THE NEW IDEOLOGY OF ABORIGINAL RIGHTS

by

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ABSTRACT

Aboriginal rights are at the basis of much of the political discussion between white and native spokespersons, especially that which focuses on native land claims. The notion of rights which inure to indigenous populations first arose in early international law, and aboriginal rights became the focal point of government policy regarding native peoples in newly acquired territories. In the past ten years, the concept of aboriginal rights has been adopted as the rallying cry for native spokesmen across Canada, but it is important to note that what is meant by aboriginal rights in their political discussion is different from what is understood as aboriginal rights in the white perspective. This thesis proposes to outline the origins of the concept in the principles of the law of nations, and then examines the white and native views of the subject as they have developed through government policy and modern native political activity.

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When contrasting cultures approach an issue of great material and symbolic importance, it should come as no surprise that they encounter difficulty in communicating. They comprehend such issues differently. The tragedy of their mutual unintelligibility is that they are unlikely to achieve any satisfactory compromise until they do understand each other.

Gurston Dacks, *A Choice of Futures—Politics in the Canadian North*, (Toronto: Methuen Publications, 1981), p. 75.

INTRODUCTION

It is obvious that there is much disagreement between white and native spokesmen on the subject of aboriginal rights. The purpose of this thesis is to clarify some of the confusion surrounding the issue. It will compare the white perspective on aboriginal rights, as evidenced in governmental policy and jurisprudence in the field, to the "new ideology of aboriginal rights" which is the basis of the position taken by contemporary native spokesmen and motivates their perception of the land claims question.

The term "ideology" is a politically loaded one, and it is important to state at the outset that it is being employed in this work in a very general sense to describe a system of ideas held by a certain group which aspires both to explain the world and to change it. Ideology is a specific political term, but in this study it is not meant to imply the false consciousness which distorts reality while justifying a certain political stance, as it does in Marxist thought. Nor is it used in the sense described in Karl Mannheim's view of the sociology of knowledge, where ideology is a means of defending the *status quo* while utopia is the vision of social reform often held by the lower classes. In either case, ideological thought is not regarded as an objective assessment of reality. Generally speaking, ideology itself has become a derogatory term when used by most political thinkers.

A qualitative evaluation of the truth or falsity of the ideology exposed in this study is not the task at hand. Rather, this thesis pro-

poses simply to suggest an understanding of the present political stance of native organizations in Canada as based upon a complete set of related ideas which together comprise a world view which is unique to aborigines. Ideology in this work then indicates a broad perspective which explains social relations in a very general way, and which suggests a new way of viewing those relations which promises a change. It is used to characterize the native position regarding aboriginal rights which has developed over the last ten years or so because that position encompasses a whole set of political ideas which together form a more or less complete view of the present and desired future place of the aboriginal peoples in the larger white society.

The concept of aboriginal rights, being understood by both white and native persons as those rights of natives to their traditionally occupied lands, provides the connecting point between the white and native cultures. The value of the land to each is unquestionable, and consequently it seems natural that rights to the land are the focal point of discussion when the two conflicting views must confront each other. Many other political terms besides aboriginal rights, such as nationhood and sovereignty, which were originally coined by whites, are also used by natives in a particular way to relate their ideological view to the white politicians and public they must reach in order to achieve their political objectives. The new ideology of aboriginal rights does not only concern the question of native rights to the land, but also asserts a certain place for native populations within or alongside white society which is based upon concerns including, but broader than, aboriginal rights as understood from the white point of view.

The literature which was used to elaborate upon the white conception of aboriginal rights may be briefly mentioned. *Native Rights in Canada*,[1] the second edition by Cumming and Mickenberg, is a useful point of departure. The legal cases pertinent to the subject can be found in any law library, and various articles in law journals provide excellent summations of the theoretical issues in the more confusing and lengthy cases. In addition, several periodicals such as *Canadian Forum*,[2] *Canadian Welfare*,[3] and *Northern Perspectives*[4] have produced special issues on aboriginal rights and native land claims which have exposed, and often criticized, the economic considerations of the white view of native rights to the land. The treaty-making process is outlined in *Native Rights*, mentioned above, but a good historical source to consult is Alexander Morris' study *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*.[5] There are also several publications of the Department of Indian and Northern Affairs (DINA), such as *Indian Treaties in Historical Perspective*[6] and *A History of Native Claims Processes in Canada 1867-1979*[7] which provide very clear exposés of the government's position regarding aboriginal rights, native land claims, and treaties. Departmental press releases and statements, many of which are housed in the National Library of Canada's Indian Claims Commission Collection, are also of great use in the understanding of the governmental perspective. An excellent discussion of the White Paper policy proposal of 1969 is in Weaver's *Making Canadian Indian Policy: The Hidden Agenda 1968-70*[8] which outlines the development of the policy as well as the reaction to it.

The literature from which the native perspective was gleaned

is a little more difficult to characterize. There are several books written by white persons, academics and others, in support of the native cause. *As Long as This Land Shall Last*[9] by René Fumoleau is a study of the making of Treaties 8 and 11 in the Yukon and Northwest Territories which presents a native view of events. Hugh and Karmel McCullum have written two books supporting the native position: *This Land is Not For Sale*[10] and *Moratorium.*[11] Boyce Richardson analyzed the events leading up to the James Bay Agreement in *Strangers Devour the Land,*[12] and Mel Watkins' collection *Dene Nation—the colony within*[13] is well known to those interested in the claims of the Dene in the Northwest Territories. In addition, natives themselves presented their views of the land claims question and aboriginal rights in the testimony they presented to *The Mackenzie Valley Pipeline Inquiry,*[14] edited by T. R. Berger and *The Alaska Highway Pipeline Inquiry,*[15] edited by K. M. Lysyk *et al.*

Of more value to this thesis are the books, written by native persons in the period of backlash to the White Paper, which are indicative of the developing native view. Harold Cardinal wrote *The Unjust Society—Tragedy of Canada's Indians*[16] in immediate response to the policy proposal and later followed it with *The Rebirth of Canada's Indians*[17] which further expands upon his basic position. *The Fourth World: An Indian Reality*[18] by George Manuel and Michael Posluns is perhaps the most complete expression of a new native ideology in the sense in which it is used here.

Finally, there are literally hundreds of individual documents[19] such as position papers and press releases of the native organizations in Canada which were an invaluable aid in discerning a consistent posi-

tion on aboriginal rights. Many of these documents may be found in the National Library of Canada's Indian Claims Commission Collection or the Aboriginal Rights files of the Treaties and Historical Research Center of the Department of Indian and Northern Affairs, but the bulk of them are housed in the collections of the native organizations themselves. The National Indian Brotherhood (NIB) has an impressive collection open to researchers which includes documents from virtually all of the provincial organizations as well as its own statements on aboriginal rights and related issues. The Native Council of Canada (NCC) has also made its statements and publications accessible to researchers. All of the original documentation acquired from the National Library, DINA, the NIB, and the NCC is available from those institutions which are all located in Ottawa.

Although most of the statements made on both sides of the issue of aboriginal rights are partisan, this does not prevent a systematic examination of both the white and native views regarding the subject. This thesis outlines the original principles in the law of nations which formed the basis of the theory of aboriginal rights, and demonstrates the expansion of that theory in a new, paternalistic direction i.e. British, and later Canadian, governmental policy concerning the indigenous populations. The new native ideology of aboriginal rights, as developed in the last part of the thesis, is, in some ways, a return to the principle of the original equality of nations proposed in international law, yet its fundamental objective is the entrenchment and enhancement of the special status of native peoples within Canadian society. The new idology of aboriginal rights is thus an amalgamation

of seemingly conflicting ideas. It nonetheless proposes a comprehensive view of social reform with aboriginal rights as the means by which that change might be achieved.

The new ideology of aboriginal rights as expressed by native spokesmen over the last ten years provides a key to understanding not only the land claims question, but other claims that natives are making upon Canadian society and government as well. The inclusion of a clause recognizing existing aboriginal rights in the new Canadian constitution, and the debate that preceded it, indicates the seriousness with which the native peoples are pursuing their political objectives and the seriousness with which white politicians are taking their demands. It is important to understand that the new ideology of aboriginal rights addresses much more than the question of native land claims, and asserts much more than aboriginal title.

NOTES TO THE INTRODUCTION

[1]Peter A. Cumming and Neil H. Mickenberg, *Native Rights in Canada* (2nd ed.), (Toronto: The Indian-Eskimo Association of Canada in association with General Publishing Co. Limited, 1972).

[2]*Canadian Forum*, Special Issue: Native Land Claims & The Mackenzie Pipeline, November 1976.

[3]"The Emerging Indian Crisis," *Canadian Welfare*, July-August, 1967.

[4]"The Baker Lake Decision," *Northern Perspectives*, Vol. VIII, No. 3, 1980.

[5]Alexander Morris, *The Treaties of Canada with the Indians of Manitoba & the North-West Territories*, (Toronto: Willing & Williamson, [1980?]).

[6]George Brown and Ron Maguire, *Indian Treaties in Historical Perspective*, (Ottawa: Research Branch, DINA, 1979).

[7]Richard C. Daniel, *A History of Native Claims Processes in Canada 1867-1979*, (Ottawa: Tyler, Wright & Daniel Ltd., Research Consultants to (Research Branch) DINA, 1980).

[8]Sally Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-70*, (Toronto: University of Toronto Press, 1981).

[9]René Fumoleau, O.M.I., *As Long as This Land Shall Last—A History of Treaty 8 and Treaty 11 1870-1939*, (Toronto: McClelland and Stewart Limited, 1973).

[10]Hugh and Karmel McCullum, *This Land is Not For Sale*, (Toronto: Anglican Book Centre, 1975).

[11]Hugh and Karmel McCullum and John Olthius, *Moratorium*, (Toronto: Anglican Book Centre, 1977).

[12]Boyce Richardson, *Strangers Devour the Land*, (New York: Alfred A. Knopf, 1976).

[13]Mel Watkins, ed., *Dene Nation—the colony within*, (Toronto: University of Toronto Press, 1977).

[14]T. R. Berger, ed., *The Mackenzie Valley Pipeline Inquiry: Northern Frontier, Northern Homeland*, Vols. 1 and 2, (Ottawa: Minister of Supply & Services Canada, 1977).

[15]Kenneth M. Lysyk, et al., *The Alaska Highway Pipeline Inquiry*, (Ottawa: Minister of Supply & Services Canada, 1977).

[16]Harold Cardinal, *The Unjust Society—The Tragedy of Canada's Indians*, (Edmonton: M. G. Hurtig Ltd., 1969).

[17]Harold Cardinal, *The Rebirth of Canada's Indians*, (Edmonton: Hurtig Publishers, 1977).

[18]George Manuel and Michael Posluns, *The Fourth World: An Indian Reality*, (Don Mills: Collier-Macmillan, Canada, Ltd., 1974).

[19]These documents were studied during a six-week research trip to Ottawa, i.e., June-July of 1981 which was funded by the Northern Political Studies Program at The University of Calgary.

Chapter 1

THE ORIGINS OF ABORIGINAL RIGHTS IN INTERNATIONAL LAW

> 'Aboriginal rights' are those property rights which inure to native peoples by virtue of their occupation upon certain lands from time immemorial. The law of aboriginal rights is really a composite of several doctrines, each with its own slowly evolving theories and dogma . . .[1]

The concept of aboriginal rights is very important to the contemporary Canadian situation, and also plays a prominent role in the politics of other states with indigenous populations. The idea of native rights first appeared in early works in the field of international law where aborigines were seen to be nations subject to the law of nations, just as were the European powers. Prior to the discovery of America, discussion of the rights of indigenous peoples simply did not occur to conquering states. However, since the mid-sixteenth century, aboriginal rights have been debated from many different philosophical perspectives and consequently, any modern definition of the term must confront the ambiguities which this prolonged and varied discussion has produced. The delineation of the historical development of the idea is, therefore, enlightening to anyone concerned with the question of aboriginal rights. It produces a clear outline of the two major ways in which the idea of native rights has been perceived, in an egalitarian or paternalistic mode of thought, and it also allows for a contemporary analysis of the term as it is used today.

The earliest recorded discussion of the question is to be found in the works of Franciscus de Victoria.[2] His analysis of the law of nations in the light of the recent discovery of the Americas led to further philosophical debates upon the subject of natives with regard to international law. Later examinations of the same issue removed it from the realm of international law into the realm of applied policy until the questions regarding the absolute nature of aboriginal rights as recognized in the law of nations were all but removed from the discussion of the term. Policy proven effective over time, based upon a paternalistic conception of white/native relations, became the measure of rightness in the modern view of aboriginal rights in the late nineteenth and early twentieth centuries. Recently, the egalitarian view of the subject, with native groups being seen as sovereign nations with the right to self-determination, has been resurrected by interested parties in the attempt to secure compensation for the previous extinguishment of aboriginal rights (which is held to be illegitimate due to the alleged unfairness of proceedings) or the further enhancement of those rights not yet extinguished. The result of this renewed debate has led to increasing confusion on all sides of the issue as those concerned come to realize the persuasive strength of both the egalitarian and the paternalistic applications of the concept.

In this chapter, an attempt will be made to clear up some of this confusion through a survey of the origins of the concept and its historical development. The early theological-philosophical bases of native rights in the law of nations will be examined extensively in the work of Franciscus de Victoria and more briefly in the writings

of Hugo Grotius and Samuel Pufendorf. Emer de Vattel provides the link between the egalitarianism of international law and the paternalism of later policy regarding natives in his discussion of the superiority of the advancing European civilization at the time of conquest. The more modern position will be examined in its development through the works of Henry Wheaton and Alpheus Snow. The conclusion will summarize the development of the concept of aboriginal rights and relate that development to the current enhancement/extinguishment debate. It is hoped that it will become evident that the specific legal enshrinement of aboriginal rights as special rights for indigenous populations is based upon the modern paternalistic view of white/native relations. The earlier theorists of international law never developed a notion of specific native rights, but rather were concerned with the relations between equal, sovereign nations in which indigenous peoples were included.

The Early View of Native Rights

> In the history of humanity there has been no epoch comparable in importance to the glorious years which mark the end of the fifteenth and the beginning of the sixteenth centuries. Then took place that event, the greatness of which cannot be exaggerated, the discovery of the New World—in other words the addition of an immense field to the theatre of human activity and the inclusion of the whole globe within the scope of man's political activities.[3]

Franciscus de Victoria (*c.* 1486-1546)[4] was a Dominican theologian who lectured at the University of Salamanca. The origins of the theory of native rights are generally traced to two famous lectures he gave in 1539[5] which were later collected and recorded by his students in the *Relectiones Theologicae* after his death. Victoria's work was based on the moral premises accepted in Christian theology. Conse-

quently, these original ideas on the rights of indigenous populations in the face of conquest and the assertion of sovereignty by other nations are all highly moral in flavor and revolve around such questions as the obligations of Christians to promulgate the faith. Regardless, " . . . in his *Relectiones* Franciscus de Victoria repudiates all theories, whether based on the alleged superiority of the Christians, or on their right to punish idolatry, or on the mission which might have been given them to propagate the true religion."[6] His original thoughts on the issue provided the groundwork for the philosophical analyses which were to follow.

Victoria begins from the premise that rights accruing to discoverers of a new land only pertain to uninhabited regions. This principle, he asserts, lies at the basis of international law. "According to the Law of Nations . . . that which has no owner becomes the property of the seizor; but the possessions we are speaking of were under a master, and therefore they do not come under the head of discovery."[7] The aborigines of the New World are not the natural slaves of the Europeans, nor are they knowing sinners or unbelievers, just as they are not witless or irrational, although their lifestyle is not blessed with the civilized values of the conquering nations. The dominion of the natives over their land is natural and God-given, and therefore Christians are not entitled to seize their land and their property on the basis of rights of discovery.

"It being premised, then, that the Indian aborigines are or were the true owners, it remains to enquire by what title the Spaniards could have come into possession of them and of their country."[8]

Victoria posits seven titles[9] which he argues are insufficient justification for the the acquisition of native property by conquering nations. He does not admit that the Emperor of any temporal state is the lord of the earth and is therefore justified in deciding his pleasure on these issues, nor does he assert papal jurisdictional supremacy in temporal matters concerning a non-Christian populace. The right or title of discovery, as already mentioned, he limits to uninhabited regions. The refusal of natives to accept Christ and atone for their sins does not justify Spanish retribution as the natives are naturally ignorant and fearful on these matters. Rather, he places the responsibility of reasoned persuasion on the conquerors, charging them with presenting Christianity in an acceptable manner. Furthermore, the idea that the Spanish mission to the New World is God-ordained he rejects on the grounds of lack of prophets and miracles proving the validity of such a mission. Finally, the voluntary submission of the aborigines to the Spanish and their willing transfer of their property is also unacceptable, due again to the natural fear and ignorance of the natives.

Victoria bases all claims to the New World on the law of nations,[10] those laws generally accepted by all nations as valid and held independently and in common.[11] Because of the natural society and fellowship of the human race, the Spanish are entitled to travel in native territories and pursue trade as long as they do not harm the natives without just cause. The law of nations holds it to be inhumane to treat foreigners badly without cause, so the aborigines would have no natural objection to harmless Spanish infiltration. Furthermore, Spaniards had the right to proclaim the Christian message within native

lands and also to prevent the tyrannical ordering of a return to idolatry which native rulers might impose. Indeed, part of the Christian mandate is to be responsible for one's neighbor, and Victoria asserts that this principle would also allow for the prevention of any acts of tyranny on the part of native leaders. The Spaniards could honor their obligations to native allies against other groups and share in whatever reward might result. Finally, Victoria mentions a right of the Spanish to establish and administer a lawful, civil state if natives are incapable of the task—a sort of political guardianship of the conquerors set up for the benefit of the conquered. However, although he admits this title as generally accepted at the time, Victoria refuses to take a stand one way or another on the question of political tutelage, but he does accept a role of religious tutelage for the Spanish with regard to the natives of the New World.

Those titles aside, Victoria does admit a much more sweeping right to the aboriginal land and properties which the Spaniards might acquire in the case of a just war.[12] However, diversity of religion, the desire to aggrandize the realm, or the glory or interest of the prince cannot provide sufficient justification for war. After a lengthy discussion, Victoria asserts: "The conclusion is that there is only one just cause of war—that is, the injury suffered."[13] And even if a just war were to occur between the aborigines and the Europeans, " . . . it must not be waged so as to ruin the people against whom it is directed, but only to obtain one's rights and the defense of one's country and in order that from that war peace and security may in time result."[14] In other words, although the Spanish or other conquering nations might win

an absolute right over natives and their property in the case of a just war, this right must be exercised with civilized Christian moderation both during the war itself and after the fact if retribution is in order.

Therefore, if the aborigines themselves do not accept the limited rights of the Spaniards to travel, trade, and propagate the faith peacefully within their territories as outlined by the law of nations, the Spanish may be forced to take action against them.

> However, if the barbarians oppose the Spaniards in their exercise of [these rights], the latter should first have recourse to reason and should show that they do not come with intent to hurt. If such a method is insufficient, and if the Indians employ force, it is lawful for the Spaniards to defend themselves, to repel violence, to build forts, to make war, showing moderation, however, and inflicting the least injury possible. If the barbarians persist, nevertheless, in their hostility, and if they try to destroy the Spaniards, the latter may make use of all the rights of war, may despoil their enemies of their goods, may reduce them to captivity and may depose their chiefs.[15]

The condemnation and punishment the aborigines could suffer at the hands of the Spanish in this case is contingent upon the extent of their wrongdoing. Thus, the only means by which the conquering nations can assume an absolute right over the natural dominion of the aborigines is in the case of the just war prompted by native hostility and unwillingness to behave decently toward harmless foreigners.

A Papal Bull was issued in 1537 by Pope Paul III in which the recognition of Indians' rights to liberty and property were initially enshrined.[16] It is interesting to note that the first policy statement regarding aboriginal rights was made by the Church, and this statement outlined the principles upon which Spain's Law of the Indies was based.

Hugo Grotius (1583-1645),[17] the brilliant Dutch jurist, made his principal contributions to the field of international law concerning this subject in his discussions of the acquisition of territories and the necessity of treaties. Beginning from the right of discovery, he agrees with Victoria's assertion of the principle of international law that "Things belonging to no one become the property of those who find or take them . . ."[18] Thus, uninhabited lands, like any other material object, can be claimed by those who discovered them. Grotius, like Victoria, was primarily concerned with questions of international law, and although he said nothing regarding the aboriginal situation in America, much can be inferred from his works concerning the law of nations which applies to that situation, especially on these subjects of conquest and the acquisition of territory.

Grotius redefines the idea of the just war[19] on which Victoria had based the acquisition of any absolute right of conquest over native property. He removes the just war from the realm of moral obligation to right a wrong, and asserts that a just war is merely one which is duly and formally declared by the sovereign on both sides, the object of which is to compel restitution and procure indemnity for injuries suffered. "If individuals can reduce each other to subjection, it is not surprising that states can do the same, and by this means acquire a civil, absolute, or mixed dominion. So that, in the language of Tertullian, victory has often been the foundation of dominion, and it often happens . . . that the boundaries of states and kingdoms, of nations and cities, can only be settled by the laws of war."[20]

When Grotius speaks of the rights of conquest, he is concerned

with those rights accruing to the victors of a just war, not the rights of discovery. Regarding this subject, he asserts the primacy of the sovereign in victory.

> By conquest, a prince succeeds to all the rights of the conquered sovereign or state; and if it be a commonwealth, he acquires all the rights and privileges which the people possessed . . . The right of conquest may go even beyond this . . . For it is in his own power to determine, to what extent his generosity, or the exertion of his right shall go.[21]

The conquering sovereign, Grotius writes, possesses an absolute right over the conquered and may exercise that right at his pleasure. Thus Grotius has nothing to say about the moral goodness with which a situation of conquest may be analyzed. "We sometimes read of nations that have been so far subdued as to be deprived of the use of all warlike arms, being allowed to retain no instruments of iron but the implements of husbandry; and of others, that have been compelled to change their national customs and language."[22] Such are the chances of losing the war.

However, with regard to land rights, the principal focus of aboriginal rights, Grotius introduces a limit to the absolute right of dominion which the conquering sovereign might be thought to possess.

> Lands are not understood to become a lawful possession and absolute conquest from the moment they are invaded. For although it is true that an army takes immediate and violent possession of the country it has invaded, yet that can only be considered as a temporary possession, unaccompanied with any of the rights and consequences alluded to in this work, till it has been ratified and secured by some durable means, by cession or treaty.[23]

The victorious sovereign has absolute rights over the conquered in social and political spheres, but territory must be duly ceded before the right

of the new sovereign over it becomes valid. Thus, treaties are introduced as the main method of formalizing land cession in the case of conquest; an idea which was later applied to the aboriginal situation in North America.

Furthermore, Grotius recognizes two types of treaties:[24] equal treaties, in which both parties benefit equally from the bargain; and unequal treaties, in which one side benefits at the expense of the other's loss. Regardless, "treaties of both kinds, whether [made from motives] of peace or alliance are made from motives of some advantage to the parties."[25] As such, treaties are bargains or contracts which both parties enter into willingly, albeit under duress, and as such, their violation by one party negates the other's treaty obligations.

Closer to the aboriginal question in America, Grotius asserts: "In considering treaties, it is frequently asked whether it be lawful to make them with nations who are strangers to the Christian religion; a question which, according to the law of nature, admits not of a doubt. For the rights which it establishes are common to all men without distinction of religion."[26]

In Grotius' work can be found some of the roots of the more modern position regarding aboriginal rights. If the concept of conquest is expanded to include discovery or merely the ability to conquer the opposition in war rather than the fact of actual conquest, the rights of conquest which Grotius outlined are easily applied to the aboriginal question. However, Grotius bases his discussion on two principles of the law of nations: the right of discovery as limited to uninhabited lands and the notion of the just war; the same principles upon which

Victoria had also rested his ideas on the subject. Like Victoria, his writings should not be examined without regard to those concepts.

> The incontestable merit of Vitoria [*sic*] . . . consists of the fact that from a doctrine still medieval and theologically conceived he deduced with inspired acumen modern conceptions concerning constitutional law and the legal interrelations of nations . . .
>
> Hugo Grotius, on the other hand, possessed an extensive theological, philosophical, and humanistic culture. Thus he was enabled to reduce to a comprehensive system the totality of the juridical inheritance handed down by classical antiquity and enriched by writers of the Middle Ages as well as of more recent times.
>
> Pufendorf's attitude is different: he abandons the theological-dogmatic as well as the humanistic-historical foundation of law; notwithstanding his eminent erudition, which was characteristic of his time, he resolutely seeks after the true sources of his juridical system in the laws of human reason and the nature of things.[27]

Samuel Pufendorf (1632-1694)[28] lived in the days of Descartes, Newton, Leibniz, and Spinoza. The primacy of mathematical logic coupled with the philosophical examination of the world which marked the Age of Enlightenment permeates his analysis of human nature, rights, and obligations. However, because Pufendorf's work is largely a philosophical discussion of larger questions concerning human relations, the contributions which his ideas made to the subject of native rights must be gleaned from general discussions, as was the case with Grotius who also did not address the issue directly.

> Now since human nature belongs equally to all men, and no one can live a social life with a person by whom he is not rated at least a fellow man, it follows, as a precept of natural law, that 'Every man should esteem and treat another man as his equal by nature, or as much a man as he is himself . . .' From this equality as we have posited it, there flow other precepts, the observance of which has the greatest influence in preserving peace and friendly relations among men.[21]

Pufendorf asserts the equality of all men, but does not base his reason-

ing on a transcendent theological value or principle as did Victoria. Rather, he grounds his argument upon the facts of man's social existence. Because we live together, we must treat each other as equals, and from this treatment will flow the benefits of a peaceful existence.

Thus each individual has the right to enter into agreements and pacts with his fellows, and also holds the responsibility of fulfilling the obligations of his promises.

> Since promises and pacts regularly limit our liberty and lay upon us some burden in that we must now of necessity do something, the performance or omission of which lay before entirely within our decision, no more pertinent reason can be advanced, whereby a man can be prevented from complaining hereafter of having to carry such a burden than that he agreed to it of his own accord, and sought on his own judgment what he had full power to refuse.[30]

Each man, as equal to every other man, has to make his own decision regarding the advantages to be gained from any given bargain, and once he enters into it, must accept the consequences.

With regard to property rights, Pufendorf appears to view them as another type of pact which men have made between themselves to facilitate their interaction.

> . . . [We] should say, by way of introduction, that proprietorship and community are moral qualities which have no physical and intrinsic effect upon things themselves, but only produce a moral effect in relation to other men; and that these qualities, like the rest of the same kind, owe their birth to imposition. Therefore, it is idle to raise the question whether proprietorship in things is due to nature or to institution. For it is clear that it arises from the imposition of men, and there is no change in the physical substance of things, whether proprietorship is added to or taken away from them.[31]

Pufendorf recognizes the validity of negative community proprietorship as well, in which things are held by the community at large and are

not assigned to any particular person. Occupancy in community, he continues, establishes dominion for the whole group over everything in the district, and the right to utilize the territory and its produce exclusively. "And so things were created neither proper nor common by any express command of God, but these distinctions were later created by men as the peace of human society demanded."[32]

Consequently, property rights, seen as a type of agreement between men to recognize proprietorship, are not absolute and are subject to change as the human condition requires. Other rights may be asserted over certain property rights. For example, Pufendorf outlines four main types of rights which allow for claims to be made against another person's property.[33] The emphyteutic right allows for the renting of property and the gains from the property to accrue to the lessee, although the property itself is not alienated from its owner. Superficiary rights incorporate the payment of a sum for the disposal of all objects above the ground, but not the land itself. The right of the possessor in good faith is recognized, whereby the title of those who receive it in good faith from someone not able to grant it is valid. Servitudes such as contracts of usufruct, use, habitation, and labor of servants are the fourth type of property right which transcends that of proprietorship.

However, alienation itself is the only means by which the absolute title of proprietorship may be transferred, according to Pufendorf. If the title of another is recognized as valid, to obtain it one must bargain openly and honestly with the proprietor, arranging a situation which will be conducive to the voluntary transfer of his property. "For

alienation means, first and foremost, that a thing passes from a willing owner, and that it is not taken from him against his will by mere violence."[34] The agreement must be contractually valid and formally agreed to by the two parties who enter into it freely and as equals. And like any other agreement, both parties must live with the eventual results. "It is furthermore clear, that, when transfer or alienation has taken place perfectly and absolutely, there remains to him who makes the transfer no right or claim to the thing formerly his."[35]

Pufendorf's ideas regarding property rights as created by men in their own interest opens the door to an evaluation of native rights from a legal and political point of view rather than the egalitarian view espoused by the early writers in the field of international law. The notion that bargains freely made regarding the alienation of property are final and absolute can lead to the modern assumption of the validity of the extinguishment of aboriginal title through the treaty-making process.

The Modern Conception of Aboriginal Rights

Emer de Vattel (1714-1767)[36] was also concerned with the law of nations and only addressed the question of the rights of indigenous populations as a peripheral issue within international law. Vattel's thought on the subject revolves around his assertion of the principle of the equality of all nations and their sovereignty, but he also notes the unique circumstance of discovery in the New World and relates it to the larger advancement of the human community. It is Vattel's recognition of the superiority of the European civilization and its agricultural

base that allows for a departure from the principles of international law in the consideration of native rights. Land becomes the focal point of the issue and its efficient productivity the key to the limitation of native rights as sovereign nations when confronted with advancing Europeans. Vattel's ideas on this subject provide a natural point of departure for the modern, paternalistic conception of aboriginal rights even though his basic premises are those of the law of nations.

"Since men are by nature equal, and their individual rights and obligations the same, coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights."[37] As equals, sovereign nations are free to enter into bargains or treaties with other nations and consequently incur the responsibilities and obligations associated with such compacts. Sovereignty does not necessarily apply to every nation however. "Every Nation which governs itself, under whatever form, and which does not depend on any other Nation, is a *sovereign State.*"[38] Treaties between sovereign nations are binding agreements which do not derogate from the sovereignty of the signatories, but which often affect the relationship of power between the two in some serious way.

More pertinent to the question of aboriginal rights is Vattel's discussion of the cultivation of land and its relation to the discovery of the New World.

> The earth belongs to all mankind; and being destined by the Creator to be their common dwelling-place and source of subsistence, all men have a natural right to inhabit it and

> to draw from it what is necessary for their support and suited to their needs. But when the human race became greatly multiplied in numbers the earth was no longer capable of supporting its inhabitants without their cultivating its soil, and this cultivation could not be carried on properly by the wandering tribes having a common ownership of it. Hence it was necessary for the tribes to settle somewhere and appropriate to themselves certain portions of the earth, in order that . . . they might endeavor to render those lands fertile and thus draw their subsistence from them.[39]

In this passage, Vattel implies that there is a natural progression of civilization which focuses by necessity upon subsistence, and therefore upon the use of the land. When populations are small and the territory is large, a nomadic, hunting-gathering type of existence is possible. As a population increases and the land can no longer support its inhabitants in this manner, settlement and agriculture become the means by which people may sustain themselves. Thus, this natural progression from a nomadic existence to an agricultural one allows for the acquisition of territory in the proprietary sense in which it is usually thought of. Communities of men come together to utilize the territory and in this way acquire the land as their own. "Such must have been the origin, as it is the justification, of the rights of *property* and *ownership*..."[40]

When this principle is applied to the discovery of the New World, the implications are quite clear.

> There is a celebrated question which has arisen principally in connection with the discovery of the New World. It is asked whether a Nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small numbers can not populate the whole country. We have already pointed out, in speaking of the obligation of cultivating the earth, that these tribes can not take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions can not be held as a real and lawful taking of possession, and when the Nations of Europe, which are too confined at

> home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take posession of them and establish colonies in them. We have already said that the earth belongs to all mankind as a means of sustaining life. But if each Nation had desired from the beginning to appropriate to itself an extent of territory great enough for it to live merely by hunting, fishing, and gathering wild fruits, the earth would not suffice for a tenth part of the people who now inhabit it. Hence we are not departing from the intentions of nature when we restrict the savages within narrower bounds.[41]

The acquisition of territories in the New World is thus related in a general way to the advancement of man's civilization. The inevitability of the loss of the nomadic way of life is implied by Vattel and the necessity of gaining new territories to support a large European populace justifies the limiting of the natives' right to use and occupy the vast areas of their traditional lands. Furthermore, ownership becomes associated with the ability to make the best use of the land in order to support the population. Vattel's view is not based on an assumption of racial superiority, but rather, it focuses on the superiority of the agricultural mode of life over nomadic existence with respect to the efficiency of land use. The nomadic tribes, in his opinion, have no natural right to prevent others from utilizing the land in a more productive way.

Vattel's thought on this subject, although derived from principles of international law, allows for the concept of native land rights to be viewed from the perspective of utility and superiority. The natural rights of nations which indigenous populations might be thought to possess are subject to the necessity of utilizing the land in the most productive way possible. If advancing nations can acquire and use the land in a way superior to the nomadic Indian tribes, that territory

accrues to them regardless of any question of native rights. On this point, Vattel provides the basis of the modern paternalistic conception of aboriginal rights which was to form the basis of policy regarding indigenous populations in North America.

The modern view of aboriginal rights begins with acceptance of white sovereignty as an established fact, as shown in the words of Henry Wheaton:

> The title of almost all of the nations of Europe to the territory now possessed by them, in [the American] quarter of the world, was originally derived from conquest, which has been subsequently confirmed by long possession and international compacts, to which all the European states have successively become parties.[42]

The modern position regarding aboriginal rights is marked by a clear lack of concern for the origins of the concept in the principles of the law of nations. Rather, this view focuses on the fact of discovery, merged with "conquest," of inhabited or uninhabited territories, without regard for either of the two principles of international law upon which the earlier perspective had been based: the right of discovery as valid only in unoccupied lands and the concept of the just war.

Henry Wheaton was writing in the field of international law in the mid-nineteenth century.[43] His work appears connected directly to concepts of international law which were earlier outlined by such men as Grotius and Pufendorf, yet the egalitarian tone which underscored those earlier jurists' works is lacking in Wheaton's writings. There is no absolute principle of equality asserted from which the concept of aboriginal title may be derived; it is now viewed as recognized and dealt with by the established state at its pleasure, based upon its previous dealings with native populations. The superiority of the

sovereign state is evident, and its right to deal with indigenous populations within its territories makes the assumption of a paternalistic policy very easy. Furthermore, the question of extinguishment has moved to the fore in the discussion of native rights, and the value of progress over the traditional values of the native lifestyle is openly asserted.

> In the various wars, treaties, and negotiations, to which the conflicting pretensions of the different States of Christendom to territory on the American continents have given rise, the primitive title of the Indians has been entirely overlooked, or left to be disposed of by the States within whose limits they happened to fall, by the stipulations of the treaties between the different European powers. Their title has thus been almost entirely extinguished by force of arms, or by voluntary compact, as the progress of cultivation gradually compelled the savage tenant of the forest to yield to the superior power and skill of his civilized invader.[44]

The ways in which Wheaton claims aboriginal title has been legitimately extinguished in the New World, by force of arms or by voluntary compact, were two of the many means of extinguishment which Victoria argued against. It seems clear that the two earlier principles of international law upon which the concept of native rights as distinct nations had been based were no longer even paid lip service by the modern thinkers in the field. The right of discovery had come to be seen as including all territory, inhabited or not, and the idea of the just war as providing an absolute right of the conqueror over the conquered was no longer addressed as the notion of discovery was translated into conquest. Consequently, the modern position lost much of the moral, philosophic tone of earlier works related to the subject which had been founded upon a conception of the Indians as subject to the law of nations like all other nations. Aboriginal rights were now a fact merely because conquering states agreed to recognize them. Whatever compensation was made

for the extinguishment of aboriginal title (indeed, whether aboriginal claims were acted upon or not), was up to the newly established sovereign state with regard to its own treaty obligations with other European powers.

> Some of these savage tribes have totally extinguished their national fire, and submitted themselves to the laws of the States within whose territorial limits they reside; others have acknowledged by treaty that they held their national existence at the will of the State; others retain a limited sovereignty and the absolute proprietorship of the soil . . . [By this is understood that the] Indian tribes have only a right to occupancy. Their possession was held to be of so nomadic and uncivilized a character as to amount to no more than a kind of servitude or lien upon the land, chiefly for fishing and hunting: the absolute title being in the republic.[45]

The absolute or ultimate title was seen to be vested in the conquerors, and all rights accruing to native persons as the indigenous populations of the territories endured at the pleasure of the state.

Early twentieth century concepts of aboriginal rights derive more of their basic premises from writers like Vattel and Wheaton than those who originally speculated upon the subject. In 1918 Alpheus Snow was commissioned by the United States' Department of State to compile all documentation concerning aboriginal rights for its use.[46] It is interesting to note that Snow does not even mention Victoria or any other early writers in international law. His focus is primarily upon legal case studies and the establishment of important precedents regarding native claims with respect to governmental policy. His study does not include any works related to the subject which were written earlier than the 1820s. The modern concept of aboriginal rights had completely superseded the original views based on the law of nations.

> Aboriginal tribes in non-self-governing colonies and in other dependencies are under the administration of the Crown by orders in council or by regulations made by the local governors under authority delegated to them by orders in council and subject to supervision and disapproval by the Crown . . . Self-governing colonies insist upon managing their own relations with the aboriginal tribes, claiming this right under the law of nations as an incident of self-government.[47]

"Taking it to be established as a fundamental principle of the law of nations that aboriginal tribes are the wards of civilized States . . .,"[48] it appears clear that the law of nations no longer applied to the aborigines themselves, as it had earlier. The modern view tended to place native persons as inferior to the advancing nations, not only in the area of civilization, but in all areas. Tutelage was now the central concept of white/native relations, although the religious tutelage proposed by Victoria was not considered as the focal point of the relationship.

> It is thus evident that civilized States are inclined to allow to themselves and to each other a wide discretion in determining what restrictions upon the liberty of their aboriginal wards are needful in any given situation . . . The development of the law of nations in this respect would seem to be in the direction of the recognition of the tutorial duty of civilized States towards the aborigines under their sovereignty as imperative and unalienable,—as inevitably involved in the personal relationship of guardianship,—and the restriction of the personal liberty of the aborigines only to the extent needful to enable the State to effect the necessary mental correction.[49]

All men were no longer thought to be equal, as Pufendorf and others had claimed, and consequently the contracts made between the state and aboriginal populations were no longer viewed as free bargains made between peoples of equal sovereignty and rights.

> It is thus evident that the term 'treaty,' as applied to an agreement between a civilized State and an aboriginal tribe is misleading, and that such an agreement is, according to the law of nations, a legislative act on the part of a civilized State, made on conditions which it is bound to fulfill since it insists that the aboriginal tribe shall be bound on its part. When the executive of a civilized State enters into a 'treaty' with an aboriginal tribe, it seems clear that he exercises, according to the law of nations, a legislative power over the tribe in subordination to the legislature of the State.[50]

The modern view of aboriginal rights removes the discussion entirely from the concept of fair and just bargaining between equals for territory in the possession of one party, which possession and other accompanying rights accrued to the party by virtue of its occupation upon those lands from time immemorial according to the law of nations. Aboriginal rights now are seen to come solely under the discretion of the conquering sovereign and the recognition of those rights would depend upon the historically established policy of the state. The entire conception of the nature of aboriginal rights had moved from the realm of the egalitarian principles of the law of nations to the sphere of policy based upon the realities of the situation which included a paternalistic view of white/native relations.

Conclusion

> The notion that America was stolen from the Indians is one of the myths by which we Americans are prone to hide our real virtues and make our idealism look as hard-boiled as possible. We are probably the one great nation in the world that has consistently sought to deal with an aboriginal population on fair and equitable terms. We have not always succeeded in this effort but our deviations have not been typical.[51]

For as many persons who would whole-heartedly agree with these sentiments expressed by Felix Cohen, there are at least an equal number

who would passionately argue against his point. However, it seems safe to assume that in the latter part of the twentieth century there has been an increasing concern over the issue of aboriginal rights and how they have been and should be dealt with. Yet in spite of the common goals expressed by persons on all sides of the issue, the satisfactory dealing with those who have legitimate aboriginal claims, agreement on the means of achieving this goal remain elusive. Many continue to argue for the final extinguishment of any remaining aboriginal claims, and base their opinion principally on those ideas central to the modern conception of aboriginal rights. Many others, including various native organizations themselves, are agitating for the further enhancement of aboriginal rights and enlarge upon the earlier principles of international law by asserting their national right to self-determination as possible only in a system that recognizes enhanced aboriginal rights.

In summarizing the historical development of the concept of aboriginal rights, the cogent ideas of both the early and the modern positions on the question become evident. These ideas are easily related to the contemporary confusion surrounding the issue which has resulted principally, it would seem, because the contradictory principles on which both positions are based have not yet been clearly delineated.

Victoria, as the first known writer on the subject, made his major contributions by putting native rights on the same level as those of the Christian conquerors. He was the first to assert the two principles of international law which formed the basis of theories of native rights for centuries: the right of discovery as applicable only to uninhabited lands, and the idea of a just war as the only means of attain-

ing absolute rights over native claims. Grotius added to Victoria's work by redefining the concept of the just war in a more purely legalistic way and by further asserting the limited nature of a conquering sovereign's right to acquired territories in his introduction of the idea of treaties. Pufendorf began from the premise of the equality of all men and the sanctity of their contracts. Property rights, he asserted, were another type of man-made agreement and were not, therefore, absolute. There were types of property rights which overlapped proprietary rights, but the legal alienation of property was the only means of true transfer. Treaties, therefore, were seen as final bargains between equal parties. These select early writers in the field of international law all allow for a derivation of the concept of native rights based upon the egalitarianism of the law of nations. In this sense, none of them had a view of aboriginal rights *per se*, but rather, native rights were simply an extension of the rights of nations accorded to all sovereign powers.

Vattel seems to be the link between the early and the modern perspectives, deriving his position from basic principles of international law but adding to it the concept of advanced means of land use which can justify a limitation of the apparent natural rights of the natives. The notion of the superiority of the European civilization enter here based upon its agricultural mode of land use.

The modern authors, building upon Vattel's assumption of European superiority, have constructed a paternalistic, as opposed to egalitarian, view of native rights. Wheaton saw aboriginal title, its recognition and the way with which it was dealt, as dependent upon the state's historical policy. He further asserted the primacy of the

notion of civilized progress over uncivilized habitation, placing the natives in an inferior position with regard to their white conquerors. The rights of discovery had become the rights of conquest in all lands, occupied or unoccupied. The notion of the just war was discarded as conquest had come to mean occupation by a more advanced population. Wheaton's discussion opened the way for other modern writers, like Alpheus Snow, who began to analyze aboriginal rights without regard for the philosophical principle of egalitarianism on which the concept had originally been based. Legal case studies came to provide the definitive statement on native claims, and this emphasis coupled with the supremacy of state power and the natural inferiority of the Indians led to a view of the treaties as anything but a bargain struck for the mutual advantage of two relatively equal parties. The paternalistic attitude of the modern position is exemplified in the return of the concept of tutelage, though of a social and political nature, far broader than the original concept of religious tutelage which Victoria had discussed.

The paternalism of the modern view of aboriginal rights is evident in the history of white/native relations in what is now known as Canada. The development of Canadian law on the subject of aboriginal rights indicates very clearly that the recognition of such rights has been solely under the discretion of the sovereign throughout Canada's history and that the paternalistic framework within which the concept has been placed has allowed for the development of special status within a liberal state. This development and the questions it raises will be addressed in greater detail in the following chapter.

As for the contemporary debate over aboriginal rights, native spokesmen now wish to revive the egalitarian view originally espoused by the early writers of international law which did not recognize rights special to the indigenous populations outside the realm of the law of nations. They use the terminology of specific aboriginal rights which, as has been shown, is a result of the paternalism of the modern policy; but speak also of nationhood, sovereignty, and self-determination which indicate a denial of the modern view and a return to the original principles of the law of nations. This somewhat confused position forms the basis of the new ideology of aboriginal rights which will be addressed later in the thesis.

NOTES TO CHAPTER 1

[1]Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada* (2nd ed.), (Toronto: The Indian-Eskimo Association of Canada in association with General Publishing Co. Limited, 1972), p. 13.

[2]*Ibid.*, p. 14.

[3]Franciscus de Victoria, "De Indis et de Ivre Belli Relectiones," *Relectiones Theologicae XII*, (New York: Oceana Publications Inc., 1964), p. 64.

[4]*Ibid.*, p. 64.

[5]Cumming and Mickenberg, *op. cit.*, p. 14. The date of the lectures given in this account is 1532, but this is disputed by Brian Slattery who asserts the now accepted date of 1539. See Slattery, Brian: *French Claims in North America 1500-1559*, University of Saskatchewan Native Law Center, Saskatoon, 1980, p. 26. The dispute is discussed in note 120.

[6]de Victoria, *op. cit.*, p. 85.

[7]*Ibid.*, p. 86

[8]*Ibid.*, p. 129.

[9]*Ibid.*, pp. 129-148.

[10]*Ibid.*, pp. 90-92.

[11]Hugo Grotius, *The Rights of War and Peace*, (New York: M. Walter Dunne, 1901), p. 296.

[12]de Victoria, *op. cit.*, p. 91.

[13]*Ibid.*, p. 92.

[14]*Ibid.*, p. 187.

[15]*Ibid.*, p. 90.

[16]Cumming and Mickenberg, *op. cit.*, p. 14.

[17]Grotius, *op. cit.*, p. 4.

[18]*Ibid.*, p. 338.

[19]*Ibid.*, p. 314.

[20]*Ibid.*, p. 348.

[21]*Ibid.*, p. 348.

[22]*Ibid.*, p. 349.

[23]*Ibid.*, p. 336

[24]*Ibid.*, p. 170

[25]*Ibid.*, p. 170

[26]*Ibid.*, p. 172

[27]Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo*, (New York: Oceana Publications, Inc., 1964), p. 11a.

[28]*Ibid.*, p. 12a.

[29]*Ibid.*, pp. 330 and 335.

[30]*Ibid.*, p. 402.

[31]*Ibid.*, p. 532.

[32]*Ibid.*, p. 536.

[33]*Ibid.*, p. 598-599.

[34]*Ibid.*, p. 606.

[35]*Ibid.*, p. 607.

[36]Emer de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and the Affairs of Nations and of Sovereigns*, (New York: Oceana Publications Inc., 1964), pp. iii and vi.

[37]*Ibid.*, p. 7.

[38]*Ibid.*, p. 11.

[39]*Ibid.*, p. 84.

[40]*Ibid.*

[41]*Ibid.*, p. 85.

[42]Henry Wheaton, *Elements of International Law*, (New York: Oceana Publications Inc., 1964), p. 201.

[43]*Ibid.*, p. v.

[44]*Ibid.*, p. 203.

[45]*Ibid.*, pp. 49-50.

[46]Alpheus Snow, *The Question of Aborigines in the Law and Practice of Nations*, (Northbrook, Illinois: Metro Books, Inc. 1972), p. 3.

[47]*Ibid.*, p. 45.

[48]*Ibid.*, p. 117.

[49]*Ibid.*, p. 106.

[50]*Ibid.*, p. 128.

[51]Felix S. Cohen, "Original Indian Title," *Minnesota Law Review*, 32 (1947-48), 34.

Chapter 2

THE WHITE CONCEPTION OF ABORIGINAL RIGHTS

It is not surprising that native political leaders and their white counterparts have extreme difficulty in discussing the concept of aboriginal rights as the term holds an entirely different significance for each. The paternalistic approach to aboriginal rights has been espoused by the whites since the assertion of European sovereignty on the North American continent. This position has become more clearly defined throughout the years and its development is obvious in the treaty-making period in Canada as well as in the historical and contemporary case law concerning the subject of native rights. The culmination of the white conception of aboriginal rights is apparent in the government's submission of the White Paper of 1969—a proposal of change in Indian policy which was based upon the liberal ideals of individual rights and freedom as opposed to the more paternalistic notion of special status and collective rights which would guarantee that position. The special status accorded natives as a result of the modern concept of aboriginal rights had failed to allow for the successful integration of natives into white society. A new tactic, more in keeping with the liberal ideology of the Canadian government, was proposed. The purpose of this chapter is to outline the historical development of the concept of aboriginal rights in basic governmental policy through the treaty-making process and Canadian case law concerning the subject. A brief discussion of the

White Paper will provide a natural point of departure for the later examination of the native position as it has been articulated over the last ten years. Indeed, the conclusion of the development of the white position in the government's policy proposal of 1969 launched the development of the new ideology of aboriginal rights.

The Treaty-Making Period

> From the earliest days of European settlement in North America, the relationship between Indians and non-Indians was characterized by an assumption on the part of colonial governments that native people had an interest in the land which had to be dealt with before non-native settlement or development could take place.[1]

The view of the discovering or conquering sovereigns assumed that whatever native interest existed was to be recognized and dealt with so as to ensure the peaceful settlement of such territories as might be needed or desired by the incoming whites. Within the Royal Proclamation of 1763, the basic model for the acquisition of Indian lands was set out quite clearly: ". . . the 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 . . ."[2] The practical application of the cession/purchase command with regard to native territories led to the negotiation and conclusion of treaties between the sovereign and the Indians, concluded by whatever representatives of the Crown were in a position of authority at the time of negotiation and settlement.

Treaties, as commonly understood as a feature of international law, are compacts or agreements between two or more sovereign nations

which are concluded to the mutual benefit of both. Treaties usually signal the end of hostilities between the nations which have either threatened them both or proven one victorious over the other. The binding force of an international treaty comes from its ratification and legislative implementation. "Both historically and legally, it seems that the Indian treaties are not international treaties in the sense of agreements between two or more independent nations."[3] It is clear that the British Crown considered the Indian peoples its subjects in North America and not independent sovereign nations with whom international treaties had to be concluded. Nor were the agreements with the Indians treaties in the private law sense. "In private law, 'treaty' refers to the discussion of terms which occurs immediately prior to the making of a contract . . . but it is clear that the agreements entered into with the Indians are neither international treaties nor simple private contracts . . ."[4]

> It is thus evident that the term 'treaty' as applied to an agreement between a civilized state and an aboriginal tribe is misleading, and that such an agreement is, according to the law of nations, a legislative act on the part of the civilized state, made upon conditions which it is bound to fulfill since it insists that the aboriginal tribe shall be bound in its part.[5]

Although the Indian treaties are not of the nature of international or private compacts, they are nonetheless legally recognized as binding. Since the earliest days of white settlement in North America, they have proved the means of extinguishing aboriginal title and fulfilling the *plenum dominium* in the Crown.

The first set of treaties negotiated in what is now Canadian territory were the Maritime treaties, signed between 1693 and 1779.

"They were styled 'Treaties of Peace and Friendship,' which certainly appears to be a misnomer, for most of the treaties began with the words 'Articles of Peace and Submission,' hardly an indication of an agreement signed between two equal powers for mutual benefit . . . Perhaps it is more accurate to consider these agreements, called treaties, to be a cross between a document of surrender and an armed truce, with the Indians making most of the concessions for an occasional quid *pro quo* from the British."[6] These treaties were concluded during and after a period of intense conflict between white explorers and settlers and the natives of the Maritimes. The Maritime treaties were not considered to be land cession agreements. "[They] stressed mutual peace and friendship, the objective [was] to ensure the assistance or neutrality of the Indian people."[7] Consequently, if aboriginal rights existed in the Maritimes, these early treaties did not recognize them or seek to extinguish them in any way.

In 1713 the Treaty of Utrecht was signed by France and Britain. France retained Cape Breton Island and Prince Edward Island, while ceding Nova Scotia to Great Britain. New Brunswick remained in dispute.[8] The French occupation of these territories had not included a recognition of aboriginal rights and this heritage was passed to the British government when it acquired the Maritimes. No treaties have been concluded in these provinces with the objective of extinguishing an aboriginal title as such an interest did not exist under the French regime. The same reasoning was applied to the lands of present day Quebec, and consequently, the first true land cession treaties in Canada were not concluded until westward expansion in the mid-nineteenth century necessitated British

extinguishment of native title.

> The premise on which the British occupation of what is now Canada is said to be based in that absolute title to the land was vested in the Crown—this paramount estate becoming a *plenum dominium* (full power to dispose of property at will) whenever the Indian title was surrendered or otherwise extinguished. The French, on the other hand, did not subscribe to the principle of an Indian or aboriginal title but rather, on acquiring the land, accepted a responsibility for the religious welfare of the indigenous peoples . . .[9]

In the late eighteenth and early nineteenth centuries, numerous small treaties were negotiated in the lands of Upper Canada which sufficed to extinguish the aboriginal title in territories used for white settlement. The Robinson Treaties of 1850 were the first major land cession treaties negotiated by the British government to extinguish aboriginal title in lands contemplated for extensive settlement, and they ". . . discharged the aboriginal title of twice as much land as had been affected in all other Upper Canadian Treaties put together."[10] These two treaties established the pattern of extinguishment prior to extensive settlement and also included the principal features of later treaty settlement: provisions for the payment of annuities, the establishment of reserves, and the freedom of natives to hunt and fish on any unsettled Crown lands.

The post-Confederation treaties were concluded with the same objective in mind: the clearing of Indian title and the opening of large tracts of land to future settlement. In 1871, the treaty-making process in Canada began in earnest. Treaties Nos. 1 and 2 in the Red River District were concluded in 1871; Treaty No. 3, the Lake of the Woods area, 1873; Treaty No. 4, southern Saskatchewan, 1874; Treaty No. 5, the Lake Winnipeg region, 1875; Treaty No. 6, most of the North

Saskatchewan River district, 1876; Treaty No. 7, the remainder of the South Saskatchewan River system (Alberta), 1877. These treaties encompassed prospective areas of western settlement as well as lands likely for railroad rights-of-way and steam navigation via Lake Winnipeg and the Saskatchewan River. Treaty No. 8, signed in 1899, covered territory between Edmonton and the access route to the Yukon gold fields. Treaty No. 9, 1905, extinguished native title to the north-eastern portion of the province of Ontario, including access to James Bay. Adhesions to this treaty in 1929-30 covered the remaining northwestern part of the province bordering on Hudson's Bay. Treaty No. 10, 1906, took in the remaining unsurrendered portion of Saskatchewan and Treaty No. 11, 1921, covered the western part of the Northwest Territories and the south-eastern tip of the Yukon.[11]

The texts of the numbered treaties are all unmistakably clear in their objective of the extinguishment of native title and conform remarkably to the formula whereby the Indians ". . . do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits . . ."[12] It may be a matter of contention whether the natives, when agreeing to the treaties, understood the exact nature of what they were surrendering; but legally, the treaty language is crystal clear in every case with regard to this issue—and indeed, the question remains as to why the treaties were negotiated at all if not to extinguish whatever native title existed in those lands.

The compensation in each of the numbered treaties is also quite

uniform: ". . . the Crown would set aside reserves for Indians and would provide other benefits such as cash payments, annuities, schools, medical assistance, and recognition of hunting and fishing rights, in return for the relinquishment of the native interest in the land."[13] These agreements marked the end of the formal treaty-making process between the government of Canada and native peoples.

Understandably, several problems arose as a result of this process. Many contemporary native groups insist that the conditions under which their forefathers agreed to sign the treaties seriously undermined their contractual legitimacy. Assertions that verbal promises were made which were not included in the final documents or that Indians did not understand the concept of land cession lead many Indian activists to question the validity of the entire treaty-making process in Canada. Other complaints concern the non-fulfillment of treaty obligations on the part of the government; for example, the continued lack of reserves in the Northwest Territories when the provision for their establishment was made in the last of the numbered treaties, Treaty No. 11, signed in 1921.

The largest issue of contention remains the lack of treaties in a large portion of Canada's territory.

> Here the question was how the government could explain to the Indians the making of treaties in some areas of Canada and its refusal to make them in other areas. Since the question was not of treaty rights but of aboriginal land rights, the point of Indian pressure was to convince the government to recognize their land title as a basis for making treaties, as it had done elsewhere in Canada. These non-treaty areas covered a wide arc of land beginning in Newfoundland and Labrador on the east, through Quebec, the Inuit portion of the Northwest Territories, all of the Yukon, ending in most of British Columbia.[14]

Where aboriginal rights have been legally recognized in Canadian

territory, the present day government has undertaken negotiations with native groups in order to deal with whatever aboriginal title may yet exist regarding those lands. Its objective in these settlement negotiations is exactly the same as it was during the height of the treaty-making period in Canadian history: the extinguishment of aboriginal rights in return for compensation including cash, lands, and special privileges. Modern settlements such as the James Bay Agreement can be viewed as an extension of the treaty-making process necessitated by the resurgence of native rights in the last ten years in Canada.

It would be useful to examine the development of the legal concept of aboriginal rights in Canadian case law before broaching the subject of the White Paper and its aftermath. The treaty-making process illustrates the government's historical and contemporary recognition of the concept of aboriginal rights and the means with which it may be dealt, but the judicial development of the concept gives a more clear picture of the exact nature of aboriginal right and title and also illustrates the type of disputes which prompt litigation in the field. Since there are two main approaches to aboriginal rights, political settlement through legislation or treaty, and litigation, Canadian cases must be examined in order to form a clear picture of the paternalistic conception of aboriginal rights in Canada.

Aboriginal Rights and Title in Canadian Jurisprudence

The exact nature of aboriginal or native rights has not yet been clearly defined in either philosophical or legal terms, and consequently, the courts have focused upon the question of aboriginal title to lands

occupied by indigenous populations from the onset of colonization. Aboriginal rights *per se* have tended to be defined only in relation to aboriginal title; the extent of such rights beyond the concept of native title, if any, has not been judicially addressed. The judicial refinement of the concept of aboriginal title does imply certain things about aboriginal rights, but it is not clear whether the latter apply only to persons with some sort of aboriginal title as yet unextinguished or whether they are much broader in scope, accruing to all persons with Indian blood regardless of legal status.

Because our country and its situation in North America has been shaped so strongly by the influences of both Great Britain and the United States, it is necessary to look briefly at the original British and American policies. The Royal Proclamation of 1763[15] was the first major policy statement of the British government which dealt specifically with problems concerning natives and their lands in North America. Because of Britain's interest in the continent, especially after the conquest of New France in 1760, it seemed clear that Great Britain would have to clarify certain of its policies in the colonies. The Royal Proclamation formally addressed the question of Indian territories and rights, among other issues.

"[The] leading Canadian document on Indian rights, the Proclamation of 1763, reflects the pre-existing policies and practices of the British government and colonists."[16] The problem addressed by the Proclamation was that of white settlement on native lands. Serious disputes arose as a result of white encroachment upon and purchase of certain territories, the absolute title of which was not explicitly in the

hands of the natives. Regardless, these lands were clearly in the possession of the Indians, who seriously resented whites trespassing on their homelands. Whites and Indians alike were having severe difficulties with the settlement of lands which were not under the jurisdiction of any particular government, it appeared, but which offered much possibility for white exploration and settlement.

The Royal Proclamation served three purposes regarding the question of native lands. Firstly, it reserved certain defined territories in North America for the Indians over which, it was hoped, they could freely roam and hunt. Secondly, the Proclamation proscribed any private purchase or government granting, leasing, etc. of those territories. These steps were taken so that ". . . the 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 to any of them, as their Hunting Grounds . . ."[17] Finally, the Proclamation asserted the principle of international law commonly understood as the right of conquest or discovery. "[If] at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in our Name . . ."[18] In other words, alienation of Indian territory was to be made only to the Sovereign, the British Crown, and the model for the process was outlined in the idea of purchase of the lands after negotiation with the occupying tribe. This is the principle which, when applied in practice, led to the treaty-making process. Note that the Royal Proclamation, while it protected Indian title, did so in a way which

demonstrated the authority of Britain over the land and which clearly illustrated that the underlying absolute title to the land was vested in the Crown. The Proclamation was unilateral; there were no consultations or negotiations. Indians were, in effect, allowed to retain the use of their traditional lands at the pleasure of the sovereign.

The Royal Proclamation of 1763 set the tone for dealings with the Indians and their lands in the whole of North America. Unsettled lands, if occupied by indigenous populations, were seen as being under some sort of Indian claim or title to those territories, based upon rights of possession and use, although the extent and nature of this claim was undefined. White prospectors and settlers were prohibited from encroaching upon Indian land, and the only legally recognized alienation of those areas was to be made to the Crown, in whom the underlying title rested. These basic principles governed the early settlement of territories in both the United States and Canada, as the two countries would come to be called. They furnished a standard by which American, and later Canadian, courts would further attempt to define concepts related to aboriginal rights.

The American judiciary had to address questions related to aboriginal rights well before such issues arose in Canadian litigation. Consequently, it is of some value to examine the basic reasoning of the first American decisions which dealt with the status and rights of natives as they formed the basis of American jurisprudence on this subject and were also frequently cited in later Canadian cases.

The decisions of Chief Justice John Marshall are those most often cited in reference to American judicial policy regarding natives

and their claims. There are two main aspects to Marshall's thought on the matter: his assertion of the dominance of the right of conquest or discovery over any native title, and his belief in the peaceful assimilation of natives into the growing American society. These ideas were reflected in his statements in three major U.S. cases in which aboriginal claims were at issue: Johnson & Graham's Lesee v. McIntosh (1823),[19] Cherokee Nation v. The State of Georgia (1831),[20] and Worcester v. The State of Georgia (1832).[21] All of these cases have been cited numerous times in later Canadian cases.

Marshall's position can be summarized quite concisely:

> . . . [The] restriction of the Indians' land claims was required for the country's very existence. While Indians possessed the 'original natural rights' to the land, the Americans possessed the land—if only by claims originating in conquest . . . While the Chief Justice affirmed unequivocally that the laws and hence the titles of the conqueror must control the conqueror's courts, he presumed that the conquered will be left, where possible, with the use and possession of their property and even of their independence, both theirs until voluntarily ceded to the conqueror.[22]

Marshall was concerned with the establishment of legitimate government in the United States, and he saw the reconciliation of the indigenous population with the new society in this light. "Government's authority to suppress the natural rights of men, members of its civil society or not, appeared to the Chief Justice as but a regrettable necessity incidental to government's fundamental purpose: preserving the natural rights of its own society's members so far as possible."[23] Marshall unwaveringly accepted the legitimacy of the conquering sovereign's title to lands in its newly acquired jurisdiction: "It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it."[24] Rather, his ap-

proach focused upon the necessity of limiting aboriginal title or claims for the security necessary to the settling of new territories. Indians were hostile and dangerous to the new Americans. "[Their] warlike savagery made their physical proximity a mortal danger to the conquering settlers, [but] only to the extent of that danger might their lands be appropriated."[25] Marshall's realism was reflected in his view that superior power must be accommodated and that the title of conquest was conceded by the major powers of the world. However, he noted that the conqueror's sovereignty must be tolerable and humane, rather than oppressive, eventually encouraging the intermingling of the old and new societies under the legitimate government of the conqueror. In short, American society must be safely established and form the basis of law and order, and the restriction of aboriginal rights to meet this end might be required. Once Indians no longer posed a threat to the new society, they were to be encouraged in their own way of life until such time as they accepted the new society more whole-heartedly. Thus Marshall justified the early transgression of the natural possessory rights of the native on humanitarian grounds, asserting the expediency and liberty to be achieved in the long run by the establishment of good government.

Marshall's thought is reflected in the judgments he delivered in this field.

> In this first judicial opinion on Indian affairs [Johnson v. McIntosh (1823)], the Chief Justice seemed to be showing his fellow citizens that the exceptional and harsh treatment of the savages involved in America's settlement could be interpreted in the light of liberal and humane principles—and thus could be understood as exceptional. To discourage such brutal treatment where possible, as in

> . . .
> his own time, was the great endeavor of Marshall's other judicial utterances on the subject, Cherokee Nation v. Georgia and Worcester v. Georgia.[26]

Johnson v. McIntosh (1823) was a case in which the claimants had purchased certain lands from the Piankeshaw Indians in 1773, believing the transfer of title from the Indians to them was complete and legally valid. In 1818, the U.S. government had granted the same land to the defendant, which grant, McIntosh asserted, conferred to him the true title to the land. The case revolved around the issue of the alienation of aboriginal territories, and Marshall's decision was in favor of the defendant. He held that the Indians could not alienate their land except to the federal government. He focused his reasoning on the primacy of the right of discovery, while at the same time asserting a recognized right of the Indians to the lands they had occupied since time immemorial.

"An absolute title to lands cannot exist, at the same time, in different persons, or in different governments . . . All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians."[27] However, continued Marshall, ". . . it has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned."[28] The Chief Justice argued that the entire history of white/native relations on the North American continent had been based on a recognition of Indian title to occupied lands, but that absolute title was necessarily asserted by a conquering or discovering sovereign in the securing of

newly acquired territory. In fact, he added that most of the United States' territories had been granted in the colonies by the Crown in spite of the fact that those lands were then still occupied by various native groups.

> In the establishment of these relations [i.e., between the advancing whites and the natives], the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as indian nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[29]

"[Discovery] gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise."[30]

Marshall did, however, note a limit to the sovereign's exercise of power in these matters. "The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed . . ."[31] If natives made war on advancing whites, the sovereign power was justified in penalizing the Indians accordingly. This was an adaptation of the principle of the just war in international law—that undue provocation justifies swift and sure retaliation or punishment. Barring that circumstance, Marshall felt that a general respect for the Indian title, even in its limited state, would facilitate the natives' trust and confidence in the new government, thus encouraging the eventual

mingling of the old and new members of American society.[32]

> . . . Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two peoples, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.[33]

In short, in Johnson v. McIntosh, Marshall set out the basic concepts which were to determine his later decisions on questions of this nature, and which would also influence Canadian decisions. He recognized the concept of Indian title to lands based on the natives' rights to the use and occupation of the territory which had been in their possession since time immemorial. However, Indian title was necessarily limited by the advance of a conquering or discovering sovereign, whose duty it was to secure newly acquired territories to ensure the peaceful coexistence of all its subjects, in which the natives were considered included. The absolute title to all lands was seen to be vested in the sovereign, although natives were entitled to use and benefit from the occupation of their homelands until they either surrendered their title voluntarily through the alienation of the lands to the sovereign, or else forfeited their title by unduly provoking military action of some kind. The basis of Marshall's reasoning rested in his conception of the primacy of the absolute title and rights of the conquering or discovering sovereign over those of the indigenous populations. If the power of the sovereign were to be tested, Marshall implied that the exercise of its power could be unlimited in the effort to secure newly claimed lands.

The case of the Cherokee Nation v. The State of Georgia (1831) posed an interesting juridical problem: the status of native groups within the American state. The Cherokees were proceeding against Georgia as a foreign state. Asserting their own position as that of a foreign nation, they were claiming sovereignty over their own territory, stating that legislation passed by the state of Georgia should have no influence in Indian territory.

Marshall began by noting the unique character of the relationship between the United States and the native peoples living within the country.

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated "domestic dependent nations." They occupy a territory to which we assert a title independent of their will, which must take in effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[34]

Marshall again based his decision on the primacy of the sovereign's title, and inferred that, for this reason, Indians could not be considered foreign nations in the strict legal sense of the expression. They were indeed subjects of the conquering sovereign in some senses, as illustrated by the limited nature of Indian title. Therefore, Indian peoples could not be considered foreign nations with absolute sovereignty in their territories. The court denied the Cherokee motion for an injunction on that basis, not on the question of the validity of Georgia's legislation in Indian territories. It is interesting to note

here the introduction of the concept of pupilage or guardianship which was later to form the basis of both American and Canadian government policies regarding aborigines.

Worcester v. The State of Georgia (1832) was an appeal case in which the plaintiff lived on Cherokee land as a missionary with the sole permission of the Cherokee nation. He was prosecuted and convicted in a Georgia court for not having requested from the state a license or permit to live on Indian land—a procedure required by an act of the Georgia legislature in 1830.

Again, Marshall opened his summary of the decision by asserting the absolute title of the sovereign with respect to Indian lands. "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that [limitation] imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer . . ."[35] Alienation of Indian territories could only be made to the discovering power. Until such time as that alienation was achieved, the Indian peoples were to retain possession of their lands and were not to be interfered with in the use or enjoyment of those territories by any authority other than that of the discovering sovereign. The Cherokee nation had not yet alienated its land to the United States.

> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in con-

> formity with treaties, and with acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[36]

The court thus found the prosecution of Worcester invalid, and the previous decision was nullified. The basis for this conclusion was the idea that the Indian title should allow, as far as possible, the freedom necessary to the Indian tribes to fully use and enjoy their territories. The American Congress, representing the sovereignty of the American people, had the power to transgress the aboriginal title, but state legislatures were without sufficient authority to do so. It is in this case that Marshall expressed most clearly his ultimate faith in the liberty and independence of the Indian tribes. As they no longer represented a dangerous threat to the new social order, they were to be allowed the fullest expression of their rights until such time as treaties or other arrangements were negotiated with the sovereign to extinguish their aboriginal rights by the alienation of their aboriginal title.

These three cases illustrate clearly the basic concept of a recognized, although limited, Indian title in Marshall's jurisprudence, which became the foundation of both the American and the Canadian judicial theories of natives and their land claims. The early limitation of native rights and title in American history was justified by the necessity of securing the newly acquired territories of the conquering or discovering nation. Once the new order was established, dealings with the natives were to be as equitable as possible, allowing them as much freedom in the retention of their title as was prac-

tical, but not allowing them the full status of sovereign foreign nations. The relationship between the native peoples and the American state was characterized as one of guardianship. With regard to the aboriginal title itself, alienation was to be made to the sovereign modelled on the concept of negotiation and purchase, or, in the case of a threat to peace, in whatever manner the sovereign chose to exercise its absolute title and accompanying rights. Until such alienation occurred, peaceably or not, the Indians were to be granted as much liberty in the exercise of their rights as was practical. Marshall appeared to be attempting the encouragement of peaceable interaction and intermingling between natives and whites in American society, while at the same time firmly entrenching the absolute title of the sovereign in Indian territories and the exclusive right of the U.S. government to deal with the Indians as circumstances would dictate. This approach has been summarized by a Canadian scholar:

> Sovereignty, in the sense of the right to govern and tax, may have been asserted as against European powers by virtue of discovery, or by conquest, or (in the case of the United States) by purchase from the country asserting a prior claim. While acquisition of territory in this sense may carry with it a claim of underlying title to the soil, it leaves untouched the question of a coexistent aboriginal claim to the soil . . .
>
> The two claims of title stand together with respect to unsurrendered lands. By constitutional doctrine, the ultimate fee is in the Crown, and it has never been held to be vested in the Indians . . . In brief, the Crown's underlying, or ultimate, title is one which is perfected to become full ownership (*plenum dominium*) by the surrender of Indian title.[37]

The Royal Proclamation of 1763 established a policy in North America of recognition of native right or claim stemming from their original possession and use of lands newly acquired by the conquering

sovereign. Early American jurisprudence, as represented by Marshall's decisions, expanded upon the rights of the sovereign with regard to Indian title, recognizing the tension existing between the liberty of the old society and the orderly establishment of the new. By the time Canadian courts began to address questions of this nature, a standard for the evaluation of native land rights had been well established, and the concepts of sovereignty and Indian title had been defined for the North American situation.

The five Canadian cases discussed here do not represent, as did the American cases presented, the thought of any one major Justice, nor do they reflect the formal policy of the Canadian government with regard to natives. Rather, these cases were chosen because they are the major pieces of litigation dealing with basic question of aboriginal rights in Canadian jurisprudence to date. The case of St. Catherine's Milling & Lumber Company v. The Queen (1887)[38] clarified the question of the alienation of Indian lands within a province. Calder *et al.* v. The Attorney-General of British Columbia (1971)[39] concerned the agitation by the Nishga Indians of British Columbia for a declaration that aboriginal rights were outstanding in the province because aboriginal title had never been extinguished. The James Bay cases (1973-74)[40] dealt with the attempt by natives of the area to halt work on the James Bay power development project pending the settlement of an aboriginal claim. In Re: Paulette *et al.* and the Registrar of Titles (1974)[41] the question of the ability to file a caveat based on aboriginal title was raised. Finally, the case of The Hamlet of Baker Lake *et al.* v. The Minister of Indian Affairs and Northern Development (1980)[42] was a declaratory suit

brought by the Inuit of the Baker Lake region asserting that the territory was subject to aboriginal title. There are many other cases which deal with various aspects of native rights and claims in Canada's legal history, but these five represent not only different aspects of the land question, but also the increasing complexity and seriousness with which aboriginal claims are being asserted and contested in our courts. Furthermore, these cases lead to a more narrow definition of the nature of aboriginal title than was given by either the Royal Proclamation of 1763 or the jurisprudence of Justice Marshall.

The St. Catherine's Milling case was heard by the Supreme Court of Canada in 1887. Its decision was later appealed to the Judicial Committee of the Privy Council which dismissed the appeal in 1889.[43] It involved a disagreement between the Province of Ontario and the Government of Canada as to the ownership of territories ceded by the Saulteaux Indians in an 1873 treaty concluded with the Dominion. Ontario claimed the lands by virtue of section 109 of the British North America Act while the federal government claimed jurisdiction by virtue of the Royal Proclamation of 1763, asserting that the nature of aboriginal title was fee simple ownership and thus full title was transferred in the signing of the treaty.[44] Without getting entangled in the federal/provincial aspect of the case, the decision of St. Catherine's Milling, upheld on appeal, had a narrowing effect on the legal definition of the concept of aboriginal title. Noting the limited nature of the Indian title, much along the lines of Marshall's reasoning, the court asserted that such title was not like one of fee simple where the land was owned outright, and that, therefore, the alienation of Indian lands did not

entail the simple transference of title to the specific body or agent with whom the treaty had been concluded. Rather, the alienation of Indian territories was made to the Crown, in recognition of the absolute title of the conquering sovereign, and thus, the most clearly responsible representative of the Crown in the particular case could exercise that absolute title. In short, the alienation of Indian lands within a defined province could be made to the Crown as represented by the province, rather than to the federal government, with whom the treaties had been made. This conclusion emphasizes that extinguishment of Indian title is not a simple sale or exchange between contracting parties but an exercise by the Crown of its *plenum dominium*.

In the original case, Justice Strong commented upon the nature of Indian title:

> We have very full and clear accounts of the policy in question. It may be summarily stated as consisting in the recognition by the crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible to any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the crown itself, in whom the ultimate title was vested . . .[45]

Strong noted that the limitations of Indian title made it similar to a usufructuary title: one in which the absolute owner of the land entitled others to occupy and use it, as well as reap the benefits of its produce for their own well-being, while retaining the absolute title himself. In the classical Roman concept of usufruct, the title reverted to the owner upon the death of the inhabitant. Clearly, the Indian title was not exactly congruent with a classical usufructuary title,

but the similarities were made strikingly apparent for the first time in Strong's discussion.

The judgment of the appeal case was delivered by Lord Watson who confirmed that ". . . the tenure of the Indians was a personal and usufructuary right, dependent upon the goodwill of the Sovereign."[46] Watson asserted that the treaty of 1873 did not represent a transaction between the Government of Canada as such and the Indians in question but rather, that treaties were concluded between representatives of the Crown and the Indians. The Crown could exercise its absolute title in any one of its representative bodies, and thus, he upheld the decision of the Supreme Court that the ceded territories came under the jurisdiction of the Province of Ontario. The main contribution of the St. Catherine's Milling case with regard to aboriginal rights was to further define the concept of aboriginal title as a "personal and usufructuary right, dependent upon the goodwill of the Sovereign." That the right accompanying the Indian title was characterized as a personal one implies that it cannot be transferred by sale or gift. Just as a citizen cannot sell or give away his personal right to vote, so an Indian cannot sell or give away his personal right to gather subsistence on the land. The similarity of the Indian title to a usufructuary title limits the property rights of the natives to the use and enjoyment of their traditional lands; it also limits the title of the Crown until such time as that alienation of the aboriginal title is achieved. The usufructuary right of the Indians becomes an encumbrance of sorts upon the ultimate title of the sovereign.

The Calder case was originally decided by the Supreme Court of

British Columbia in 1971, but it was subsequently appealed to the Supreme Court of Canada in 1973 where the decision in the original case was upheld.[47] In this case, officers of the Nishga Indian Tribal Council representing various B.C. bands brought an action against the Attorney-General of British Columbia ". . . for a declaration that the aboriginal or Indian title to certain lands had never been lawfully extinguished."[48] As was mentioned earlier, few treaties were concluded in British Columbia, and those were mainly confined to the territory of Vancouver Island. It is important to note that a case of this type could not arise in areas that have been formally ceded by valid treaties.

Chief Justice Davey, in delivering the B.C. court's decision which dismissed the action, referred to Marshall's concept of the right of the sovereign to determine the correct policy with which to deal with natives and the court's obligation to recognize that policy. He asserted that:

> In each case it must be shown that the aboriginal rights were ensured by prerogative or legislative Act, or that a course of dealing has been proved from which that can be inferred.
>
> Whether aboriginal rights ought to be confirmed or recognized depends entirely upon the Crown's or Legislature's view of the policy required to deal properly with each situation . . . I see no prerogative or legislative Act ensuring to the Nishga Nation any aboriginal rights in their territory . . . If I be wrong, and the Indians of British Columbia did acquire any aboriginal rights, . . . the historical and legislative material. . . . shows they have been extinguished.[49]

Justice Tysoe added: ". . . I think it is necessary to keep in mind the clear distinction between mere policy of a sovereign authority and rights of natives conferred or expressly recognized . . . and the different legal results that follow."[50] The Nishga action was dismissed on the

principle that the sovereign at no time expressly or implicitly recognized aboriginal title in British Columbia; consequently, the court determined that such title cannot judicially be considered to exist outside of such recognition. Furthermore, even if it were later determined that the existence of aboriginal title is independent of sovereign recognition, the ensuing policies and legislation in British Columbia had implicitly extinguished that title.

The Supreme Court of Canada upheld the judgment of the B.C. court but the question of aboriginal rights remained a contentious issue in the decision. Justice Judson, who delivered the decision, cited the St. Catherine's Milling case and also Marshall's decisions in Johnson v. McIntosh and Worcester v. Georgia stressing the absolute nature of the title of the sovereign. The jurisdictional limitations of the Royal Proclamation of 1763 and the policy regarding Indians that was evident throughout the history of British Columbia provided further support in the reasoning behind the decision. However, although two of the seven judges were in agreement with Justice Judson's opinion on the case, three others opposed the ruling, arguing that aboriginal rights continued to exist in British Columbia as they had not been extinguished by the sovereign. The jurisdictional limitation of the Royal Proclamation was questioned, and it was asserted that aboriginal rights, once established, must be presumed to exist until the contrary is proven.

> The Supreme Court split three-three and it fell to Pigeon, J., the remaining judge, to break the tie. Pigeon J. noted that the application brought the Crown's own title to the land into question. In Pigeon J.'s view, British Columbia law required that proceedings affecting the Crown's title must have the consent of the Lieutenant-Governor. In this case, consent had not been given. Hence the application for a declaration must be refused.

> On these strictly procedural grounds, then, Pigeon J. arrived at the same conclusion as Judson J. and the two judges supporting his reasons for denying the Nishga's claim.[51]

The Calder case, although dismissed by the Supreme Court of Canada, ". . . served to increase dramatically the legal credibility of Indian land claims."[52] That the dismissal of the appeal was the result of a procedural technicality allowed the decision to be viewed as a victory by native leaders across Canada. That the highest court in Canada would produce such a peculiar split decision on the question of aboriginal rights may have played some part in the Canadian government's about face on aboriginal land claims which was announced by Mr. Chretien on August 8, 1973.[53] In short, although the Calder case did not really clear up any of the difficult legal questions surrounding the concept of aboriginal title, it asserted that aboriginal title is legally recognized as well as extinguished only by the sovereign due to the absolute nature of the title it holds in Indian territories, and that such recognition and extinguishment can be either overt or covert.

The James Bay case was being heard in the Quebec courts at the same time as the Nishga action was ongoing.[54] Justice Malouf of the Superior Court of Quebec, on November 15, 1973, decided to allow the petition of the Inuit and Cree Indians of the James Bay area who were seeking an interlocutory order of injunction against the James Bay Development Corporation and others. On November 22, 1973, the Court of Appeal for Quebec suspended the lower court's injunction until the outcome of the companies' appeal was known. The Supreme Court of Canada refused the natives' subsequent appeal regarding the suspension order on

December 21, 1973. In the interim, negotiations between the native groups and the federal and provincial governments was ongoing, and on November 15, 1974, an agreement-in-principle as to a settlement was reached which ended the court action. The Court of Appeal shortly thereafter reversed Justice Malouf's decision based on the merits of the case, but because of the forthcoming settlement, the matter was not appealed to the Supreme Court of Canada.[55]

The Inuit and Cree of the James Bay region began the litigation in early November of 1972, petitioning for an interlocutory injunction against the James Bay Development Corporation and others to halt work on the project pending the outcome of the hearing on a permanent injunction peitioned earlier that year.[56] Malouf's decision came a year later and was based upon the nature and history of Indian rights. Asserting that not all conceptions of property are identical to the white one, he cited statute after statute which noted the government's obligation to deal with aboriginal title before the opening of territories to white settlement. "The judge said he was not called upon to decide the exact nature and extent of the Indian title, but merely to satisfy himself that the petitioners had made out a *prima facie* proof that they had clear rights sufficient to ensure that they had a substantial case to be considered by the court in the final hearing, and that he found."[57]

The corporation immediately appealed the decision to the Quebec Court of Appeal, and ". . . exactly a week after Malouf brought down his judgment, the Appeal Court swept it aside . . ."[58] The judges who sat on the appeal case were not interested in the discussion concerning

aboriginal rights, ". . . saying that Indian rights were irrelevant to the application for a suspension of the injunction on the grounds of public interest."[59]

The natives in turn appealed this decision to the Supreme Court of Canada. The 1973 decision of the Supreme Court refusing the appeal of the petitioners was the only one of the three cases which was reported. In that instance, the court decided that the Quebec Court of Appeal had properly exercised its jurisdiction in suspending Justice Malouf's injunction, and the case was summarily decided upon questions of legal technicality without regard to the issue of aboriginal rights. Malouf's ruling was eventually overturned by the Quebec Court of Appeal in November of 1974,[60] but by that time, the James Bay settlement had been reached.

The James Bay cases led to the first contemporary settlement of native claims based upon aboriginal right. "For the Indians the importance of the Malouf judgment was that it confirmed their rights. The principle that these rights could and should be alienated to the government by agreement or treaty was accepted on both sides, and the Malouf judgment created a favorable political situation for such an agreement."[61] Within two weeks of Malouf's decision, the Quebec government submitted a proposal to the natives which was made public after two months in which the Indians and Inuit did not reply to the offer. Cash compensation, royalties, socio-economic programs, hunting and trapping rights in designated areas, and reserve lands were all part of the package. Also included were proposed project modifications which might have allayed some of the natives' environmental concerns. This proposal was rejected.

"The country was impressed: the Indians were spurning $100 million."[62] Jean Chretien, then Minister of Indian Affairs, threatened to cut off the funds with which the Indians were pursuing the court action. "Under heavy attack, he quickly said he had been misinterpreted."[63]

> It was against the background of these misgivings that in March 1974 the hunting families were flown out of the bush camps so that they could hear about the government's offer, made five months before, and express their opinion of it. . . They spoke with the passion, feeling and perception of poets. The talked about the purpose that the Creator had when he created the earth and put the animals on it and gave them to the Indians to survive on. They talked of how they had worked and suffered for the land . . . They talked about the white man, and his thoughtless ways, his failure to ask their permission before he invaded their lands . . . Over and over again they declared their affection for the land and their knowledge that its destruction meant their destruction.[64]

The negotiations for a political settlement continued through the summer and autumn of 1974. During this time the Quebec Court of Appeal began to consider the appeal of the corporations against the merits of the Malouf judgment. The argument against the continuing existence of aboriginal rights in the region was based upon the 1670 charter of King Charles II which gave those lands to the Hudson's Bay Company. In that document, no reference was made to aboriginal rights and consequently, ". . . if any Indian right had existed, it was surrendered, legally speaking, from that moment, 'whether by discovery, occupation, conquest or royal decision.'"[65] The Appeal Court overturned the Malouf decision on November 21, 1974.[66]

Ironically though, on November 15, 1974, an agreement-in-principal was signed between the Quebec government and Grand Council of the Cree which involved the surrender of all Indian rights in return for $150 million in cash and royalties, special rights to certain lands,

reserves, and project modifications. "This cash settlement was greater than any made on native people in Canada before . . . They also received more land than other Canadian Indians."[67] The James Bay cases illustrated two main points: first, that native peoples are likely to achieve more through political settlement than litigation; second, that the Government of Canada is still engaged in the treaty-making process which is based upon the extinguishment of aboriginal rights.

The case of Re: Paulette *et al.* and the Registrar of Titles was originally heard by the Supreme Court of the Northwest Territories in 1974,[68] Justice Morrow presiding. It was later appealed to the NWT Court of Appeal in 1976,[69] which overturned Morrow's decision. The final appeal of the overturned decision was made to the Supreme Court of Canada in 1977,[70] which upheld the decision of the Court of Appeal.

Justice Morrow in Re: Paulette had to decide whether aboriginal title was an interest sufficient for filing a caveat on certain lands in the Northwest Territories. Paulette and others presented a caveat, a legal statement of interest in land, based on their aboriginal rights. After some difficulty in establishing the ability of the court to decide upon the case,[71] Morrow approached the problem with this question in mind: is there a "*prima facie* situation . . . which may promise a possibility of a claim . . . ?"[72] He claimed that a caveat offers no restrictions whatever on Crown title, but merely declares an interest in the territory.

Morrow outlined some well-established characteristics of Indian title to lands occupied prior to colonial entry: it confers a communal, possessory right to use and exploit the land. Indian title is alienable

to the Crown, and is terminated by such alienation, but it cannot be transferred. Finally, the Crown has an underlying interest in Indian title, ". . . it being an estate held of the Crown."[73] Morrow determined on the evidence presented that the area covered by the caveat had been used and occupied by the natives prior to colonial entry, and that the native title to the land was characterized by the qualities of Indian title he delineated. "Unless . . . the negotiation of Treaty 8 and Treaty 11 legally terminated or extinguished the Indian land rights or aboriginal rights, it would appear that there was a clear constitutional obligation to protect the legal rights of the indigenous people in the area covered by the proposed caveat, and a clear recognition of such rights."[74]

Morrow asserted that Treaties 8 and 11 could not have extinguished the aboriginal title because the all-encompassing nature of the treaties was not understood by the natives who agreed to them.[75] He based his decision on the evidence presented by witnesses and descendants of witnesses to the treaties and on the assertion of the purpose of the federal government in negotiating those treaties as emphasizing ". . . their dominant title only."[76] Therefore, he concluded that aboriginal title in the Northwest Territories still exists and provides sufficient reason for the filing of a caveat based on that interest.

A good illustration of the type of argument Morrow supported in this case is to be found in René Fumuleau's study of Treaties 8 and 11, *As Long As This Land Shall Last.*[77] Fumoleau traces the history of the treaty-making process in the Northwest territories, relying heavily upon the oral tradition of the native culture. He asserts that discov-

ery of natural resources and the possibility of economic development in the north were the main reasons prompting the government to conclude treaties with the Indians. The representatives of the government made verbal promises according to native tradition, but did not make sure that the Indians understood exactly what they were giving up for these benefits, nor were many of the verbal promises included in the written text of the treaties. In other words, a certain amount of misrepresentation occurred on the part of the government. In addition, Fumoleau argues that the pressure on the Indians to acquiesce to the treaties was intense and not indicative of a true bargain, that some signatures were forged, and that some of the terms of the treaty have not been fulfilled by the government. The conclusion that Fumoleau draws is that the treaties in the north are not representative of agreements concluded in good faith by relatively equal partners, and that consequently, they are not binding. This type of argument is also used by the Dene Nation and other native groups to challenge the validity of treaties in their regions, and in fact may be used to challenge the validity of the entire treaty-making process in Canada if similar circumstances may be discovered in the oral histories of various Indian tribes. The filing of the caveat case rested upon this reasoning, which asserts that aboriginal rights were not extinguished by treaties because the treaties themselves were not valid agreements.

Morrow's decision was appealed to the Northwest Territories' Court of Appeal two years later. The decision of the court allowed the appeal based on the legal requirements for the filing of a caveat. If the interest upon which a caveat is to be based is not documented in

some certifiable way, the caveat may not be filed. As Justice McDermid noted: "All titles derive from the Crown and without a title from the Crown there can be no registration under the [Land Titles] Act for there is nothing to register."[78] Justice Sinclair added: "The caveat in question does not purport to affect lands for which a certificate in fee simple has been issued."[79] Although the court did not speak directly to the question of aboriginal rights and the validity of the treaties, the decision implied that aboriginal title cannot form the basis of sufficient reason for the filing of a caveat unless it is documented in some formal statement of title. Morrow's decision was overturned on this basis.

Paulette *et al.* appealed the NWT Court of Appeal's decision to the Supreme Court of Canada. Chief Justice Laskin delivered the decision of the court, which upheld the appealed judgment. He stated: "In short, there is no indication in ss. 48 and 49, nor anywhere else in the [Land Titles] Act, that a caveat can be filed in respect of unpatented Crown land . . . Such a caveat should not be accepted for filing by the Registrar of Titles, and, if accepted, would be of no effect."[80] The plaintiffs' appeal was dismissed, and the caveat was not filed. The decisions of both the NWT Court of Appeal and the Supreme Court of Canada were not based upon a discussion of aboriginal rights or title *per se*; rather, they focused upon the legal requirements for the filing of a caveat. If aboriginal title is not formally documented, it cannot be deemed sufficient interest for the filing of a caveat.

The Baker Lake case is the most recent Canadian case dealing expressly with the concept of aboriginal rights. The Inuit of the

Baker Lake region of the Northwest Territories brought an action against the Attorney-General of Canada in 1980 for a declaration that the Baker Lake area is subject to the aboriginal right and title of the Inuit to hunt and fish thereon. The Inuit claimed that mining operations, made possible by federal government leases, interfered with their aboriginal rights and therefore they sought the declaration and consequent restrictions upon the government's issue of land use and prospecting permits, and the like.

Justice Mahoney of the Federal Court put the onus of proof of aboriginal title upon the plaintiffs.

> The elements which the plaintiffs must prove to establish an aboriginal title recognizable at common law are:
> 1) That they and their ancestors were members of an organized society.
> 2) That the organized society occupied the specific territory over which they assert the aboriginal title.
> 3) That the occupation was to the exclusion of other organized societies.
> 4) That the occupation was an established fact at the time sovereignty was asserted by England.[81]

He based these criteria on numerous cases that cumulatively lead to the conclusion that the common law concept of aboriginal title depends on these characteristics.

Mahoney, in his view of the evidence, recognized the Inuit as an organized society in terms of being a cohesive unit utilizing a specific territory, that territory including the Baker Lake region. He further acknowledged that the occupation was to the exclusion of other organized societies and that it was an established fact at the time of the assertion of British sovereignty.

The problem in this list of criteria is the extent of the indigenous populations occupation of a given territory. The Inuit had

never resided at Baker Lake nor even travelled there very often; but they had hunted caribou whose range included Baker Lake. Justice Mahoney recognized the complexity of this issue in dealing with nomadic peoples in a relatively barren area, but supported the Inuit occupation as sufficient.

> The nature, extent or degree of the aborigines' physical presence on the land they occupied, required by the law as an essential element of their aboriginal title is to be determined in each case by a subjective test. To the extent human beings were capable of surviving on the barren lands, the Inuit were there; to the extent the barrens lent themselves to occupation, the Inuit occupied them.[82]

With this reasoning, Justice Mahoney accepted the Inuit's aboriginal title. Furthermore, he asserted that no legislation has been enacted by Parliament which explicitly or implicitly extinguished that aboriginal title. Mahoney judged in favour of the plaintiffs, but reiterated that compensation due the Inuit resulting from encroachment upon their title by the government and the mining companies was not the issue at hand. His decision merely related to the question of an aboriginal title in the region, not to the restriction of government leases or mining activities. He supported the Inuit's entitlement to ". . . a declaration that the lands comprised [in the Baker Lake region] are subject to the aboriginal right and title of the Inuit to hunt and fish thereon."[83] The Inuit of Baker Lake have a usufructuary right and title to that land as an indigenous people which has fulfilled the established criteria necessary to determine aboriginal title at common law; but such title or right does not impinge upon the government's capacity to grant certain types of leases on the land regardless of the aboriginal title. In other words, the decision accepted the theory of aboriginal right and

went far in an attempt to define characteristics which indicate its existence, but it weakened its practical meaning by allowing the sovereign to authorize competing uses of the land prior to the extinguishment of the aboriginal title. Aboriginal title may be legally proven to exist but appears to have little effect on the sovereign's ability to exercise its underlying, absolute title.

To summarize, "'aboriginal rights' are those property rights which inure to native peoples by virtue of their occupation upon certain lands from time immemorial."[84] Since the Royal Proclamation of 1763, Indian title to occupied lands has been recognized by both American and Canadian courts and governments, and has been defined more precisely throughout the judicial history of North America. Aboriginal title in Canada's courts today is viewed as a usufructuary right dependent on the pleasure of the sovereign. It is legally recognized and extinguished only by the sovereign, due to the rights and authority of the conquering or discovering power. The method used for the extinguishment of aboriginal title has been the treaty-making process which still forms the basis of government policy. Aboriginal title may form the basis of certain legal rights and claims, but not others, and it is determinable upon the presentation of evidence in accordance with defined common law criteria.

The White Paper of 1969

> All [the unfortunate] conditions of the Indians are the product of history and have nothing to do with their abilities and capacities. Indian relations with other Canadians began with special treatment by government and society, and special treatment has been the rule since Europeans first settled in Canada. Special treatment has made the Indians a community disadvantaged and apart.

> Obviously, the course of history must be changed. To be an Indian must be to be free—free to develop Indian cultures in an environment of legal, social and economic equality with other Canadians.[85]

On June 25, 1969, the Hon. Jean Chretien, Minister of the Department of Indian Affairs and Northern Development, submitted the government's proposal for change in the area of Indian policy. "He referred to the policy as a 'statement' and as a 'proposal,' not as a White Paper, and after a cursory description of its contents, he outlined the general steps of implementation: a special unit would be established immediately in the department to consult with the Indians, the provinces, and other federal departments on 'the means of implementation and the pace of it.'"[86]

The new policy was the product of a year of consultations with natives concerning the revision of the Indian Act, but the White Paper and its proposal of terminating the special status enjoyed by Indians came as a complete surprise to natives across Canada. The proposal included four major aspects of change: repeal of the Indian Act, transfer of the responsibility for natives to provincial governments, making funds available for interim economic development, and winding up Indian Affairs within the Department of Indian Affairs and Northern Development. The goal was to achieve equality for natives within Canadian society; the means by which it was to be achieved was the removal of all legislative and administrative policies which secured special status for aboriginal peoples.

> Legislative equality would be achieved by repealing the Indian Act and by replacing it with an Indian Lands Act: Indians were to control their own lands . . . [Administrative] equality required transferring DIAND programs and responsibilities to the provinces and to other federal departments . . .

> In terms of claims and treaties, government's responsibilities were limited to 'lawful obligations,' such as are seen to exist in terms of the unfulfilled treaty promises for reserve lands in the Northwest Territories and in some areas of the Prairie provinces. The policy argued that the importance of treaties in serving the broad social and economic needs of Indians had steadily diminished over the years, to the point where 'the anomaly of treaties between groups within society and the government of that society will require that these treaties be reviewed to see how they can be equitably ended.' In addition to ending the treaties, aboriginal land title was rejected as a basis for claims.[87]

Provisions for an Indian Claims Commission to deal with unfulfilled treaty obligations were made within the policy statement.

At first glance, the White Paper of 1969 appears to be an abrupt departure from the historical development of government relations with the native peoples. The end of the treaty-making process seemed antithetical to the recognition of and fair dealing with aboriginal rights which had formed the keystone of white/Indian relations since the earliest days of formal relations between the two. That claims would be limited to outstanding treaty obligations and that aboriginal title was virtually written out of the future of native affairs made yet more clear the government's intention to move away from its traditional position. The other means of securing special status, legislation and the bureaucracy established to deal with Indian affairs, were also to be eliminated in an attempt to make the Indians simply other Canadians, equal and individual members of a liberal society.

However, in another sense, the White Paper was a logical culmination of earlier Indian policy. The objective had always been to eliminate whatever special rights might have accrued to native persons by virtue of their aboriginal status, or at least to minimize the effects of those rights upon the power of the sovereign, in an attempt to

normalize relations between whites and natives. Treaties had been based upon the concept of extinguishment; aboriginal rights had been reduced to aboriginal title, a type of definable property right with obvious limitations. The legal mode of eliminating these native rights and subsequent claims that might have arisen as a result of them had become the means of encouraging Indians to participate in Canadian society on the government's terms. Temporarily, in order to extinguish aboriginal rights, the government had had to place the Indians in the position of enjoying a special status not shared by all Canadian citizens as a result of the compensation offered for the termination of the natives' original rights. The White Paper of 1969 proposed to end all of that and to secure for Indians their rightful place as equals in Canadian society. The removal of special status and the non-recognition of the aboriginal rights which had ultimately allowed for its development were the means by which equality would be achieved.

NOTES TO CHAPTER 2

[1]DINA, Office of Native Claims, "Native Claims: Policy, Processes, and Perspectives," (Ottawa: Minister of Supply & Services Canada, 1978), p. 2.

[2]Peter A. Cumming and Neil H. Mickenberg, *Native Rights in Canada* (2nd ed.), (Toronto: The Indian-Eskimo Association of Canada in association with General Publishing Co. Limited, 1972), p. 29.

[3]*Ibid.*, p. 54.

[4]*Ibid.*, p. 54.

[5]A. H. Snow, *The Question of the Aborigines in the Law and Practice of Nations*, (New York: Pitnam's, 1921), p. 191.

[6]W. E. Daugherty, *Maritime Indian Treaties in Historical Perspective*, (Ottawa: DINA Research Branch, Corporate Policy, 1981), p. 45.

[7]George Brown and Ron Maguire, *Indian Treaties in Historical Perspective*, (Ottawa: DINA Research Branch, 1979), p. 10.

[8]*Ibid.*, p. 8.

[9]*Ibid.*, p. 1.

[10]*Ibid.*, p. 26.

[11]*Ibid.*, pp. 29-30.

[12]Cumming and Mickenberg, *op. cit.*, p. 314. This particular passage is taken from the text of Treaty No. 3, the Northwest Angle Treaty signed in October of 1873.

[13]DINA, Office of Native Claims, *op. cit.*, p. 2.

[14]Sally Weaver, *Making Canadian Indian Policy—The Hidden Agenda 1968-1970*, (Toronto: University of Toronto Press, 1981), p. 36.

[15]Cumming and Mickenberg, *op. cit.*, pp. 289-292 (excerpts). The Royal Proclamation of 1763 is also discussed in ch. 4., pp. 28-30.

[16]*Ibid.*, p. 23.

[17]*Ibid.*, p. 291.

[18]*Ibid.*, p. 291.

[19]Johnson & Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat) 240 (1823).

[20]Cherokee Nation v. The State of Georgia, U.S. (5 Pet) 1 (1831).

[21]Worcester v. The State of Georgia, 31 U.S. (6 Pet) 350 (1832).

[22]Robert K. Falkner, *The Jurisprudence of John Marshall*, (Princeton, N.J.: Princeton University Press, 1968), p. 52.

[23]*Ibid.*, p. 48.

[24]*Ibid.*, p. 54. This is a statement made by Marshall in the delivery of his decision.

[25]*Ibid.*, pp. 54-55.

[26]*Ibid.*, p. 56.

[27]Johnson v. McIntosh, (8 Wheat), p. 588.

[28]*Ibid.*, p. 603.

[29]*Ibid.*, p. 574.

[30]*Ibid.*, p. 587.

[31]*Ibid.*, p. 589.

[32]*Ibid.*, pp. 589-90.

[33]*Ibid.*, pp. 591-92.

[34]Cherokee Nation v. Georgia, (5 Pet), p. 17.

[35]Worcester v. Georgia, (6 Pet), p. 559.

[36]*Ibid.*, p. 561.

[37]D. Paul Edmond, *Native Rights—Spring Semester 1981.* Course materials compiled by Edmond. (Toronto: Osgoode Hall Law School, 1981, p. 1.82. Taken from: K. Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of Calder," *Canadian Bar Review*, 51 (1973), pp. 450-80 .

[38]St. Catherine's Milling and Lumber Company v. The Queen, 13 SCR 577 (1887); 10 App. Case 13 (1889).

[39]Calder *et al.* v. The Attorney-General of British Columbia, 13 DLR (3d) 64 (1971); 1974 SCR 313.

[40]Kanatewat *et al.* v. James Bay Development Corporation *et al.* Quebec Superior Court, November 9, 1973; Quebec Court of Appeal, November 22, 1973; Supreme Court of Canada 75 CS 107; 315; Quebec Court of Appeal 1974, 41 DLR (3d) 1.

[41]Re: Paulette *et al.* and the Registrar of Titles, 42 DLR (3d) 8 (1974); 63 DLR (3d) 1 (1976); 1977 SCR Vol. 2, 628.

[42]Hamlet of Baker Lake *et al.* v. The Minister of Indian Affairs and Northern Development *et al.*, 107 DLR (3d) 513 (1980).

[43]Note the double citation of note 38 *supra.* The first is the original Supreme Court decision and the second is the appeal case citation. The same chronological format has been used in the citation of all the Canadian cases and their various appeals.

[44]Cumming and Mickenberg, *op. cit.*, p. 33.

[45]St. Catherine's Milling, 13 SCR, p. 608.

[46]St. Catherine's Milling, 10 App. Case, p. 25.

[47]Note the double citation of note 39 *supra.* The first citation is the original B. C. decision and the second is the Supreme Court of Canada reference.

[48]Calder v. Attorney-General of B.C., 13 DLR, p. 64.

[49]*Ibid.*, pp. 67-69.

[50]*Ibid.*, p. 73.

[51]D. Paul Edmond, *op. cit.*, p. 1.74. Taken from Letters to the Editor, Globe and Mail (Toronto), February 25, 1975, "Nishga Case" by David W. Elliot, Assistant Professor of Law, Carleton.

[52]Douglas Saunders, "The Nishga Case," *B.C. Studies*, Autumn 1973, p. 18.

[53]*Ibid.*, p. 19. Lloyd Barber has claimed the decision was taken earlier in 1873. He also spoke at length about the events of the summer of 1973 in a talk he presented Friday, November 6, 1981, at the Native Studies Conference held in Brandon, Manitoba which was entitled "Indian Land Claims."

[54]Note the four citations of note 40 *supra*. These are the references to the four cases as chronologically listed.

[55]There is a good description of the cases in: D. Paul Edmond, *op. cit.*, p. 10.10. Taken from Peter A. Cumming, "Canada: Native Land Rights and Northern Development," IWGIA Document series, Copenhagen, 1977.

[56]Boyce Richardson, *Strangers Devour the Land*, (New York: Alfred A. Knopf, 1976), p. 336.

[57]*Ibid.*, p. 297.

[58]*Ibid.*, p. 300.

[59]*Ibid.*, p. 300.

[60]*Ibid.*, p. 337.

[61]*Ibid.*, p. 303.

[62]*Ibid.*, p. 305.

[63]*Ibid.*, p. 305.

[64]*Ibid.*, p. 307-08.

[65]*Ibid.*, p. 316.

[66]*Ibid.*, p. 337.

[67]*Ibid.*, p. 320-21.

[68]Re: Paulette, 42 DLR (3d) 8 (1974).

[69]Re: Paulette, 63 DLR (3d) 1 (1976).

[70]Re: Paulette, 1977 SCR, Vol. 2, 628.

[71]Re: Paulette, 39 DLR (3d), p. 45.

[72]Re: Paulette, 42 DLR (3d), p. 13.

[73]*Ibid.*, p. 27.

[74]*Ibid.*, p. 30.

[75]*Ibid.*, p. 31-33.

[76]*Ibid.*, p. 33.

[77]René Fumoleau, O.M.I., *As Long As This Land Shall Last--A History of Treaty 8 and Treaty 11 1870-1939*, (Toronto: McClelland and Stewart Limited, [1973?]).

[78]Re: Paulette, 63 DLR (3d), p. 4.

[79]*Ibid.*, p. 12.

[80]Re Paulette, 1977 SCR, Vol. 2, p. 645.

[81]Baker Lake, 107 DLR (3d), p. 542.

[82]*Ibid.*, p. 545.

[83]*Ibid.*, p. 560.

[84]Cumming and Mickenberg, *op. cit.*, p. 13.

[85]Statement of the Government of Canada on Indian Policy 1969, presented to the First Session of the Twenty-eighth Parliament by the Honorable Jean Chretien, Minister of Indian Affairs and Northern Development. [*The White Paper*], p. 3.

[86]Weaver, *op.cit.*, p. 169.

[87]*Ibid.*, p. 167.

Chapter 3

THE NEW IDEOLOGY OF ABORIGINAL RIGHTS

Origins

> Now, at a time when our fellow Canadians consider the promise of a Just Society, once more the Indians of Canada are betrayed by a programme which offers nothing better than cultural genocide.
>
> The new Indian policy . . . presented in June of 1969 is a thinly disguised programme of extermination through assimilation.[1]

Prime Minister Trudeau's plans for participatory democracy had included a series of consultative meetings between Indians across Canada and representatives of the federal government in the year prior to the tabling of the White Paper. The objective of these meetings was to reach a consensus on the proposed revision of the Indian Act, which was originally thought to be the means of ameliorating the native situation. When the final proposal was presented in June of 1969, the native community was shocked. The Indian Act was not to be revised but was to be repealed, and the Department of Indian Affairs, the agency from which special benefits came, was to be phased out altogether. Aboriginal rights were no longer to be acknowledged. Indians were to lose their special status and become ordinary Canadian citizens. Their response was swift and definite.

The National Indian Brotherhood released a press statement on June 26 repudiating the White Paper,[2] noting that native participation had not even been considered in the formulation of the new policy, and

that the policy was a denial of their special rights which had been constitutionally and legislatively guaranteed. The White Paper was viewed as an attempt by the government to avoid its constitutional responsibilities toward the native people. The ". . . NIB declared that the White Paper would lead to 'the destruction of a Nation of People by legislation and cultural genocide'."[3]

Trudeau's speech in Vancouver on August 8 added fuel to the fire. He acknowledged the government's willingness to recognize treaty rights, but indicated that ". . . perhaps the treaties shouldn't go on forever. It's inconceivable, I think, that in a given society, one section of the society have a treaty with the other section of the society."[4] On the subject of aboriginal rights, he was much more definite:

> Our answer may not be the right one and may not be the one which is accepted but it will be up to all of you to make your minds up and choose for or against it, and to discuss it with the Indians. Our answer is no. We can't recognize aboriginal rights because no society can be built on historical 'might-have-beens.'[5]

The official native response came a year later in June of 1970 when the National Indian Brotherhood presented the Indian Association of Alberta's *Citizens Plus* as its response to the government's proposal. A meeting with the full cabinet took place on June 4 when the Red Paper, as it came to be known, was tabled. It was a carefully organized document which made counter-proposals to the main tenets of the White Paper.

> The White Paper Policy said 'that the legislative and constitutional bases of discrimination should be removed'.
>
> We reject this policy. We say that the recognition of Indian status is essential for justice . . .
>
> The White Paper Policy says 'that services should come through the same channels and from the same government agencies for all Canadians.'
>
> We say that the Federal Government is bound by the British North America Act . . . to accept legislative responsibility for 'Indians and Indian lands.'[6]

The chiefs placed a copy of the White Paper in front of Chretien, indicating their rejection of the policy proposal, and a copy of the Red Paper was given to Prime Minister Trudeau, which signalled their intent to begin discussing counter proposals.[7] Trudeau's response was surprising. He acknowledged that the policy proposal might have been shortsighted and perhaps a bit misguided, and made it clear that the government was not interested in forcing the White Paper on the Indians if it was so completely unacceptable. Although the policy proposal was not formally withdrawn at this time, consultation between the native organizations and the government were to resume. However, the government's rejection of aboriginal rights as a basis for native claims continued until August of 1973 when a statement by Chretien formally opened the issue as the focal point of negotiations.

> The present statement is concerned with claims and proposals for the settlement of long-standing grievances. These claims come from groups of Indian people who have not yet entered into Treaty relationships with the Crown. They find their basis in what is variously described as 'Indian Title,' 'Aboriginal Title,' 'Original Title,' 'Native Title,' or 'Usufructuary Rights.' In essence, these claims relate to the loss of traditional use and occupancy of lands in certain parts of Canada where Indian title was never extinguished by treaty or superseded by law.[8]

As a result of the native reaction to the White Paper, the government had begun providing funds in 1970 to native organizations to enable them to conduct research into Indian treaties and rights. This was supposed to facilitate their submission of claims to the Indian Claims Commission which had been established the year previous. Much of this research was focused upon the determination of the nature and extent of aboriginal rights and/or title in an effort to move the government from its seemingly intractable position on the subject. The

NIB submitted a position paper on Aboriginal Title in 1971, in which it was argued that:

> Indian title as defined by English law connotes rights as complete as that of a full owner of property with one major limitation. The tribe could not transfer its title; it could only agree to surrender [its title to the Crown] or limit its right to use the land.[9]

The concept of native title in this statement replaced the notion of usufruct with one of full ownership, albeit limited in the aspect of alienation. Furthermore, recognition of this aboriginal title was implicit in the negotiation of the treaties, and continued recognition of outstanding aboriginal title was the responsibility of the federal government from the Indians' point of view. Treaty rights, as a result of the extinguishment of native title, were likewise seen as obligations of the federal government. In other words, the Brotherhood implicitly argued that the special status enjoyed by treaty Indians is a direct result of their original, aboriginal rights as the indigenous occupants of the territory, and that both treaty and aboriginal rights were, and must continue to be, recognized and guaranteed by the federal government.

Other provincial and territorial native organizations supported the NIB position. The Indian Brotherhood of the Northwest Territories, later known as the Dene Nation, presented a position paper entitled 'The Threat to the Indian in the Northwest Territories' to the annual meeting of the National Indian Brotherhood in July of 1971.[10] They rejected transfer of the responsibility for natives from the federal to the provincial governments as a possible complication of the already difficult situation faced by native peoples in the north. The Union of British

Columbia Indian Chiefs (UBCIC) prepared their own 'Declaration of Indian Rights' in early 1971: "The Federal government seems intent on raping our culture and unique status, on wanting to destroy our identity as Indians. We reject this philosophy and demand our own destiny without jeopardizing our aboriginal rights and our special relationship with the Federal government."[11] The UBCIC later that year submitted a claim to the lands and waters of the province based on aboriginal title.[12] They referred to it as their 'Brown Paper.' At the same time, the Nishga initiated the Calder case to assert their aboriginal title over the Naas River valley. The position of the Indian Association of Alberta had been made clear in *Citizens Plus*. Still another rejection of the White Paper came in the position paper of the Manitoba Indian Brotherhood (MIB): 'Wahbung, Our Tomorrows,'[13] issued in October of 1971. The lack of consultation with natives on the new policy proposal was criticized, and the frustration and resentment of Indians was forcefully articulated in a brief and early statement of rejection of the White Paper by the MIB.

> The present situation throughout Canada, created largely as a result of the Government's Policy Statement, is one of violent reaction, unanimous rejection and much confusion and uncertainty about the future. There is developing a ground swell of non-Indian support for the Indian position. The credibility gap between Indians and government has widened significantly; the situation is serious . . .
>
> Indian resentment and hostility are charged up. The powder keg is fully fused; all that's required is the spark. Indians didn't want this; government in its adamant attitude that it knows what is best has forced us to fight for our survival. Before the fires of discontent consume us all, let's consider, let's seek together solutions while it is still possible to discuss and negoatiate in an atmosphere of good will and understanding.[14]

Wahbung noted the existence of the treaties as recognition of aboriginal title, and further asserted the need of legislation to "protect and

guarantee our aboriginal rights."

Other native organizations undertook similar studies in the early 1970s.[15] The main point of the research was the issue of aboriginal rights. The position papers unanimously asserted the existence of aboriginal title as the basis for aboriginal and treaty rights while at the same time calling for legislative recognition and protection of these rights. Under mounting pressure, compounded by the unusual split decision of the Calder case, the government reversed its position on the subject and Chretien made the new claims policy statement in August, 1973.

The response of the NIB to this change in the government's position was positive, but cautious.

> On the credit side of the ledger for the government, we find that after many representations and hundreds of years of pleas, we have finally succeeded in convincing the Canadian government that Indians do have rights to the land which they occupied for thousands of years . . .
>
> On the minus side of the accounting, our priority concern is that the Cabinet has decided that aboriginal rights as they understand [them] will be defined by law and under such definition are accessible to termination.[16]

That the government recognized aboriginal rights was considered a victory for the native cause, but that such rights were to be considered subject to extinguishment was not viewed positively by the Brotherhood. At any rate, the NIB was convinced that ". . . the prior government position paper of 1969, so completely rejected by Indians, has now been laid to rest by the government."[17]

"The White Paper became the single most powerful catalyst of the Indian nationalist movement, launching it into a determined force for nativism—a reaffirmation of a unique cultural heritage and identity."[18] Aboriginal rights became the focus of the new nativism, and land became

the primary issue in the developing ideology.

Land as Symbol

Land has been the focal point of white/aboriginal relations since the Europeans first came to the Americas. It was the quest for new lands which prompted exploration and the assertion of sovereignty by the conquering or discovering powers. Land cession was the objective of the treaty-making process. Even today, it is the acquisition of all of the rights to the land which is the point of contention between whites and natives in contemporary land claims negotiations.

For the aboriginal peoples, land has always been the source of subsistence and now has come to represent the means of cultural survival and economic advancement in the white man's society.

> The critical element in northern land claims is 'land.' The emerging new, industrial society of the north, centres upon the use and development of lands. The traditional identity focuses upon land. The native culture is rooted in land. Land must be seen as the bridging mechanism from the old to the new society.[19]

Aboriginal rights, by which the native connection to the land has been recognized in the white man's legal system, take on an even greater meaning when the symbolic importance of the land to the aboriginal political position is coupled with the actual economic potential the land promises.

Native title, however, must be understood as an aspect of the European concepts of property and ownership. "The term 'title' presupposes the institution of property. Property is a social institution whereby people regulate the acquisition and use of the resources of our environment according to a system of rules."[20] As such, the modern con-

concept of property was imposed upon the aboriginal inhabitants with the coming of the white man. The value of the land to the advancing Europeans was clear; their desire to acquire it with the least possible disruption by the potentially hostile native populations was quite understandable. However, their conceptions of property and ownership were foreign to the aborigines and became the source of continuing disagreements over the value of the land. A modern scholar writes:

> Where, for instance, land has been in abundance, and the use of the land has not required the expending of labour, land will generally be considered to be open to inclusive enjoyment. Thus, nomadic tribes in an area of abundant land . . . generally don't recognize property in land . . . Scarcity and labour can thus be said to be the foundation of the institution of property.[21]

The nomadic indigenous populations had lived on the land using it in a communal way for centuries prior to the coming of the white man. With the Europeans came an exclusive, individual concept of property which did not readily lend itself to the aboriginal perception of the land. The idea of rights to the land which could be alienated to others was not compatible with the native view, but became the basis of the concept of aboriginal title which is the source of all aboriginal rights. "The mere taking of sovereignty by one social system over another, it must be kept in mind, is in itself not sufficient to give rise to a problem of native title . . . The continued recognition of the existence of a separate but servient social system is an essential feature of a situation giving rise to a question of native title."[22]

Aboriginal title then can only be properly understood as an aspect of the European concept of property, which concept focused upon the exclusive rights of persons to enjoy the land and the ability to

alienate those rights in a situation of advantageous bargaining. The indigenous populations of Canada had no such exclusive concepts of property or rights to the land except in the tribal sense of communal territory which was more closely linked to the avoidance of enemies than to scarcity and labour. The assertion of European sovereignty in the Americas necessitated the imposition of the European conception of property which recognized an aboriginal title as an extrapolation of the principles of international law.

To the native, land was something completely different from the potential economic base that it represented to the white man.

> The concept of land for the Natives is quite different to that of white people. Land for the natives has a mystical quality; it is a communal ownership that is there for a person's use and for future generations. While the land and its resources are at their disposal, no one has the permission to destroy it by misusing it, thus annihilating its benefits for the future.[23]

And again: "Without land Indian people have no Soul—no Life—no Identity—no Purpose."[24] The land was Mother Earth, the source of life for the native peoples. Not only were its fruits to be communally used, but it represented the very essence of the native existence. Survival was focused upon the land and the animals it harbored. The land dictated the means by which the aboriginal people would live, in fact, and consequently became one of the focal points of aboriginal spirituality.

> The land from which our culture springs is like the water and the air, one and indivisible. The land is our Mother Earth. The animals who grow on that land are our spiritual brothers. We are a part of that Creation that the Mother Earth brought forth. More complicated, more sophisticated than the other creatures, but no nearer to the Creator who infused us with life.[25]

Natives view themselves as one aspect of the larger creation whose con-

tinued existence depends upon their ability to live in harmony with the entirety of the natural world.

This aboriginal spirituality provides the basis for the modern native conception of aboriginal rights which has become associated with political rhetoric concerning the nationhood and sovereignty of Indian peoples. The place of the aborigines within the larger creation was given them by the Creator, and the obligations of natives to the land and the rest of the natural world follow from the native position in the creation.

> In defining aboriginal rights, our elders were considering the responsibilities and obligations, or the covenant, that the founding father of the Indian nations entered into with the Creator.
>
> . . . A tribal definition of nationhood . . . would almost always be based upon the relationship between a people and the Creator. One would probably find that tribal peoples throughout the world believe that they are chosen by the Great Spirit, or whatever they call their creator. And in that, they find their whole purpose in being where they are and who they are.
>
> . . . Our elders have always made sure that no outsiders would ever stop Indians from following their beliefs and carrying out their responsibilities to their Great Spirit, or to all the elements of the earth.[26]

Aboriginal rights are the means by which natives can ensure not only their cultural survival or economic development, but also the fulfillment of their spiritual obligations as part of the larger natural creation. The sovereignty of the Indian nations prior to the coming of the white man, as reflected in their harmonious existence with the land which allowed for their survival, was a God-given gift which also included responsibilties to the land and all that lives on it, including other men.

> The nature of this sovereignty is that it exists in and of its own right. Or, it might better be said that it is a gift to each Nation, as a Nation, from the Great Spirit, our Creator.
>
> Indians, prior to the coming of the whiteman, were independent and sovereign people. Indian sovereignty did not come, nor was it granted by, any earthly authority or entity. If sovereignty is a thing that is granted by an entity other than the one who exercises it, then the grantor, in the Indian's case, is the Great Spirit, the Creator.[27]

Native sovereignty, although it has political implications, has its origins in the aboriginal spirituality which dictates the place of the Indian within the world. As part of creation, he has an obligation to live in harmony with the rest of nature. His independence and sovereignty was granted by the Creator, which allowed for the existence and survival of the Indian nations in the face of all obstacles, both natural and human. Aboriginal rights, as originating in Indian sovereignty, not granted by a European sovereign, are the rights and obligations of the native peoples to the land as part of the natural world. As such, aboriginal rights prove to be the means of future cultural, economic, and spiritual survival, not only for the natives but for all men.

Western conceptions of property and land ownership have led to an exploitation of the earth's natural resources which is not viewed favorably by the Indians. Consequently, the modern assertion of their aboriginal rights includes an implicit rejection of the white man's use of the land and view of development.

> To native people, the land is more than just a source of food or cash. It is the permanent source of their security and of their sense of well-being. It is the basis of what they are as people. The land, and the birds, fish and animals it supports, have sustained them and their ancestors since time immemorial. Properly cared for, it can always do so. Native

> people know how to take care of the land, and they know why that must be done.[28]

The native testimony at the Mackenzie Valley Pipeline Inquiry emphasized the threat perceived by Indians that western development poses. The brief of the Council for Yukon Indians put it well:

> The pipeline represents 'development' to the whiteman—but it represents 'destruction' to the Indian. We are told that the pipeline is needed for development. We are not convinced. We are not sure we can survive much more 'development' by outsiders.
>
> Development is what we mean when we say Land Claims. Much of the misunderstanding about our Land Claims is due to the fact that we are looking for ways to develop ourselves without spoiling the land . . . We are going to stay in the Yukon for many many years. We need to be sure that our land will not only be here, but that our grandchildren will be able to use it. We know many non-Indians share this concern for our land and we hope that they will support us at this time and in the future.[29]

Economic development based upon the exploitation of resources is seen as a sure means of destroying the land in the native view. The threat of destruction includes the native people themselves inasmuch as they see themselves as part of nature. Destruction of the land means destruction of the source of the native being. By protecting the land through an assertion of aboriginal rights, Indians are attempting to ensure their survival.

The lack of trust which natives have for the white man's judgment on the subject of development is very obvious. Their traditional way of life would provide a much more harmonious existence with nature, so they believe, and the results of the white man's mode of life are indeed horrifying to them.

> In a strange kind of way the Native people of Canada perhaps owethe non-native people a belated apology for several centuries of neglect. When your people first came to North America you needed, and got, our help. We shared our intimate

> knowledge of the country and its resources which allowed you to successfully explore, then settle and then exploit. We shared the land and, quite often, our ancestry with you. It is obvious to us now that we did not go far enough and that we left you on your own much too early.
>
> For the past two hundred years at least we have watched you make a series of startling and frightening mistakes that have brought you and your society and economic structures to the brink of self-inflicted disaster. We have let you poison the air at Thurso and Dryden and Flin Flon and Prince George. We have stood by while you turned Lake Erie into a cesspool and the Ottawa and Wabigoon and Saskatchewan Rivers into open sewers. We said nothing while you turned vast sections of the land into Sudbury moonscapes. We have seen you build traffic-congested cities in which you cannot drive by day or even walk safely by night. We have heard your tedious, indeed, childish squabbles over who should get what rake-off from each barrel of oil exported to people more intent on dominating you than you are of dominating us.
>
> How in the name of the Great Spirit can the Native people of Canada feel secure in the face of assurances that you, this very same group of people, are genuinely committed to protecting for us a quality of life that you have destroyed for yourselves? Why should we trust you?[30]

The native peoples have looked aside for the past two centuries and have allowed the white man to assert his sovereignty, impose his conception of property, and exploit the land in a very destructive way. No longer will the indigenous populations ignore their responsibilities as part of nature. The time is ripe, it would appear, for the assertion of Indian sovereignty, a native view of property, and a mode of life which will ensure that the land is utilized in a consciously protective and responsible way. Perhaps the world is in need of an aboriginal ideology which may redirect our ideas about progress and development.

The Fourth World: A New Aboriginal Age

George Manuel is the native author who has attempted the most complete outline of the concept of the Fourth World,[31] a notion which

has been used by various native organizations to enhance their political claims for national autonomy and self-determination. The Fourth World, as Manuel describes it, will be established when the traditional value systems and social institutions of aboriginal peoples throughout the world become the guidelines for future technological and social development. It embraces a leftist political stance, although it does not espouse communism or socialism as presently understood in modern societies. It is millennial in that it urges the establishment of a new age, but does not predict a swift and sure cataclysmic event which will overturn the present dominant western order. Above all else, the Fourth World concept is becoming a rallying cry of political assertions of native groups within Canada and on the international scene, and as such, it provides an ideological framework within which to view the native concept of aboriginal rights as it is presently asserted by Indian organizations everywhere.

The Fourth World, as Manuel presents it, will be the world of aboriginal peoples which is yet to come; but at the same time, it describes the present reality of aboriginal peoples around the globe. They live within sovereign states and have no prospect of national liberation, yet they will be able to determine their futures within their respective countries once their national, aboriginal rights to self-determination and the land are recognized and further development of natural resources takes place on native terms with native values guiding the process. The concept of the Fourth World can be used in both a futuristic, millennial sense and in a contemporary, descriptive sense to delineate the place of aborigines within white society.

In the present worlds of capitalism and socialism, indigenous populations are colonially oppressed by Europeans who have attempted to organize the society upon the values and institutions of the western world which are foreign, if not hostile, to native ways. It is this common experience which unites aboriginal peoples all over the world.

> [What] impresses me from my travels is that aboriginal peoples everywhere share a common attachment to the land, a common experience and a common struggle. The Indian people of Canada and other indigenous peoples that I have met . . . have suffered and are still suffering from deprivation and exploitation by colonizers.
>
> Today colonizers, the corporations, are often supported by governments. Both have exploited the indigenous inhabitants by depriving them of their human rights and destroying their social, cultural, economic and political institutions.[32]

The experience of colonialism and an opposition to western concepts of development and the resulting economic situation are the two main unifying aspects of the situations of aboriginal peoples around the world which will create the Fourth World. Their struggle for liberation from colonial oppression and the emergence of aboriginal values is what has become politically articulated in the growing nationalist movements for the self-determination of indigenous populations which are springing up everywhere.

"It was an African diplomat who pointed out to me that political independence for colonized peoples was only the Third World. 'When native peoples come into their own, on the basis of their own cultures and traditions, that will be the Fourth World,' he told me."[33] The Fourth World will be established when the colonial governments lift their oppression of native peoples and social, economic, and political institutions may be modelled along the aboriginal lines of family, communal sharing, and consensus democracy. It will be established through

the example and guidance of native populations throughout the world if they are allowed their natural rights of self-determination and sovereignty within modern nation-states. It is a struggle in a political sense at the outset which is concerned with the harmonizing of seemingly incongruous traditional and modern objectives and the methods which might achieve those ends. "The hardest task in the struggle for the Fourth World is to learn to produce a new reality that reconstructs a tradition in which people can hold a common belief, and which uses all the benefits of a global technology."[34]

The traditional aspect of the Fourth World will come from a revival of aboriginal spirituality coupled with the political independence which will secure the survival of those values in the modern world. This is not to say that the exact replication of traditional religious ritual is necessary, but rather that a social structure must be created within which the aboriginal values of land and communal sharing of responsibility can flourish. The re-emergence of traditional values will allow for choices regarding social, economic, and political structures which are entirely beyond the range of the first and second worlds, the worlds of capitalism and socialism, or the world which seeks to emulate them, the world of the developing nations. The Fourth World will be a new creation: a creation based upon native spiritualism.

> For a people who have fallen from a proud state of independence and self-sufficiency, progress—substantial change—can come about only when we again achieve that degree of security and control over our own destiny. We do not need to re-create the exact forms by which our fathers lived their lives . . . We do need to create new forms that will allow the future generations to inherit the values, the strengths, and the basic spiritual beliefs—the way of understanding the world—that is the fruit of a thousand generations' cultivation of North American soil by Indian people.[35]

The world is the community of creation in the aboriginal mind; its source is the earth to which all life is ultimately attached in native thought. Man, as a brother to all other living things, is responsible for the fulfillment of his role as the reasonable actor in nature. From this community of nature springs the political communalism of the tribal organization, and the collective responsibility for its continuation. "In a society where all are related, where everybody is someone else's mother, father, brother, sister, aunt, or cousin, and where you cannot leave without eventually coming home, simple decisions require the approval of nearly everyone in that society. It is the society as a whole, not merely a part of it, that must survive."[36] The political method of ensuring community survival in tribal society is the expression of the collective will in consensus, whereas the economic expression is along the lines of sharing produce and distributing goods as the community's situation necessitates. Underlying both the spiritual and the institutional aspects of tribal organization is the aboriginal value system derived from the importance of the land and the necessities of community survival. This aboriginal orientation, Manuel asserts, is what links all native peoples throughout the world and distinguishes them from western men. "Although there are as wide variations between different Indian cultures as between different European cultures, it seems to me that all of our structures and values have developed out of a spiritual relationship with the land on which we have lived . . ."[37]

It is precisely the lack of aboriginal spirituality and institutions which will doom civilizations of the first three worlds. The lack of natural harmony and concern expressed in the terms of collective

responsibility to the land and to each other will allow technological developments to destroy the entirety of creation, man included. Without the moral guidelines of native spirituality, the exploitative mentality of westernman, capitalist or socialist, will ensure disaster. This is why the establishment of the Fourth World is such an urgent struggle in the native view. It is the only means by which such a cataclysm might be avoided.

> The present concern with ecological disasters visited upon Western man by his failure to recognize land, water, and air as social, not individual commodities, testifies to aboriginal man's sophistication in his conception of universal values.
>
> As we view the North American Indian world today, we must keep in mind two things: Indians have not yet left the aboriginal universe in which they have always dwelt emotionally and intellectually, and the Western world is gradually working its way out of its former value system and into the value system of the Aboriginal World.[38]

In its colonized state, where oppression has threatened to silence the natural spirituality and collective responsibility of the aboriginal world, no hope could exist except that the struggle for political independence has truly taken root among native peoples awakened to their position, and that there are non-aborigines as well who are awakening to the dangerous possibilities of western development. The struggle is taking place on two fronts: the political effort of aboriginal self-determination and example, and the educational effort to make western man aware of the faults of his value system in relation to the delicate ecological balance of the natural world.

The conception of the Fourth World is not merely a rallying cry for aboriginal peoples in Canada. "There is more to the Fourth World than that because it is a global village in which we live . . . Our lives are too bound up with yours for either of us to go our separate

ways."[39] It is a call for a new world order, a new global society based upon the aboriginal spirituality which is viewed as the only means of preventing the disaster in which western progress might probably result. The Fourth World means the salvation of all mankind and of the earth itself.

> European North Americans are already beginning to work their way out of a value system based on conquest and competition, and into a system that may at least be compatible with ours. If those values are really shared, technology can be harnessed to make the transition easier and less painful . . . We do not have anything resembling ten thousand years remaining to us to make that transition if we are to survive. Either you or I.[40]

The World Council of Indigenous Peoples was established in 1975 in order to facilitate international aboriginal interaction on these issues. At their first International Conference held in Port Alberni in October of that year, Secretary of State Hugh Faulkner recognized the value of Manuel's points.

> A deep and abiding reverence for the land, a familiarity with the natural environment, strong family and communal traditions, a sense of world citizenship, a non-exploitative relationship with nature—these and others are the philosophical strengths of our unique aboriginal cultures. And it is these values that we need most in Canada today . . .
>
> The Fourth World, the world's indigenous peoples, are standing up and demanding to be heard—we must all be prepared to listen.[41]

However, it is important to note that the emergence of the Fourth World has been the result of the confrontation between the advancing technological progress of western society and the aboriginal way of life. As such, the political articulation of the values of the aboriginal world has not been quiet and subdued.

> Common to the people of the Fourth World is a rapidly increasing amount of confrontation with a variety of colonial-exploitative type institutions, both governmental and commer-

> cial. Confrontation is almost invariably between the economic system of the dominant society and an aboriginal sector which is usually entirely dominated, and often subjugated by the colonial relationship. [42]

Consequently, the expression of the frustration of the oppression felt in the aboriginal sector is focused on the economic system of the dominant society and is often harsh in its appraisal of the value of progress as understood in the western sense. Because land is always at the root of the conflict, the native position is frequently expressed in terms of the native view of aboriginal rights with emphasis on the natural right of self-determination of indigenous peoples. Liberation from the colonial system which threatens the land and the unique existence of the aboriginal peoples are seen as possible only in terms of national self-determination.

> The Indian Nations of Canada, invoking their rights as a colonized people to self-determination and self-government under the Charter of the United Nations and related covenants, further declare their manifest will to reclaim their collective liberty by the abolishment of colonial controls . . .
>
> As unconquered Nations possessing an inherently sovereign position in the National state structure, any terms of union which would have the effect of submitting the special destiny of Indian Nations to the European majority is inadmissible.[43]

> We are not claiming any land, the land is ours. What we are asking is that the Federal Government in the name of Canada recognize our Aboriginal Rights and negotiate with us a way in which those rights can be safeguarded so that our people and our culture can flourish rather than be extinguished and die.[44]

Recognition of aboriginal rights is the political means by which the Fourth World can be realized.

> The Fourth World is not, after all, a Final Solution. It is not even a destination. It is the right to travel freely, not only on our own road but in our own vehicles . . . The way to end the condition of unilateral dependence and begin the long march to the Fourth World is through home rule.[45]

Based in concepts associated with aboriginal spirituality, the Fourth World is a political expression of the native desire for liberation from the colonial relationships which they see as binding them in a larger society with values and institutions antithetical to their own. The Fourth World has socialist tendencies with its emphasis on collective responsibility and communal sharing; it is millennial in that it suggests a new social order. But above all else, the idea of the Fourth World is a political tool which very nicely pieces together the various aspects of what is referred to as the new ideology of aboriginal rights.

The New Ideology of Aboriginal Rights

The new idology of aboriginal rights can only be properly understood when it is perceived as a return to the original principles of international law which gave rise to the special relationship of the advancing Europeans and the indigenous populations they encountered in the New World. As such, the cornerstone of this present native view of aboriginal rights is the assertion of Indian nationhood and the consequent right to self-determination. Native sovereignty is implicit in this view and the land provides the means by which that sovereignty will be exercised in the form of control over future development. Aboriginal rights are not only the natural, national rights of indigenous populations, but are the means with which natives can ground their own future on a solid economic base.

> We the Original Peoples of this land know the Creator put us here.
>
> The Creator gave us laws that govern all our relationships to live in harmony with nature and mankind.
>
> The laws of the Creator defined our rights and responsibilities.

> The Creator gave us our spiritual beliefs, our languages, our culture, and a place on Mother Earth which provided us with all our needs.
>
> We have maintained our freedom, our languages, and our traditions from time immemorial.
>
> We continue to exercise the rights and fulfill the responsibilities and obligations given to us by the Creator for the land upon which we were placed.
>
> The Creator has given us the right to govern ourselves and the right to self-determination.
>
> The rights and responsibilities given to us by the Creator cannot be altered or taken away by any other Nation.[46]

Implicit in this Declaration of the First Nations issued in November of 1981 is the view that the nationhood of the natives is God-given along with the self-determination that such nationhood implies. There are also associated rights and obligations which are connected with the land. Furthermore, the connection between the spiritual aspect of native nationalism and the principles of international law is also made clear by native spokesmen. In other words, the spiritual origins of native nationhood are politically expressed in terms of the law of nations.

> Two principles are basic to the position of the Indian people . . . The first is the principle of self-determination of peoples. This is a principle of International Law . . . The principle of self-determination of peoples is a basic political and legal concept. To be effective it must exist with a second principle, that of the equality of all peoples.[47]

Not only are Indian tribes nations in a spiritual sense, but they are nations equal to any other in a political/legal sense as well. Self-determination is not limited to the determination of a relationship between Indian people and the Creator, but is also asserted within the framework of international law.

Associated with this Indian nationalism, expressed in both spiritual and political terms, is the concept of Indian sovereignty.

"We the people and the land, declare our nationhood. We . . . declare ourselves to be a free and sovereign nation. We bring you a declaration of independence."[48] The sovereignty of the European powers at the time of colonization is not directly challenged, but an equal and enduring sovereignty of Indian nations is asserted to be at the root of Indian/white relations.

> The Indian peoples of Canada have always defined themselves as Nations, each endowed with its own language, culture, economic activity and land. As Nations, they have governed themselves from time immemorial under the principles of natural law and the special destiny granted by the Great Spirit. That Europeans recognized them as Nations is evidenced in the Royal Proclamation of 1763, in treaty negotiations, and in several leading court cases . . .
>
> The Indian Nations, possessing sovereignty and dominion over their lands, signed treaties of peace, friendship, alliance, and trade with the European peoples, and as such Indian treaties are instruments by which the Indian Nations agreed to participate as partners and allies in the birth of a new country—Canada.[49]

According to this view, the Indian nations, equal to the European nations in sovereignty and rights, entered into relationships with them which were based upon the European recognition of that equal status. The treaties were not agreements of land cession in exchange for other rights and benefits, but were friendly alliances between equal nations. "To native people their title to their tribal lands was explicit in this political sovereignty. The actions of the colonial powers in entering into treaties with native peoples were an acknowledgement of sovereignty and a recognition of native rights to the land."[50]

The political sovereignty of Indian nations implied full ownership of all tribal territories, not merely a usufructuary right as native rights had come to be understood in English law. This full ownership was recognized by the Europeans in their treaty-making efforts.

Aboriginal rights from this perspective were not a sort of encumbrance upon the absolute title of the conquering or discovering European sovereign, but the natural product of Indian nationhood and sovereignty, in both the spiritual and the political senses. "Prior to the coming of the European immigrants, our ancestors exercised all the prerogatives of nationhood . . . As . . . Indian nations, our rights and entitlements to this land were inherited from our forefathers. Our rights to the ownership of the land precede and supersede the claims upon our lands by the Europeans."[51] It is interesting to note that the proprietary concept of land ownership as introduced by the white man has become a fundamental aspect of the native view of aboriginal rights.

These notions of Indian nationhood, sovereignty, and ownership of traditional lands have become the basic principles of the new ideology of aboriginal rights. Aboriginal rights, the rights of native peoples to lands they have traditionally occupied, are now viewed by native spokesmen as inalienable and must be enhanced or guaranteed in some way by the larger system within which the Indian nations struggle to survive. As the Declaration of Rights made by the Native Council of Canada in 1979 states: "We the Metis and Non-Status Indians, descendants of the 'original people' of this country declare: . . . that we have the inalienable right to the land and the natural resources of that land."[52] Extinguishment of these rights is no longer considered valid or even justifiable with the new understanding of the status of Indian nations. "[We] have rejected the notion that land settlement necessarily means the extinguishment rather than the preservation of rights."[53] "Aboriginal Rights means that we as Indian people have the right within

the framework of the Canadian constitution, to govern through our own unique forms of Indian governments . . . Aboriginal Rights must be recognized, expanded and entrenched within the British North America Act."[54] Aboriginal rights are not limited to a legal association with aboriginal title as defined in the European legal system. Aboriginal rights are the natural outcome of Indian nationhood and sovereignty, and are the means of protecting that nationhood and sovereignty through the securing of self-determination of Indian peoples. Rights to the land provide the link between the two cultures and the means of securing the survival of both.

> The main end which the Dene seek is their survival as a distinct ethnic entity, a distinct people and in that sense a distinct nation or national group within the Canadian State. The Dene propose two basic instruments for securing this end: first, legislative recognition rather than extinguishment, of collective title to their historic homeland and secondly, a devolution of governmental authority to their communal organizations . . . Their land is their life . . . the physical base of their spiritual existence.[55]

The new ideology of aboriginal rights as developed by native spokesmen over the last ten years is really a return to the original notions of the equality of nations asserted by theorists of international law three centuries ago. It is expressed in contemporary political terms and is based upon the national right of self-determination which has become so prominent in the twentieth century. Indian sovereignty is the basis of full native ownership of the land, now understood in the European sense of proprietorship. Aboriginal rights are the inalienable, unextinguishable, natural rights of native populations to determine their future by the development of their lands in conjunction with their right to self-determination within existing sovereign states.

Strictly speaking, the concept of aboriginal rights *per se* makes no sense if the Indian tribes had been sovereign nations equal to the advancing European powers at the time of contact. Like other nations in the face of conquering powers, the Indians would have had no special rights granted to them by the nations confronting them although they would have been entitled to the same treatment as any other sovereign nation, just as Victoria had indicated. In historical fact, this was not the case. The notion of special aboriginal rights, never mentioned in international law but developed in British law, was designed to protect native peoples from undue harassment by white land speculators initially, and the negotiation of land cession treaties was to free the absolute title of the Crown from the encumbrance placed upon it by this native title. The Indian tribes were not considered to be sovereign nations in the way that other European powers were. Rather, the relationship between the native populations and the British government was founded on the assumption that the aboriginal peoples were less civilized than their European counterparts, and that it was the obligation of the governments of the day to protect them as a guardian would protect his ward. Added to this relationship was the basic belief that it was in the best interest of the natives to eventually assimilate into the white culture. The entirety of government policy regarding aborigines in both the United States and Canada indicates that this paternalistic perspective was at the foundation of white/native relations for the last two centuries. In fact, the treaty-making process itself was initiated and concluded at the pleasure of the government both historically and in the present day land claims question.

The terms were and continue to be dictated by the government and the basic objective of treaties or agreements, as they are presently termed, continues to be the extinguishment of native title. Special rights and status have historically been exchanged for this extinguishment, and this is still the acceptable procedure for the dealing with comprehensive native claims based upon aboriginal title. Surely this would not be the case if the Indian peoples had been considered sovereign nations. The apparatus established to secure the provisions of special status for treaty Indians, the present day Department of Indian and Northern Affairs, continues to operate with the paternalistic perspective which necessitated its creation. Although native spokesmen themselves recognize the harm that this guardian/ward relationship has done their people, they still are loath to lose their special status and become mere Canadian citizens. The spectre of assimilation continues to haunt their vision of the future. Assimilation equals cultural genocide. Consequently, the extinguishment of aboriginal rights, or a policy proposal which leans in such a direction, means the end of Indian nations as they wish to be perceived in the larger white society.

> Native peoples claim a special status under the Constitution. But remember that they have always had special status. Indian treaties, Indian reserves, and the Indian Act are all special institutions devised by us for native people. Now they seek to devise a future of their own fashioning. Native self-determination is the contemporary expression of special status.[56]

The new ideology of native rights which seeks the enhancement and entrenchment of aboriginal rights is rhetorically based upon principles of equality and liberty, but in actuality seeks the continuation

and aggrandisement of the paternalistic relationship which is at once viewed as the downfall and the safeguard of native culture.

NOTES TO CHAPTER 3

[1]Harold Cardinal, *The Unjust Society—The Tragedy of Canada's Indians*, (Edmonton: M. G. Hurtig Ltd., 1969), p. 1.

[2]Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-70*, (Toronto: University of Toronto Press, 1987), p. 173. The whole of chapter 7, Public Reaction and Government Response (pp. 171-89) is an excellent discussion of the immediate reaction to the White Paper.

[3]*Ibid.*, p. 174.

[4]*Ibid.*, p. 179.

[5]*Ibid.*, p. 179.

[6]Indian Association of Alberta, *Citizens Plus*, a presentation to the Prime Minister and Cabinet, June 1970, pp. 4 and 6.

[7]Weaver, *op. cit.*, pp. 183-84.

[8]DINA, Office of Native Claims. Statement made by the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People. August 8, 1973, p. 3.

[9]NIB Document Q120, *Aboriginal Title*. Position Paper: consensus of the Indian representatives at Montreal on September 17-18, 1971. Ottawa, p. 2.

[10]NLC, Indian Claims Commission Collection, box 27a(1). Northwest Territories Indian Brotherhood. Position Paper: "The Threat to the Indian in the Northwest Territories" (presented at the NIB Annual Meeting, Regina, July 1971).

[11]NIB Document A106, *A Declaration of Indian Rights: The British Columbia Indian Position Paper*, March 16, 1971, prepared by the Union of British Columbia Indian Chiefs. Vancouver, 1971, p. 2.

[12]NIB Document Q135, *Claim based on Native Title*, Union of British Columbia Indian Chief's submission to the Prime Minister and Government of Canada by the UBCIC as to the claim based on Native Title to the Lands now forming B.C. and the Waters contained therein or adjacent thereto. Vancouver, 1971.

[13]NIB Document A130, *Wahbung—Our Tomorrows*, Manitoba Indian Brotherhood, 1971.

[14]NIB Document N283, Manitoba Indian Brotherhood Position Paper with Respect to the Statement of the Government of Canada on Indian Policy, 1969. Winnipeg, July 1969, p. 13.

[15]See also for examples:

NIB Document Q138, Position Paper of the Association of Iroquois and Allied Indians re Aboriginal Title, June 19, 1973.

NIB Document Q157, Report on the Status of Work of the Indians of Quebec association relating to the Revision of the Indian Act in respect to the Subject of Aboriginal Rights for the NIB Annual Meeting, 1973.

NIB Document Q350, App. VI: Position Paper of the Union of Nova Scotia Indians on Aboriginal Title, 1971.

All of these documents and many others produced by native organizations in the early 1970s concentrate on the recognition of aboriginal title and the legislative guarantee of aboriginal rights accruing to natives as a result of that title.

[16]NIB Document N141, Press Release: Response of the NIB to the Federal Government Policy Paper on Aboriginal Rights. August 8, 1973, pp. 1-2.

[17]*Ibid.*, p.1.

[18]Weaver, *op. cit.*, p. 171.

[19]NLC, Indian Claims Commission Collection, box 57(1). Peter A. Cumming, "Native Land Claims and Northern Development" (paper presented to the Canadian Bar Association Annual Meeting, August 31, 1976, p. 3.).

[20]J. C. Smith, "The Concept of Native Title," *University of Toronto Law Journal*, v. 24, 1974, p. 2.

[21]*Ibid.*,p. 2.

[22]*Ibid.*, p. 8.

[23]NLC, Indian Claims Commission Collection. Emile Pelletier, *Aboriginal Rights. Volume 2 of A Study of the Statutory & Aboriginal Rights of the Metis People in Manitoba*, ed. Bruce Sealy (Winnipeg: Manitoba Metis Federation Press, 1973), p. 70.

[24]NIB Document A107B, "Together Today for our Children Tomorrow; A Summary." Yukon Native Brotherhood [1973], p. 7.

[25]George Manuel and Michael Posluns, *The Fourth World, An Indian Reality,* (Don Mills: Collier-Macmillan Canada, Ltd., 1974), p. 6.

[26]Harold Cardinal, *The Rebirth of Canada's Indians,* ((Edmonton: Hurtig Publishers, 1977), pp. 141-42.

[27]NIB Document Q490, Presentation by Noel V. Starblanket, President, NIB to the Joint Senate/House of Commons Committee on Bill C-60, August 23, 1978, pp. 2-3.

[28]NLC, Indian Claims Commission Collection, box 68(2). Peter J. Usher, "The Significance of the Land to Native Northerners," (paper presented at the 1973 Convention of the Canadian Society of Exploration Geophysicists, Calgary, April 6, 1973, p. 7).

[29]NLC, Indian Claims Commission Collection, box 65(1). Council for Yukon Indians. Brief presented to Mr. Justice T. R. Berger, Commissioner of the Mackenzie Valley Pipeline Inquiry, describing the position of the Council for Yukon Indians on the building of a gas pipeline through the Yukon Territory, May 5-7, 1976, pp. 8-9.

[30]NCC, Submission to the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Ottawa, December 2, 1980, pp. 1-2.

[31]See Manuel and Posluns, *op. cit.*

[32]George Manuel, "An Appeal from the Fourth World. The Dene Nation and Aboriginal Rights," *Canadian Forum*, Special Issue: Native Land Claims and the Mackenzie Pipeline, November 1976, p. 9.

[33]Manuel & Posluns, *op. cit.*, p. 236.

[34]*Ibid.*, p. 245.

[35]*Ibid.*, p. 4.

[36]*Ibid.*, p. 7.

[37]*Ibid.*, p. 7.

[38]*Ibid.*, p. 11.

[39]*Ibid.*, p. 261.

[40]*Ibid.*, p. 266.

[41]NLC, Indian Claims Commission Collection, box 20. Notes for an Address by Secretary of State J. Hugh Faulkner to the International Conference for Indigenous Peoples, Port Alberni, B.C., October 27, 1975, pp. 4-5 & 12.

[42]NLC, Indian Claims Commission Collection, box 67a(2). Theo. L. Hills, "A Global View of Aboriginal Land Rights Problems" (Statement of evidence before the Mackenzie Valley Pipeline Inquiry, Yellowknife, April 1, 1976, p. 1).

[43]NIB Document N603. Alberta Tribal Chiefs: Indian Nations in a Renewed Canadian Federalism, (prepared for the All Chiefs Conference

in Ottawa, April 1980). National Chiefs Assembly, Ottawa, Canada, April 1980, p. 3.

[44]NIB Document Q593. Address to the 9th Legislative Assembly of the Northwest Territories by Bob Overvold, Director of Aboriginal Rights, The Dene Nation, Yellowknife, N.W.T., March 11, 1980, p. 1.

[45]Manuel and Posluns, *op. cit.*, p. 217.

[46]Joint Council of the National Indian Brotherhood: A Declaration of the First Nations, November 18, 1981.

[47]NIB Document Q595. Aboriginal Rights Position Paper, Union of British Columbia Indian Chiefs, Vancouver B.C., April 1980, p. 2.

[48]NIB Document Q445. A Declaration of Nishnawbe-Aski (The People and the Land) by the Ojibway-Cree Nation of Treaty #9 to the People of Canada (delivered by the Chiefs of Grand Council Treaty #9 to Ontario Premier William Davis and his Cabinet in the City of Toronto, July 6, 1977, p. 1).

[49]NIB Document N603. Alberta Tribal Chiefs: Indian Nations in a Renewed Canadian Federalism (prepared for the All Chiefs Conference in Ottawa, April 1980, p. 1).

[50]NIB Document Q350. App. VI: Position Paper of the Union of Nova Scotia Indians on Aboriginal Title, 1971, p. 1.

[51]DINA, Treaties and Historical Research Center, Aboriginal Rights Files. Nova Scotia Micmac Aboriginal Rights Position Paper

(presented to the Government of Canada by the Union of Nova Scotia Indians, from *The Micmac News*, Vol. 5, No. 12A, December 1976, p. 1).

[52]Native Council of Canada, *A Declaration of Metis and Indian Rights* (Ottawa: Native Council of Canada, 1979), pp. 1-2.

[53]NIB Document Q228. Towards a Developmental Land Settlement in the Northwest Territories (an address by James Wah-shee, President, Indian Brotherhood of the Northwest Territories to the Musk Ox Circle, Saskatoon, October 8, 1974, p. 1).

[54]NIB Document Q595 (UBCIC), *op. cit.*, p. 1.

[55]NLC, Indian Claims Commission Collection box 67a(2). Peter H. Russell, "The Dene Nation and Confederation" (Statement of Evidence before the Mackenzie Valley Pipeline Inquiry, Yellowknife, April 1976, p.4).

[56]Thomas R. Berger, "Native Rights in the New World," *Northern Perspectives*, Vol. VII, No. 4, 1979, 4.

CONCLUSION

"'Aboriginal rights' are those property rights which inure to native peoples by virtue of their occupation upon certain lands from time immemorial."[1] Aboriginal title in Canadian law today is viewed as a usufructuary right of the natives to the land which is dependent upon the goodwill of the sovereign. It is legally recognized and extinguished only by the sovereign, and the alienation of lands subject to native title may be made only to the sovereign. The concept is clearly outlined in Canadian jurisprudence, and the policy pursued by the Canadian governments regarding aboriginal rights indicates a historic view of these rights which has been relatively consistent in its acceptance of such rights as recognized and extinguished by the Crown in exchange for special status. The notion of aboriginal rights is clear from the perspective of the judiciary, although the new ideology of aboriginal rights espoused by contemporary native spokesmen has gone far to cloud the basic issues.

An interesting problem which is yet to be addressed from the white perspective is the distinction between aboriginal title and aboriginal rights. An aboriginal title includes some sorts of aboriginal rights such as the usufructuary right to the land, the right to alienate the territory to the sovereign, and so on. What is unclear is whether all aboriginal rights are included within or derivable from the legal concept of aboriginal title. If aboriginal rights are broader in scope than these claims or rights based upon native title, then the

characteristic which qualifies entitlement to these rights might be simply aboriginal blood, and not a question of aboriginal title alone. Confusion then arises as to whether or not all persons with any degree of Indian blood are entitled to such rights, however they may be defined, and whether these rights are limited or augmented according to the different degrees of Indian blood, should that prove determinable. In short, a whole Pandora's Box is opened should aboriginal rights be determined to be derivable from aboriginal blood as well as title. The problems inherent in basing rights on blood or race in a liberal democracy are far-reaching indeed. Acceptance of the new ideology of aboriginal rights may lead to such a situation. In fact, it seems inevitable in the concept of "inalienable" aboriginal rights. If the term is meant literally, aboriginal people can never leave their status, with its attendant rights and duties. The white view of aboriginal title always implied that it was a temporary status, the extinguishment of which would bring Indians into society. The contemporary native view of inalienable aboriginal rights, if taken seriously, leads to a caste-like system of inherited status. This is not apparent to most observers, probably because the new ideology uses the terminology of the older theory. The purpose of this thesis is to point out that the old words are being used with new meanings, which may be at odds with the liberal-democratic norm of equality before the law.

NOTES TO THE CONCLUSION

[1]Peter A. Cumming and Neil H. Mickenberg, *Native Rights in Canada*, 2nd ed., (Toronto: The Indian-Eskimo Association of Canada in association with General Publishing Co. Limited, Toronto, 1972), p. 13.

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