces may be more reluctant to engage in such unpopular processes in future. Many observers feel that the Harris government in Ontario, elected in 1995, will slowly withdraw from all claims negotiations and at least a slow-down is expected in BC after the next election there. The péquiste government of Quebec seems to have other priorities.

There are also many claims which are not negotiable under government guidelines. Loss of traditional resources such as wild rice, fisheries, etc. is a prime example of a non-negotiable claim. Other historic grievances such as the wide-spread abuse of native children in residential schools are also not claims which government is prepared to negotiate. This is another common criticism of the existing claims processes. The court alternative has not proved to be attractive either, the *Guerin* case being one of the few court judgments which have held government liable for significant damages in respect of an Indian claim. The limitation period imposed in the recent *Blueberry River* decision of the Supreme Court cannot help but have a chilling effect on litigation of claims dating in many cases from the last century or the century before that.

There has been a tendency, in recent years, to create commissions -- such as the Indian Specific Claims Commission or the [B.C. Treaty Commission](#) -- to deal with some of these issues, but there is no early indication that these commissions are part of the solution. It is certain that Aboriginal claims, including Métis claims which have not been dealt with at all, will be with us for many years to come.

There is, however, one major advantage to claims processes. They do add to the financial and land resources of First Nations when they do settle. And this, in turn, makes it possible for those communities to participate in business projects in a major way and to

their greater benefit. Financial institutions are keen to get claims moneys on deposit and demonstrate greater flexibility in other financing arrangements in order to get that business. Wisely used, one dollar of claims money can generate several dollars of economic advantage without erosion of capital.

Self-Government

The many initiatives that fall generally under the rubric of self-government are commonly seen as a fair and reasonable transition from government limitations imposed on Aboriginal communities and individuals to a modern, community-based self-actualizing form of government. This has many legal implications in terms of constitutional, legislative and jurisdictional issues: all complicated by an almost theological reliance upon a theory of "inherent rights" of self-government. This is not to suggest that the theory is wrong: it lacks, however, specific legal or even political content at the present time. Recognition of the inherent right of Aboriginal communities to govern themselves was a feature of the rejected Charlottetown Accord and is a commitment contained in the well-known "Red Book" advanced by the current Liberal government in Ottawa during the 1993 election campaign.

If we cannot successfully address the comparatively simple public issues of hunting and fishing rights, it is difficult to see how we can advance very far with more difficult concepts such as the inherent right of self-government. The Royal Commission on Aboriginal Peoples, due to report in 1996, has issued an interim report arguing that the right of self-government is constitutionally protected by section 35. There is scant judicial authority for that proposition. A much-diminished concept of self-government was set out in the federal government's 1995 Inherent Rights Policy which offers greater provincial intrusion into First Nations affairs, limitations on the range of powers that can be negotiated and no new funding for implementation. Many First Nations observers have seen this as the stalking horse for a new White Paper approach. While this may be an exaggeration, there is little in the new policy to make it attractive to First Nations.

The Inherent Rights Policy underscores the proposition that fiscal restraint will prevent major resources being available, even on an interim basis, to support expanded self-determination for Aboriginal communities. When one considers, however, the range of decision-making for Indian reserve communities, for example, which is partly or wholly subject to the discretion of the Minister or Governor in Council, perpetuation of the existing legislative scheme is simple injustice. In 1994, Indian and Northern Affairs Minister Ron Irwin announced a plan to wind up his Department's operations in Manitoba as a trial project and it remains to be seen whether this process, now estimated to take up to 10 years, will reflect new approaches to Aboriginal self-government or whether it will simply replace a largely non-Aboriginal bureaucracy with an Aboriginal one.

In the far north, claims settlements such as last year's [*Nunavut Agreement*](#) create de facto self-government since the quasi-municipal local structures are well funded and subject to majority Inuit political control. The situation of Métis, who have no land base and no claims settlements, is quite different and there is no real process in place to deal with it.

Another group which will be seeking a measure of self-determination is the urban Aboriginal population which lacks political recognition in the urban setting. This group, which may consist of more than half of the Aboriginal population of Canada, also brings forward the issue of self-government in the absence of a land or tax base.

A Note of Caution

This very brief introduction to the increasingly complex field of Aboriginal law is not to be relied upon as the basis for any legal opinion, nor is the commentary to be treated as in any way exhaustive in respect of the issues discussed. There is a wealth of history, legal development and political commitment that informs all of these issues -- major and minor -- and these notes are not intended to attempt to do it justice. Please seek legal advice for a considered opinion on any specific point of law.

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R. v. Taylor and Williams (1981), 34 O.R. (2d) 360 (C.A.)
R. v. White and Bob (1966), 52 D.L.R. (2d) 481 (S.C.C.)
St. Catherines Milling & Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (P.C.)
Sparrow v. The Queen (1990), 70 D.L.R. (4th) 385 (S.C.C.)
Williams v. The Queen (1992), 90 D.L.R. (4th) 129 (S.C.C.)

Two useful series of law reports are published by the Native Law Centre at the University of Saskatchewan. The Canadian Native Law Cases (C.N.L.C.) is a 9-volume digest of decisions up to 1978. The Canadian Native Law Reporter (C.N.L.R.) then takes over and continues to report the major case law affecting Aboriginal peoples. All the above cases are in those series.

Reliable reference works include Jack Woodward's looseleaf series on Native Law, the current edition of Hawley & Imai's Annotated Indian Act (updated annually) and Carswell's Consolidated Native Law Statutes, Regulations and Treaties. The 3-volume set of "Indian Treaties and Surrenders" is now being reprinted by Fifth House Publishing of Saskatoon and, with respect to the Robinson Treaties and early numbered Treaties, should be read together with Morris's "The Treaties of Canada with the Indians" (rep. Coles).