

# Developments in the Recognition of Indigenous Rights in Canada: Implications for Australia?

Peter Grose \*

## INTRODUCTION

Since the judgment by the High Court of Australia on 3 June 1992 in the case of *Mabo v Queensland* (No 2) (1992) 175 CLR 1, indigenous legal issues have captured the attention of contemporary Australia as never before. It is suggested that mainstream Australia raised on a history which proceeded on the basis that any indigenous rights were contingent, as to both recognition and over-rule by the Crown, was jolted by the revelation that common law jurisprudence elsewhere in the world had several centuries earlier recognised indigenous rights arising from an inherent source, *extrinsic* of the common law.

This article outlines developments in the recognition of indigenous rights in Canada by the contemporary dominant Canadian legal and political system. Eurocentric impediments to such recognition while still persisting in Canada would appear to be less intransigent than those manifesting themselves in Australia, currently fuelled by an agenda which refuses to acknowledge even co-existence as justifiable common law and exacerbated by the phenomenon of Hansonism.<sup>1</sup> The increasing Canadian trend toward the recognition of indigenous rights as arising from an inherent rather than a contingent source is very much in line with indigenous pronouncements expressed both nationally and internationally. Australian political movements toward extinguishment of indigenous rights run counter to the more recent developments in Canada. These Canadian developments, it is suggested, could offer insights to Australia which, if

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\* BA (UQ), LLB (QUT) MLS (British Columbia); Griffith University Faculty of Commerce and Management. The Author would like to thank Justin Malbon, Griffith University Faculty of Law for comments on an earlier draft of this article and for the blind review suggestions from JCULR.

<sup>1</sup> Pauline Hanson, dropped as the Liberal candidate for the seat of Oxley for her racist comments, went on to win that seat in the 1996 Federal elections as an Independent. Subsequent to her first speech as a parliamentarian in the House of Representatives on 10 September 1996, widespread popular support for her racist views has become evident.

translated into law and policy, might allow a more accommodating image of this country to a watching world.

### TREATIES IN COLONIAL CANADA

British colonial expansion in Canada was to some degree accompanied by treaty making.<sup>2</sup> However the French, unlike the British, took the view that the indigenous population had no territorial rights. Consequently there were no treaties of cession between First Nations people and the French.<sup>3</sup> In Canada, the Royal Proclamation of 1763<sup>4</sup> gave British recognition to aboriginal<sup>5</sup> title. To do this it had to give recognition to the *existence* of aboriginal peoples *and* to the recognition of aboriginal rights arising from sources pre-existing European intrusion. The Royal Proclamation makes explicitly clear that these rights did not confer upon the British the right to deal with land until there had been cession by, or purchase from, the native inhabitants:

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several *Nations* or Tribes of Indians with whom we are connected ...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...*<sup>6</sup>

<sup>2</sup> For a listing of treaties between indigenous peoples and British colonial authorities see *Consolidated Native Law Statutes, Regulations and Treaties 1996* (Toronto: Carswell, 1995) 445-6; D. L. Hawley *The Annotated 1990 Indian Act* (Toronto: Carswell, 1990), Chapter 1.

<sup>3</sup> Distinguish such cessionary treaties from political alliances and peace treaties as between the French and the Iroquois (and their allies) such as that involving over thirty First Nations, concluded after more than two years of negotiations in 1701: W. Eccles *Canada Under Louis XIV 1663-1701* (Toronto: McClelland and Stewart, 1964), 242-4; W. Eccles *The Canadian Frontier 1534-1760* (New York: Holt Rinehart and Winston, 1969); W. Eccles *France in America* (Markham: Fitzhenry & Whiteside, 1990).

<sup>4</sup> Reprinted in *Revised Statutes of Canada*, App.1, 1985. For historical evidence from a First Nation perspective on the Royal Proclamation of 1763 which did not encompass British claims to sovereignty in Canada, see J Borrows 'Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation' (1994) 28 *UBC Law Review* 1; for general coverage of treaties with Canada's indigenous people see, D. Kuhlen *A Layperson's Guide to Treaty Rights in Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 1985); for texts of treaty agreements see, *Indian Treaties and Surrenders from 1680-1902* (Ottawa: Queen's Printer, 1891; reprinted Toronto: Coles Publishing, 1971); *Consolidated Native Law Statutes, Regulations and Treaties 1996* (Toronto: Carswell, 1995) 351-4; D. N. Sprague 'Canada's Treaties with Aboriginal Peoples' (1996) 23 *Manitoba Law Journal* 341. Treaties in Canada with the First Nations covered over one million square miles, leaving approximately the same area as Australia as unceded First Nations territory.

<sup>5</sup> The term "aboriginal" (with no capitalisation) is used in Canada, in lower case, for generic coverage of indigenous peoples. By contrast, specific names such as "Indian", "Inuit" and "Metis" are capitalised. See, for example, *Constitution Act, 1982, Canada Act 1982*, c. 11 (UK), Schedule B, s35(2).

<sup>6</sup> *Consolidated Native Law Statutes, Regulations and Treaties*, supra n. 2 at 353.

### Canadian Eurocentrism

Several centuries later Dickson CJ and La Forest J in *R v Sparrow* (1990) 70 DLR (4th) 385 (SCC) stated:

...while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.<sup>7</sup>

Numerous commentators have queried the “never any doubt” assertion, by asking from whose perspective.<sup>8</sup> The mind-set accompanying the European discovery doctrine and its disastrous effects on indigenous peoples has naturally aroused from indigenous peoples their views on the “discovery” doctrine. Monet and Skanu’u put a different gloss on discovery when they write that Captain Cook in 1778 on his third mission was discovered by the Nootka people at Nootka Sound.<sup>9</sup> The dominant regime by imparting its colonial views could state in *R v St Catherine’s Milling and Lumber Company* (1885) 10 OR 196:

As heathens and barbarians it was not thought that they [First Nations peoples] had any proprietary title to the soil, nor any such claim thereto as to interfere with the plantations, and the general prosecution of colonisation.<sup>10</sup>

The Privy Council in *St Catherine’s Milling and Lumber Company v R* (1889) 14 AC 46 upholding the Supreme Court of Canada decision stated: “the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign.”<sup>11</sup> The Privy Council was much influenced by the Marshall CJ decisions, especially *Johnson v McIntosh* (1823) 8 Wheaton 543, which gives congruence between US and Canadian jurisprudence in positioning indigenous peoples subordinately.

In the complex split decision of *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145, the Supreme Court of Canada dismissed the Nishga appeal, holding native title of the Nishga was extinguished. This was notwithstanding the fact that there had been no treaty with, nor cession by, the Nishga; nor that there was no federal or British Columbian legislation expressly extinguishing Nishga title.

<sup>7</sup> At 404.

<sup>8</sup> For example, P. Macklem ‘First Nation Self-Government and the Borders of the Canadian Legal Imagination (1991) 36 *McGill Law Journal* 382.

<sup>9</sup> Monet and Skanu’u *Colonialism on Trial: Indigenous Land Rights and the Gitskan and Wet’suwet’en Sovereignty Case* (Philadelphia: New Society Publishers, 1992) 6; cf. I. Moores *Voices of Aboriginal Australia: Past, Present, Future* (Sydney: Butterfly Books, 1995), 428 citing “Burnum Burnum: Interview with Caroline Jones” *The Search for Meaning*, (ABC Radio National, 1990) “...Aboriginal people discovered Captain Cook sneaking up the east coast of Australia in 1770.”

<sup>10</sup> Per Chancellor Boyd at 206; cf. H. Wheaton *Elements of International Law* (New York: Oceania, 1964), 32.

<sup>11</sup> At 54.

In 1984 in *Attorney-General Ontario v Bear Island Foundation; Potts v Attorney-General of Ontario* (1984) 49 OR (2d) 353 it was stated:

Europeans did not consider Indians to be equal to themselves and it is inconceivable that the King would have made such vast grants to undefined bands, thus restricting his European subjects from occupying these lands in the future except at great expense.<sup>12</sup>

In like fashion the contemporary Canadian legal system has been taken to reserve to itself criminal jurisdiction including intra-First Nation cases.<sup>13</sup> The legal problems encountered by indigenous Canadians in seeking control of their own destinies by the standards of their own cultures have thus amounted to fundamental obstacles: mere assertion of British sovereignty or later Canadian sovereignty has been taken as sufficient to extinguish indigenous sovereignty.<sup>14</sup> An initial hurdle for indigenous claims has been to gain recognition of sovereignty having ever existed as exemplified by *R v Syliboy* [1929] 1 DLR 307:

The savages' rights of sovereignty even of ownership were never recognised. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.

Indeed the very fact that certain Indians sought from the Governor the privilege or right to hunt in Nova Scotia as usual shows that they did not claim to be an independent nation owning or possessing their lands. If they were, why go to another nation asking this privilege or right and giving promise of good behaviour that they might obtain it.<sup>15</sup>

<sup>12</sup> Per Steele J, at 386.

<sup>13</sup> *R v Shawanakisikie* (1822-1826) Upper Canada, Court of Oyer and Terminer, Western District Assize; *Sero v Gault* (1921) 50 OR 27 per Riddell J at 32; *Director of Support and Custody Enforcement v Nowegejick* [1989] 2 CNLR 27, 31-2; but see challenges in M. Walters 'The Extension of Colonial Criminal Jurisdiction over the Aboriginal Peoples of Upper Canada: Reconsidering the Shawanakisikie Case (1822-26)' (1996) 46 *University of Toronto Law Journal* 273.

<sup>14</sup> For recent Canadian legal scholarship probing this area see for example J. R. Fortune 'Construing Delgamuukw: Legal Argument, Historical Argumentation, and the Philosophy of History' (1993) 51 *University of Toronto Faculty of Law Review* 80; B. Freedman 'The Space for Aboriginal Self-Government in British Columbia: The Effect of the Decision of the British Columbia Court of Appeal in *Delgamuukw v British Columbia*, (1994) 28 *UBC Law Review* at 49; M. Asch and P. Macklem 'Aboriginal Rights and Canadian Sovereignty: An Essay on *R v Sparrow*' (1991) 29 *Alberta Law Review* 498; M. Asch 'Aboriginal Self-Government and Canadian Constitutional Identity: Building Reconciliation' in Levin (ed) *Ethnicity and Aboriginality: Case Studies in Ethnonationalism* (Toronto: University of Toronto Press, 1993); P. B. Morse 'Delgamuukw v The Queen: Implications for Australia' (1993) 3 *Aboriginal Law Bulletin* 13; B. Slattery 'First Nations and the Constitution' (1992) 71 *Canadian Bar Review* 261; J. Borrows *supra* n. 4 and J. Terry 'Self-Government for Canadian First Nations: Recent Developments' unpublished paper delivered at the 50th Australasian Law Teachers Conference, La Trobe University, Melbourne, 28 September - 1 October 1995.

<sup>15</sup> At 313.

## Shifting Perspectives

Writing in 1991 Asch and Macklem express a growing academic view in Canadian legal literature:

...the assertion of Canadian sovereignty over aboriginal peoples, as well as the contingent theory of aboriginal right that it generates, ultimately rest on unacceptable notions about the inherent superiority of European nations. If this is true, unquestioned acceptance of Canadian sovereignty and a contingent theory of aboriginal right does violence to fundamental principles of justice and human rights in the modern world, such as the assumed equality of peoples, especially of their ability to govern themselves, and the basic right of a people to self-determination. We believe it abhorrent that Canada was constituted in part by reliance on a belief in inequality of peoples and that such a belief continues to inform political and legal practice...<sup>16</sup>

Unsurprisingly, it is not uncommon for indigenous voices to call for recognition of their rights as inherent. Decades pass but the aspirations remain constant, as is illustrated by the following statement by the Native Council of Canada:

We are an historical minority with rights inherent in that status which go beyond the right of equal opportunity. The latter right assumes that we be assimilated into either French or English versions of Canadian society. As an historical national minority we have the right to remain separate and distinct from both versions and develop along lines dictated by our own cultural aspirations. The question for us, therefore is not the vague, charitable one of gaining access to "equality of opportunity" in "the Canadian mosaic", but more correctly how to relate to Canadian society without losing our identity, lands and those rights inherent in our aboriginal status in the process.<sup>17</sup>

Similarly, the Assembly of First Nations in Canada (comprising, as its name implies, representatives of First Nations whose objective it is to address national and regional government policy initiatives concerning indigenous affairs)<sup>18</sup> stated in its 1995 *Declaration of the First Nations*:

We the Original people 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

<sup>16</sup> Asch and Macklem, *supra* n. 14 at 510.

<sup>17</sup> Cited in D Sanders 'Aboriginal Peoples and the Constitution' (1981) 19 *Alberta Law Review* 424.

<sup>18</sup> International Institute for Sustainable Development *Youth Sourcebook on Sustainable Development* "Directory of Indigenous Peoples Organisations" (Winnipeg: International Institute for Sustainable Development, 1995).  
Internet: <http://iisd1.iisd.ca/youth/ysbk146.htm>.

Traditions from time immemorial. We continue to exercise the rights and fulfil 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.<sup>19</sup>

Ovide Mercredi, National Chief of the Assembly of First Nations in Canada, as a champion for the insistence upon the inherent right to self-government, continues the campaign for the repeal of the *Indian Act* RSC 1985,c I-5.<sup>20</sup> In June 1993, deficiencies of the *Indian Act* were acknowledged by the Canadian Federal Government in the following terms:

The *Act* describes a paternalistic relationship that prevents First Nations people from exercising the kind of control over their lives that other Canadians have long taken for granted. In so doing, the *Act* demeans both the people it controls and the government that administers it.<sup>21</sup>

In similar vein to the views of Mercredi, aspirations of northern indigenous people of Canada for self-determination are graphically expressed,<sup>22</sup> as for example:

We are saying we have the right to determine our own lives. This right derives from the fact that we were here first. We are saying we are a distinct people, a nation of people, and we must have a special right within Canada. We are distinct in that it will not be an easy matter for us to be brought into your system because we are different. We have our own system, our own way of life, our own cultures and traditions. We have our own languages, our own laws, and a system of justice.<sup>23</sup>

<sup>19</sup> This text is on the internet at <http://www.afn-nib.org/afn2.htm> (copy on file with the author); see also Assembly of First Nations "Negotiating Self-Government Agreements: The Experience of First Nations Involved in Self-Government Negotiations", discussion paper prepared for meeting at Kingsclear, 1 October 1992, at 15, 17 cited in M. Limerick *Resource Document on Alternative Governing Structures* (Brisbane: Office of Aboriginal and Islander Affairs, 1994), 18-19.

<sup>20</sup> Hawley, *supra* n. 2; for arguments for its repeal see O Mercredi and M. Turpel *In the Rapids: Navigating the Future of First Nations* (New York: Viking, 1993); M. Boldt *Surviving as Indians: the Challenge of Self-Government* (Toronto: University of Toronto Press, 1994); and see proposed amendments to the Canadian *Indian Act* in "First Nations in Canada" published under the authority of the Minister of Indian Affairs and Northern Development. Ottawa 1996 at <http://www.inac.gc.ca/news/sept96/1-9638sy.html> (copy on file with the author).

<sup>21</sup> Canada. Department of Indian Affairs and Northern Development June 1993. <http://www.inac.gc.ca/pubs/information/info56.html> (copy on file with the author).

<sup>22</sup> H. Brody *Living Arctic: Hunters of the Canadian North* (London: Faber and Faber, 1987).

<sup>23</sup> *Id.* vii, quoting Robert Andre: Arctic Red River. For further examples of such expressions in the same work see statements by Louis Caesar: Fort Good Hope at 5; Richard Nerysoo: Fort McPherson, at 9; Richard Nerysoo: Fort McPherson, (1977) at 9; Georges Erasmus: Yellowknife at 9; Stephen Kakfw: Fort Good Hope at 200; Dolphus Shae: Fort Franklin at 214; Vince Steen: Tuktoyaktuk at 214; Robert Andre: Arctic Red River at 232; Richard Nerysoo: Fort McPherson, at 232; and Georges Erasmus: Yellowknife, at 236.

International attention was drawn to indigenous struggles for the recognition of inherent rights during the clashes with US state and Canadian provincial forces in the late 1980's and early 1990's when Mohawk First Nation people presented their Oka position paper on sovereignty.<sup>24</sup> Drawing on their own Great Law, colonial treaty provisions and the UN Universal Declaration on Human Rights, the Mohawk people presented their demands on 24-25 August 1990 for the recognition of :

...the rights accorded every people in the world - the right to our own nationality, the right of our nation and confederacy to exist and the right to an area of government and society. Ours is the strongest natural legal right known to humans - the aboriginal right...If Canada fails in its wisdom to grow and answers with its police or military, we will and must defend our homeland and our people. This is required under our law. This must be understood by Canada and the Canadian people.<sup>25</sup>

While in this particular instance the power of the state not unexpectedly prevailed and Mohawk demands for recognition of nation status were denied, arguments are advanced that declarations and articulations framed in terms specifically of indigenous rights offer a more productive approach to self-determination claims than either the human rights or minority approaches.<sup>26</sup>

### **The Canadian Constitution<sup>27</sup>: s 35.**

Part II of the Canadian Constitution is entitled "Rights of the Aboriginal Peoples of Canada". Building on s 35(1) of the *Constitution Act 1982* which states: "existing aboriginal and treaty rights are hereby recognised and affirmed," First Nations peoples have pursued and will continue to pursue confirmation and clarification of the recognition of just what those rights are through the Canadian courts. Section 52(1) provides for the primacy of the Canadian Constitution over other Canadian law,<sup>28</sup> thus ensuring s 35 aboriginal rights are part of the entrenched supreme law of the land.<sup>29</sup> Whenever s 35(1) comes before a Canadian court, it is necessary to bear in mind the other subsections of the section, viz (2) to (4) which are as follows:

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

(3) For greater certainty in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

<sup>24</sup> R. Hornung *One Nation Under the Gun* (Toronto: Stoddart, 1991).

<sup>25</sup> *Id.* 243.

<sup>26</sup> For example, G.F.A. Werther *Self-Determination in Western Democracies: Aboriginal Politics in Comparative Perspective* (Westport: Greenwood Press, 1993).

<sup>27</sup> *Canada Act 1982*, c. 11 (UK), Schedule B.

<sup>28</sup> Section 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

<sup>29</sup> See however *R v Secretary of State for Foreign and Commonwealth Affairs* [1981] 4 CNLR 86, 99 per Denning MR.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.<sup>30</sup>

Whatever constitutional construction is given to s 35(1) in regard to the recognition and affirmation of existing aboriginal and treaty rights, it follows that this must be considered in light of the whole of s 35. Thus it is suggested, for example, that aboriginal self-government provisions arising through land claim agreements in Canada would also be protected by constitutional entrenchment.<sup>31</sup> In the words of Professor Lyon,

Section 35 calls for a just settlement for aboriginal peoples<sup>32</sup>...Section 35 is a solemn commitment to honour the just land claims of aboriginal peoples, fulfil treaty obligations, and respect those rights of aboriginal peoples which the *Charter*, aided by international law recognises as their fundamental rights and freedoms...Constitutional reform is not done to continue the status quo."<sup>33</sup>

A landmark Canadian Supreme Court decision, although not drawing on s 35, was *Guerin v The Queen* (1984) 13 DLR (4th) 321 (SCC), recognising pre-existing aboriginal rights as applying not only on reserves but also beyond reserves, and confirming the Crown's fiduciary responsibility for aboriginal peoples.<sup>34</sup> Predating *Mabo v Queensland* (No 2) (1992) 175 CLR 1, *Guerin* acknowledged that aboriginal title in Canada was a pre-existing legal right, the creation of which was independent of either the *Royal Proclamation* or Canadian legislation or executive action<sup>35</sup>. *R v Sioui* (1990) 70 DLR (4th) 427 (SCC) acknowledged independent nation status of First Nations at the time of colonial encounters, and *R v Sparrow* (1990) 70 DLR (4th) 385 (SCC) liberalised the construction of "existing aboriginal rights" to demand a flexible approach to accommodate cultural change. In respect to the interpretation of s 35(1) the court in *Sparrow* held that:

The nature of s 35(1) itself suggests that it can be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous,

<sup>30</sup> Subsections (3) and (4) were added by the *Constitution Amendment Proclamation, 1983*.

<sup>31</sup> Entrenchment arises under s 38. The procedure for amendment in s 38(1) requires a proclamation issued by the Governor General and "(a) resolutions of the Senate and the House of Commons; and (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of the provinces." See also T. Isaac 'The Constitution Act, 1982 and the Constitutionalisation of Aboriginal Self-Government in Canada: Cree-Naskapi (of Quebec) Act' (1991) 1 *Canadian Native Law Reporter* 1.

<sup>32</sup> N. Lyon 'An Essay on Constitutional Interpretation' (1988) 26 *Osgoode Hall Law Journal* 95, 100.

<sup>33</sup> *Id.* 101.

<sup>34</sup> Contrast Australian jurisprudence: see, for example, R Bartlett 'A Fiduciary Obligation Respecting the Delivery of Services to Aboriginal Communities' paper delivered at the 50th Australasian Law Teachers Association Conference, Melbourne, 28 September - October 1 1995.

<sup>35</sup> At 322-3, per Dickson J, Beetz, Chouinard and Lamer JJ concurring.



liberal interpretation of the words in the constitutional provision is demanded.<sup>36</sup>

With such judicial enunciations, Canada may thus be seen as seriously engaging in the process of developing a constitutional jurisprudence which affords recognition of indigenous rights. The stumbling block, however, has arisen through the restrictive tests which the Supreme Court of Canada has applied. In the first case to deal with s 35 issues, *R v Sparrow*, the Court devised a two stage test for determining whether a specific aboriginal right survived. The first stage involves determination whether there has been a prima facie infringement of an existing aboriginal right. The second stage involves determination if there has been such infringement whether that infringement is justifiable.<sup>37</sup> The justificatory scheme adopted in *Sparrow* begins with the construction of s 35 aboriginal rights as not being absolute.<sup>38</sup> The test for justification of interference with s 35 aboriginal rights would arise on grounds of conservation and resource management.<sup>39</sup> The court would determine whether a valid legislative objective could be found to justify such interference with aboriginal rights.<sup>40</sup> It would take into account the special trust relationship which exists between the Crown and aboriginal peoples and proceed in its determination with the honour of the Crown being held of paramount importance in any such dealings.<sup>41</sup> The Court approved the following order of priority determined in *Jack v The Queen* (1979) 48 CCC 2d 246 at 261 to apply in *Sparrow* as allocational guidelines to regulate conflicts arising between the constitutional recognition and affirmation of aboriginal rights on the one hand and valid legislative objectives of conservation on the other:

1. Conservation
2. Indian fishing
3. Non-Indian commercial fishing
4. Non Indian sports fishing<sup>42</sup>

The recent direction that the Supreme Court of Canada has taken in this judicial constitutional process of determining the actual "contents" of s 35<sup>43</sup> shows a decided preference for a specific rather than a general approach as to what is to be recognised as constituting aboriginal rights.<sup>44</sup> The standard which the Canadian Supreme Court is currently applying is as follows:

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<sup>36</sup> *Id.* 407.

<sup>37</sup> *Id.* 416.

<sup>38</sup> *Id.* 409.

<sup>39</sup> *Id.* 412.

<sup>40</sup> *Id.* 413.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Id.* 414.

<sup>43</sup> See for example *R v N T C Smokehouse Ltd* [1996] 4 CNLR 130; *R v Van der Peet* [1996] 4 CNLR 177; *R v Pamajewon* [1996] 4 CNLR 164; J. Gray 'O Canada! – Van Der Peet as Guidance on the Construction of Native Title Rights' (1997) 2 *Australian Indigenous Law Reporter* 18.

<sup>44</sup> See for example *R v Sparrow* (1990) 70 DLR (4th) 385 (SCC) 411; see also K. McNeil 'Reduction by Definition: The Supreme Court's Treatment of Aboriginal Rights in 1996' (1997) 5 *Canada Watch* 60; K. McNeil 'How can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified' (1997) 8 *Constitutional Forum* 33.

In order to be an aboriginal right an activity must be an element of a tradition, custom or practice integral to the distinctive culture of the aboriginal group claiming the right. The Court must first identify the exact nature of the activity claimed to be a right and must then go on to determine whether that activity could be said to be a defining feature of the culture in question prior to contact with Europeans.<sup>45</sup>

Despite such a trend, advocates for the recognition of aboriginal rights have the advantages conferred by the fact that s 35 falls within Part II of the *Constitution Act 1982*, and not the *Canadian Charter of Rights and Freedoms* (Part I), and thus escapes the provisions of s 1 and s 33. Section 1 “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

Section 33, the override provision of the *Charter*, allows either Canadian federal or provincial legislation, expressly so worded, to infringe s 2 and ss 7 to 15 of the *Charter*.<sup>46</sup> Section 35, not being part of the *Charter*, is thus immune from s 33.

Further constitutional protection is provided to aboriginal rights by s 25 of the *Charter* guaranteeing from erosion aboriginal rights and freedoms, including those recognised by the *Royal Proclamation* of 1763 and those arising through land claims agreements.<sup>47</sup> Section 25 also confers the benefit of preventing *other Charter rights* from being used to limit aboriginal rights.

#### CANADIAN PERCEPTIONS: INHERENCY OF INDIGENOUS RIGHTS

It is instructive to record the Canadian observer’s contribution to the 47<sup>th</sup> session, Sub-Commission on Prevention of Discrimination and Protection of Minorities:

...a central element of the Canadian Government’s approach to indigenous issues was to proceed on the premise that the inherent right of self-government is an existing aboriginal and treaty right within s 35 of the Constitution Act of 1982 under the Canadian Constitution.<sup>48</sup>

Henderson notes that among the First Nation Mikmaq, s 35 is called the “force that changes everything”.<sup>49</sup> The year following the patriation of the Canadian Constitution which was to include a Charter of Rights and Freedoms saw the release of the Penner Report<sup>50</sup> which strongly supported the entrenchment of First

<sup>45</sup> *R v Pamajewon* [1996] 4 CNLR 164 per Lamer CJ and La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ, following *R v Van der Peet* [1996] 4 CNLR 177, 199.

<sup>46</sup> Section 2 addresses fundamental freedoms; ss 7-14 cover legal rights; while s 15 covers equality rights.

<sup>47</sup> See B. H. Wildsmith *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988).

<sup>48</sup> United Nations Economic and Social Council. Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities *Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on its Thirteenth Session* (Geneva, 1995) paragraph 60.

<sup>49</sup> J. Y. Henderson ‘Empowering Treaty Federalism’ (1994) 58 *Saskatchewan Law Review* 241, 243, n 7, in the original as “*mst kowey Pilu’a’sik*.”

<sup>50</sup> Government of Canada *Report of the Special Committee of the House of Commons on Aboriginal Self-Government* (Ottawa: Queen’s Printer, 1983).

Nations' rights to self-government. The international obligations on Canada were squarely raised in the Report:

Canada is obliged to protect and promote the rights of the peoples of the Indian First Nations in a manner consistent with the rights guaranteed in the international covenants Canada has signed – the United Nations Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights, and the Helsinki Final Act of 1975. These agreements guarantee both the fundamental collective rights of peoples to be self-governing and the basic human rights of individuals.<sup>51</sup>

While these recommendations were not then accepted by the Canadian government, ensuing events such as the 1987 Meech Lake Accord and its 1990 demise engineered by the Assembly of Manitoba Chiefs,<sup>52</sup> the release of the *Coolican Report* in 1986 with its accommodating views on power-sharing with culturally distinct indigenous Canadians,<sup>53</sup> the Canadian government report (1986) acknowledging, in response to the Coolican Report, the nexus between aboriginal self-government and land claims,<sup>54</sup> the release of the 1992 Royal Commission on Aboriginal Peoples report on self-government with its identification of the necessity of the recognition of indigenous self-government as an inherent right,<sup>55</sup> *The Consensus Report on the Constitution 1992*,<sup>56</sup> and the 1996 recommendations from the Royal Commission on Aboriginal Peoples *Bridging the Cross-Cultural Divide: A Report on Aboriginal People and Criminal Justice of Canada* (1996)<sup>57</sup> all contributed to the ground swell for new perceptions by non-aboriginal Canada

<sup>51</sup> *Id.* 136.

<sup>52</sup> E. Harper 'First Nation: Killing the Meech Lake Constitutional Proposals in Manitoba's Legislature' (1991) 72 *The Parliamentarian* 177. (The recognition by the Accord of Quebec as a distinct society within Canada but no such recognition for the status of indigenous Canadians has its historical roots in the conciliatory *British North America (Quebec) Act 1774*. This background of contention is preceded by the Treaty of Paris 1763 by which France ceded her Canadian territorial claims to Britain. It is worth recalling however that one may cede only what one exercises sovereignty over. The French conducted no territorial treaties of cession with First Nations in Canada.)

<sup>53</sup> M. Coolican *Living Treaties: Lasting Agreements* (Ottawa: Department of Indian Affairs and Northern Development, 1985).

<sup>54</sup> Government of Canada *Report of the Task Force on Program Review* (Ottawa: Queen's Printer, 1986).

<sup>55</sup> Government of Canada, Royal Commission on Aboriginal Peoples 1992 *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (Ottawa: Queen's Printer, 1992); see also Royal Commission on Aboriginal Peoples 1993 *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Canada Communication Group, 1993) 38.

<sup>56</sup> In K. McRoberts and P. J. Monahan P (eds) *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) Appendix 1.

<sup>57</sup> Royal Commission on Aboriginal Peoples 1996: *Bridging the Cross-Cultural Divide: A Report on Aboriginal People and Criminal Justice of Canada*. Recommendation 1 (at 224) was that "Federal, provincial and territorial governments recognise the right of Aboriginal nations to establish and administer their own systems of justice pursuant to their *inherent right of self-government*, including the power to make laws, within the Aboriginal nation's territory" (italics added). See also the Royal Commission on Aboriginal Peoples 1996: *Final Report* (Ottawa: 1996), available through the Institute of Indigenous Government: Royal Commission on Aboriginal Peoples Access Project at internet address <http://www.indigenous.bc.ca/rcap/rcapeng.html>.

to aboriginal self-government and its inherent status. The drafting of *The Consensus Report* (final text 28 August 1992) along with the *Draft Legal Text* (9 October 1992) constituted the Charlottetown Accord which, unlike the Meech Lake Accord, included aboriginal leadership input along with that of the prime minister, provincial premiers and territorial leaders. This accorded with s 37.1(2) of the *Constitution Act 1982* whereby representatives of the aboriginal peoples of Canada would be invited by the prime minister to participate in constitutional conferences affecting aboriginal issues.<sup>58</sup> The central significance relevant to this discussion is that the Charlottetown Accord represented the greatest reform package of proposals of Canadian aboriginal issues, *agreed to* by the Canadian leadership just identified. These included, *inter alia*, the proposed amendments of s 35.1 to read:

- 35.1 (1) The Aboriginal peoples of Canada have the inherent right of self-government within Canada.
- (2) The right referred to in subsection (1) shall be interpreted in a manner consistent with the recognition of the governments of the Aboriginal peoples of Canada as constituting one of the three orders of government in Canada.
- (3) The exercise of the right referred to in subsection (1) includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction,
- (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and
  - (b) to develop, maintain and strengthen their relationship with their lands, waters and environment, so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies.”<sup>59</sup>

The defeat of the Charlottetown Accord in the referendum of 26 October 1992 does not detract from the fact that all governments in Canada had reached agreement on the proposed, most sweeping reforms for the recognition of First Nations’ inherent self-government.

Canada, at the second session of the inter-governmental working group of the Commission on Human Rights convened for the continued discussion of the *Draft Declaration on the Rights of Indigenous Peoples*, expressed a willingness to explore and accommodate the right of indigenous peoples to self-determination as espoused in Article 3 of the *Draft Declaration*. The momentous Canadian Government statement included the following:

Our goal at this Working Group will be to develop a common understanding, consistent with evolving international law of how this right is to apply to Indigenous collectivities, and what the content of this right includes. Once achieved, this common

<sup>58</sup> See however s 35(1) added by the Constitution Amendment Proclamation 1983.

<sup>59</sup> The *Draft Legal Text* is reproduced in K. McRoberts and P.J. Monahan P J, *supra* n. 56 at 314-61; the *Draft Legal Text*, unlike, for example, the *Canada Act and the Charter of Rights* adopts capitalisation for the term “Aboriginal”.

understanding will have to be reflected in the wording of article 3...

[T]he Government of Canada accepts a right of self-determination for Indigenous peoples which respects the political, constitutional and territorial integrity of democratic states. In that context, exercise of the right involves negotiations between states and the various Indigenous peoples within those states to determine the political status of the Indigenous peoples involved, and the means of pursuing their economic, social and cultural development."<sup>60</sup>

Such a statement from Canada represents a major change in stance from its previous non-acceptance of use of the term "indigenous peoples" on the grounds of the international legal ramifications that the term carries in regard to the right to self-determination, the concept espoused in the critically important Article 3.

### INDIGENOUS RIGHTS DEVELOPMENT: BRITISH COLUMBIA

The Canadian province of British Columbia may be taken to provide certain parallels with the state of Queensland. Their respective appellations bear testimony to the imperial flavour of the time of their inception, Queen Victoria's reign spanning the years 1837-1901. Their recent European histories occupy the same time frame, with the colony of Queensland attaining separate status in 1859 and British Columbia in 1866.<sup>61</sup> Both have evidenced a frontier mentality, cherishing their distinctness from their respective modern federations. British Columbia joined the Dominion of Canada as the sixth province in 1871 and Queensland entered the Commonwealth of Australia with the five other states on the 1<sup>st</sup> January 1901. In both British Columbia and Queensland indigenous rights have awaited recognition by the respective dominant non-indigenous regimes. Consequently, in the case of British Columbia, in contrast to other areas of Canada, much of the province is still without treaty coverage.

The so-called Douglas treaties were entered into between 1850-1854 on southern Vancouver Island.<sup>62</sup> They were not treaties in the true sense but rather land purchases from Indians of the Island by James Douglas, who was both chief officer of the Hudson's Bay Company in the Columbia territory and Governor of Vancouver Island. The only "real" treaty including First Nations of British Columbia, was that signed with the Canadian federal government. Treaty 8, signed between 1899-1915,<sup>63</sup> covered a restricted area of the north-east portion of the province and there is clear evidence the First Nations people involved believed they were entering a peace and friendship treaty, not a surrender of rights.<sup>64</sup>

<sup>60</sup> The statement was made on 31 October 1996, and is reported in S. Pritchard "The United Nations and the Making of a Declaration on Indigenous Rights" (1997) 3 *Aboriginal Law Bulletin* 4, 8.

<sup>61</sup> The date 1866 marks the union of the colony on Vancouver Island (1849) and the mainland colony (1858).

<sup>62</sup> H. Foster *Measures Essentially Unjust: English "Law" and Native "Custom" in New Zealand, Vancouver Island and British Columbia, 1769-1871* (Unpublished MJur thesis, University of Auckland, 1988).

<sup>63</sup> For text of treaty see Consolidated Native Law Statutes, Regulations and Treaties 1996 (Toronto: Carswell, 1995) 485-7.

<sup>64</sup> See for example the Alaska highway pipeline hearings, 1979 *Transcripts of Hearings* v 17,

A rising tide of recognition of the need to face indigenous issues, long neglected by British Columbian governments, found articulation in February 1990 through the "Reaching Just Settlements" conference held at the University of Victoria, British Columbia.<sup>65</sup> The conference explored issues relating to land claims and constitutional questions of inherent jurisdiction and aboriginal rights. Not unrepresentative of indigenous views were those expressed by Chief Councillor Mathias of the Squamish Nation:

...we are not talking about a real estate transaction. From the aboriginal point of view, we are talking about rights to govern ourselves, rights to maintain and preserve our culture, rights to maintain and preserve our languages, rights to educate our young, rights to institute our own forms of government independent of white bureaucracies, rights to determine what happens on our lands and to our resources. It's self-government, it's jurisdiction, it's wealth, access to lands and resources - it's not merely a real estate deal.<sup>66</sup>

The pressure was mounting for serious negotiations to be undertaken by the provincial government of British Columbia. Driven by persistent provincial refusal to enter negotiations, indigenous British Columbian protests had been mounted during the 1980's.<sup>67</sup> Blockades extended into 1990.<sup>68</sup> At the same time in the East an ugly situation between Quebec authorities and Mohawk helped dramatise the benefits of negotiation.<sup>69</sup> In the words of the premier of the Yukon, Tony Penikett,<sup>70</sup> in the process himself of negotiating with Yukon Indians: "...the

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1936-1937, and *Treaty No 8*, BIRD, Publication No QS-0576-000-EE-A-16, 1966, 12, both cited in H. Brody *Maps and Dreams: Indians and the British Columbia Frontier* (Harmondsworth: Penguin, 1993) 68-70.

<sup>65</sup> F. Cassidy (ed) *Reaching Just Settlements: Land Claims in British Columbia: Proceedings of a Conference held February 21-22 1990*, Victoria BC. (Lantzville: Oolichan Books and Halifax: The Institute for Research on Public Policy, 1991).

<sup>66</sup> Id. 16; cf previous negotiations with the Sechelt resulting in the *Sechelt Indian Band Self-Government Act 1986* (Can); *Sechelt Indian Government District Enabling Act 1987* (BC) and the *Sechelt Indian Government District Home Owner Grant Act 1988* (BC).

<sup>67</sup> Monet and Skanu'u, *supra* n. 9 at 16-17.

<sup>68</sup> P. Tennant 'Strong Promises on Paper: Treaties and Aboriginal Title in Canada' in C. Fletcher (ed) *Aboriginal Self-Determination in Australia* (Canberra: Aboriginal Studies Press for the Australian Institute of Aboriginal and Torres Strait Islander Studies, 1994) 177, 184. This work contains the published proceedings of the *Aboriginal Peoples, Federalism, and Self-Determination Conference*, sponsored by the Federalism Research Centre of Australian National University and Ngaanyatjarra Agency and Transport Service, held in Townsville 29-31 August, 1993.

<sup>69</sup> See for example, Hornung, *supra* n. 24.

<sup>70</sup> F. Cassidy (ed) *Aboriginal Self-Determination: Proceedings of a Conference held September 30 - October 3, 1990, Lanceville, BC* (Lantzville: Oolichan Books and Halifax: The Institute for Research on Public Policy, 1991) 143; compare the statement in the Indian Commission of Ontario 1990 *Discussion Paper Regarding First Nation Land Claims*: "If negotiation is to be an alternative to actions of violence and confrontation, such as those at Oka,...surely it is incumbent upon those who care to ensure that the alternative be one that works. History shows clearly that at this point it can only be said that the present process and policy for dealing with Indian land claims have been an exercise falling far short of anything resembling success." Cited in A. McCallum 'Dispute Resolution Mechanisms in

one overriding lesson of Oka is that there is no good alternative to negotiating seriously and in good faith.”

By the early 1990's British Columbia's refusal to negotiate with First Nations was wavering.<sup>71</sup> Democratic governments, subject to sufficient pressure applied at the opportune political time, are not impervious, and the British Columbia government agreed to proceed down the route of negotiation.<sup>72</sup> There was already precedent in the form of the first modern indigenous rights agreement in Canada, signed in 1975 over the controversial James Bay hydro-electric scheme in Northern Quebec.<sup>73</sup> By the early 1970's, Inuit leadership began the task of creating the Inuit Tapirisat (Council) of Canada which pursued the first comprehensive Canadian land claims and indigenous self-government agreement over a vast region. The newly created Territory of Nunavut (1993) provides insights into the intricacies and the specificity of detail to be addressed before negotiations of such magnitude may come to fruition as evidenced by the fact that it took more than two decades to complete.<sup>74</sup> Canadian case law had also shown a clear indication of support for political rather than attempted legal settlement of complex indigenous rights issues.<sup>75</sup> By the end of 1990, the tripartite British Columbia Claims Task Force had been established. In its 1991 *Report*, The Task Force stated:

The conflict over the rights of Aboriginal peoples in British Columbia is not solely a product of our time. The dispute has its genesis in the early years of European settlement. It is a conflict that speaks to the difficulties in reconciling fundamentally differently philosophical systems. Historically, the conflict is focused on the rights to land, sea and resources. However, the ultimate solution lies in a much wider political and legal

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the Resolution of Comprehensive Aboriginal Claims: Power Imbalance between Aboriginal Claimants and Governments-Negotiation' (1995) 2 *E Law - Murdoch University Electronic Journal of Law* 82, 83.

<sup>71</sup> See for example "First Nations Congress Response - Reaching Just Settlements: Land Claims in British Columbia" in Cassidy, *supra* n. 65, Appendix 2.

<sup>72</sup> R. Brant 'British Columbia's Approach to Treaty Settlement' paper delivered at the *Indigenous Land Use Agreements Conference*, 26-28 September, 1995, Darwin.

<sup>73</sup> See H. Feit 'Negotiating Recognition of Aboriginal Rights: History, Strategies and Reactions to the James Bay and Northern Quebec Agreement' (1980) 1 *Canadian Journal of Anthropology* 159.

<sup>74</sup> D. Purich *The Inuit and Their Land: The Story of Nunavut* (Toronto: James Lorimer, 1992); T. Isaac 'The Nunavut Agreement-in-Principle and Section 35 of the Constitution Act, 1982' (1992) 21 *Manitoba Law Journal* 390; *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada Ottawa, The Minister of Indian Affairs and Northern Development and the Tungavik*, (Ottawa: Indian and Northern Affairs, 1993); K. R. Gray 'The Nunavut Land Claims Agreement and the Future of the Eastern Arctic: The Uncharted Path to Effective Self-Government' (1994) 52 *Toronto Faculty of Law Review* 300; J. Amagoalik 'Canada's Nunavut: An Indigenous Northern Territory' in P. Jull (ed), *Surviving Columbus: Indigenous Peoples, Political Reform and Environmental Management in North Australia* (Darwin: North Australian Research Unit, Australian National University, 1994) 23-5.

<sup>75</sup> See for example *MacMillan Bloedel v Mullin* [1985] 3 WWR 577 at 607 per MacFarlane J; *Delgamuukw v The Queen* (1991) 79 DLR (4<sup>th</sup>) 185 at 537 per McEachern CJ; *Delgamuukw v The Queen* (1993) 104 DLR (4<sup>th</sup>) 470 per Macfarlane JA (Taggart JA concurring) at 547, Lambert JA at 746-7 and Hutcheon JA at 764.

reconciliation between the aboriginal and non-aboriginal societies. Addressing the problem requires an appreciation of the historical relationship between aboriginal and non-aboriginal people, and an understanding of how this history has shaped the political and legal reality of today.<sup>76</sup>

From 1991, First Nations along with federal and provincial representatives set the framework and ground rules which were to result in September 1992 in the creation of the British Columbia Treaty Commission whose mandate was to facilitate the negotiation of treaties and agreements. The Commission arose out of the recommendations of the Claims Task Force *Report* of 1991. The *Report* called for acknowledgment of the past historical conflicts and noted the necessity of building a new relationship which required for many non-indigenous people a sea change of attitude:

...a new relationship which recognises the unique place of aboriginal people and First Nations must be developed and nurtured. Recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories and ways of life must be the hall mark of the new relationship...<sup>77</sup>

The Report also stressed that self-government was included in the range of rights and obligations for negotiation.<sup>78</sup> In harmony with such formulation, in February 1996, the Minister of Indian Affairs and Northern Development made the following announcement at the *Agreement -in-Principle* Initialing Ceremony for the Nisga'a,

It is the first agreement of its kind under the new inherent rights policy which fulfils the Liberal government's commitment to recognise and implement the inherent right of Aboriginal self-government. It also clearly demonstrates negotiation is the proven approach to settling claims.<sup>79</sup>

### Gitksan and Wet'suwet'en

The progress towards negotiated settlements rather than via the litigious route has not been without serious difficulties as shown by the relationships between the province of British Columbia and indigenous peoples of Central British Columbia, the Gitksan and Wet'suwet'en. These First Nations Peoples made public their declaration on the 7 November 1977, at Kispiox, British Columbia, on the occasion of the beginning of negotiations with the Governments of Canada and British Columbia:

<sup>76</sup> *British Columbia Claims Task Force Report* June 28, 1991 (Victoria: Queen's Printer for British Columbia, 1994) 5. (Hereafter *Claims Task Force Report*).

<sup>77</sup> *Id.* 16.

<sup>78</sup> *Id.* 18.

<sup>79</sup> Speaking notes for the Honourable Ronald A Irwin Minister of Indian Affairs and Northern Development at the Initialing Ceremony for the Nisga'a, *Agreement -in-Principle*, Vancouver, 15 February 1996. (For a chronology of events from 1887-1996 leading to the *Agreement -in-Principle* with the Nisga'a Tribal Council, including *Calder v. Attorney-General of British Columbia* (1971) 13 D.L.R. (3d) 64 and *Calder v. Attorney-General of British Columbia* (1973) 34 D.L.R. (3d) 145, see <http://www.inac.gc.ca/news/chro.html> (copy on file with the author).



Since time immemorial, we the Gitksan and Carrier People of Kitwanga, Kitseguecla, Gitanmaax, Sikadoak, Kispiox, Haagwiglet and Moricetown, have exercised Sovereignty over our land. We have used and conserved the resources of our land with care and respect. We have governed ourselves. We have governed the land, the waters, the fish and the animals. This is written on our totem poles. It is recounted in our songs and dances. It is present in our language and in our spiritual beliefs. Our Sovereignty is our Culture.

Our Aboriginal Rights and Title to this land have never been extinguished by treaty or by any agreement with the Crown. Gitksan and Carrier Sovereignty continue within these tribal areas.

We have suffered many injustices. In the past, the development schemes of public and private enterprise have seriously altered Indian life and culture. These developments have not included in any meaningful way, our hopes, aspirations and needs.

The future must be different. The way of life of our people must be recognised, protected and fostered by the Governments of Canada and the Laws of Canada. Only then will we be able to participate fully in Canadian society.

We, the Gitksan and Carrier people, will continue to exercise our Sovereignty in the areas of Education, Social and Economic Development, Land Use and Conservation, Local and Regional Government.

We have waited one hundred years. We have been patient. Through serious negotiation, the basis for a meaningful and dignified relationship between Gitksan and Carrier People and the Governments of Canada and British Columbia will be determined. These negotiations require mutual and positive participation by the Federal Government and the Provincial Government.

Today, the Governments of Canada and British Columbia undertake a bold new journey to negotiate with the Gitksan and Carrier People. During this journey, we will fulfil the hopes and aspirations of our ancestors and the needs of future generations.

Let us begin negotiations.

Recognise our Sovereignty, recognise our rights, so that we may fully recognise yours.<sup>80</sup>

Since the making of the 1977 Declaration by the Gitksan-Carrier, negotiations proved unsuccessful, and Gitksan and Wet'suwet'en legal claims for recognition of ownership of and jurisdiction over the claimed land of 58,000 square kilometers and its resources rights were brought on 24 October 1984 in the *Delgamuukw*

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<sup>80</sup> Monet and Skanu'u, *supra* n. 9 at 15. (The English designate "Carrier" has been replaced by the autochthonous "Wet'suwet'en" although this term has been retained for example in the "Carrier - Sekani Tribal Council" located at Prince George, B.C., set up to represent the interests of people of Carrier - Sekani ancestry.)

case.<sup>81</sup> In their claim for the recognition of indigenous jurisdiction and self-government, Gitksan and Wet'suwet'en First Nations asked McEachern CJ to set aside his task "of determining appropriate remedies and concentrate on the evidence and complexities of Gitksan and Wet'suwet'en societies...It will be from this evidence that a legal pathway to a just resolution can be found."<sup>82</sup> The decision of the British Columbia Supreme Court by McEachern CJ handed down on 8 March 1991 was that indigenous title had been extinguished in 1858, the year the mainland area of British Columbia was declared a crown colony, and that no aboriginal claims to jurisdiction were valid. This recent British Columbian indigenous sovereignty trial judge case highlights the immense difficulties, and perhaps impossibility, of indigenous peoples' attempts to portray sovereignty in their own terms and have that interpretation recognised as holding legitimacy within the present common law national legal systems of Canada and Australia.

In an attempt to explain the fundamental problems created by "cultural imperialism"<sup>83</sup> a Gitksan-Wet'suwet'en proposal to the British Columbian Ministry of the Attorney General stated:

For a Gitksan and Wet'suwet'en there is no such thing as a purely legal transaction or a purely legal institution. All events in both day-to-day and formal life have social, political, spiritual, economic as well as legal aspects.<sup>84</sup>

And:

If, as we suggest, the content of indigenous justice, that is its principles, laws and precedents, is to be used in a meaningful way, it must function within the structure of indigenous justice. Attempts to fit the content of one system into the structure of another are bound to fail.<sup>85</sup>

The British Columbia Court of Appeal in *Delgamuukw v The Queen* (1993) 104 DLR (4<sup>th</sup>) 470 reversed much of the original Supreme Court decision by holding that the Gitksan and Wet'suwet'en peoples do have unextinguished non-exclusive aboriginal rights, other than a right of ownership to much of their traditional

<sup>81</sup> *Delgamuukw v The Queen* (1991) 79 DLR (4th) 185.

<sup>82</sup> Plaintiff's opening address 11 May 1987, *Delgamuukw v British Columbia* [1988] 1 CNLR 14, 22. See also Monet and Skanu'u, *supra* n. 9 at 22-3.

<sup>83</sup> Law Reform Commission of Canada *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission, 1991) 13, quoting Ovide Mercredi, Chief of the Assembly of First Nations of Canada.

<sup>84</sup> Gitksan-Wet'suwet'en Education Society, Smithers Indian Friendship Centre, and Upper Skeena Counseling and Legal Assistance Society *Unlocking Aboriginal Justice: Alternative Dispute Resolution for the Gitksan and Wet'suwet'en People* (Unpublished proposal to the British Columbia Ministry of the Attorney General, 20 March 1989) 15, cited in T. S. Palys 'Considerations for Achieving 'Aboriginal Justice' in Canada' p 4, <http://www.sfu.ca/~palys/prospect.htm> (copy on file with the author); cf *Gerhardy v Brown* (1985) 159 CLR 70 per Deane J at 149: "...the Aboriginal people...their society was not institutionalised and drew no clear distinction between the spiritual and the temporal."; see also A. Dussias 'The Right to Cultural and Religious Self-Determination: Lessons from the Experience of Native Americans' (1996) 2 *ILSA Journal of International and Comparative Law* 632, n 2.

<sup>85</sup> Gitksan-Wet'suwet'en Education Society, Smithers Indian Friendship Centre, and Upper Skeena Counseling and Legal Assistance Society, *supra* n. 84 at 25.

territory. The majority<sup>86</sup> did not concede that aboriginal rights extended to proprietary ownership although they did concede that not all aboriginal rights were extinguished by instruments prior to 1871, the year of British Columbia's entry into Confederation. The majority held that the claim of aboriginal jurisdiction was not for the court to adjudicate<sup>87</sup> or was not within the power of the court to grant.<sup>88</sup> Lambert JA was the stronger dissenting voice, calling for the appeal to be allowed on the grounds that the plaintiffs retained their rights to aboriginal title to occupation, use and enjoyment of all or some of the land in dispute.<sup>89</sup> He construed the claim for aboriginal jurisdiction as a claim for self-government and self-regulation rather than a claim for sovereignty and as such in his view the claim had not been considered.<sup>90</sup> Hutcheon JA, dissenting in part, while calling for particulars to be negotiated by the parties, also called for the recognition of those general principles upholding aboriginal rights including aboriginal rights to land.<sup>91</sup> In his view the rights to aboriginal self-government had not been extinguished, the *Indian Act* RSC 1985, c I-5 resulting rather only in restriction.<sup>92</sup>

Subsequently an Accord of Recognition and Respect was signed between the Province of British Columbia and the Hereditary Chiefs of the Gitksan and Wet'suwet'en Peoples on 13 June 1994 signifying the parties' preference to negotiate rather than litigate "the route to co-existence."<sup>93</sup> As of 1 February 1996 treaty negotiations were suspended between the Gitksan and the Province of British Columbia,<sup>94</sup> on the grounds claimed by the Province that the Gitksan were pursuing an "action on the land" campaign including the erection of road blocks. Wet'suwet'en negotiations were to continue. Wet'suwet'en and Gitksan issues are still expected to proceed through to a hearing before the Supreme Court of Canada,<sup>95</sup> scheduled to commence on 16 June 1997.<sup>96</sup>

<sup>86</sup> Taggart, Macfarlane and Wallace JJA.

<sup>87</sup> *Delgamuukw v The Queen* (1993) 104 DLR (4<sup>th</sup>) 470, 520 per MacFarlane JA, Taggart JA concurring.

<sup>88</sup> *Id.* 591 per Wallace JA.

<sup>89</sup> *Id.* 742-3.

<sup>90</sup> *Id.* 744-5.

<sup>91</sup> *Id.* 750-4, citing with approval *Mabo v Queensland* (No 2) (1992) 175 CLR 1 per Brennan J at 50.

<sup>92</sup> *Id.* 761-4.

<sup>93</sup> Accord of Recognition and Respect, Preamble, para. 4.

<sup>94</sup> Statement by Ministry of Aboriginal Affairs, British Columbia 'Province Suspends Treaty Negotiations with Gitksan' 1 February 1996, <http://www.aaf.gov.bc.ca...ry/newsrel/gitksan3.html> (copy on file with the author).

<sup>95</sup> Application for leave to appeal to the Supreme Court of Canada was filed on 25 October 1993.

<sup>96</sup> Supreme Court of Canada *Bulletin* (1996) 1810. Since submission of this article for publication, the Supreme Court of Canada has ordered a new trial of *Delgamuukw v British Columbia* (File No. 23799, 11 December 1997). This historic Canadian judgment is the latest to confirm that negotiations, not lawsuits, are the best way to settle indigenous land claims.

## IMPLICATIONS FOR AUSTRALIA

Developments in Australia since the High Court decision in *The Wik Peoples v Queensland* (1996) 141 ALR 129 would indicate that the Federal Coalition's political reaction to the central decision of co-existence of native title rights and pastoral lease interests has been overwhelmingly framed in terms favouring non-indigenous interests. Those Federal Australian legislators comprising the current Government have yet to demonstrate that they have perceived that dispossession of indigenous peoples' land constitutes a significant problem of social justice which requires redress, and that one view is that the solution should be based upon the recognition and accommodation of the inherency of indigenous rights. The political precludes to the proposed amendments to the *Native Title Act 1993* (Cth) have included two Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Reports.<sup>97</sup> The two majority reports which would allow for fast-tracking of "national interest" projects are sympathetic to the rationale evidenced by the Federal Coalition's *Native Title Amendment Bill*.<sup>98</sup> The two minority reports<sup>99</sup> favour recognition and accommodation of difference which would afford protection to indigenous rights.

Unlike Canada, Australia has yet to commence treaty-negotiations with the indigenous peoples of this continent. Unlike Canada, it has no constitutional equivalents to Part I, s 25 of the *Canadian Charter of Rights and Freedoms*, or Part II, s 35 Rights of the Aboriginal Peoples of Canada of the *Constitution Act, 1982*. In Canada, the relationship between Native Peoples and the Constitution was recognised as an issue requiring attention as early as February 1979, as indicated by the statement of Canadian federal minister, Bill Jarvis, on 3 December 1979 that:

All governments have experienced the costs of failing to solve these [aboriginal] difficulties; what we must do now is show our Canadian federalism provides opportunity for all peoples to fulfil themselves. Our legal and political systems have always been flexible enough to accommodate such diversity. Our only guarantees of success, however, are open minds, understanding and goodwill."<sup>100</sup>

Lacking high credentials in any of these three identified elements for success, Australian governments have, almost without exception, largely failed to negotiate satisfactory legislation for the acknowledgment of indigenous rights. Prime

<sup>97</sup> Parliament of the Commonwealth of Australia *Sixth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: The Native Title Amendment Bill 1996* (November 1996); Parliament of the Commonwealth of Australia *Seventh Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: The Native Title Amendment Bill 1996 and the Racial Discrimination Act (December 1996)*.

<sup>98</sup> See Commonwealth, *Hansard*, 27 June 1996, 3054-3058, Second Reading of *Native Title Amendment Bill*.

<sup>99</sup> The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund divided 5:5, with the Chair breaking the tie.

<sup>100</sup> Cited in P. Jull *Submission No 1, August 20 1990* in Queensland Electoral and Administrative Review Commission *Consolidation and Review of the Queensland Constitution, Public Submissions* (Brisbane: Queensland Government, 1993) 4.

Minister John Howard's Ten Point Plan<sup>101</sup>, while avoiding outright express extinguishment of native title co-existing with pastoral leases, is seen by the National Indigenous Working Group on Native Title as nevertheless effecting that end.<sup>102</sup>

It has taken the Australian contemporary legal system a little over two centuries to recognise the existence of native title in this country. Just a few years later, extinguishment of those legally recognised surviving native title rights, currently maintained in Australia by the parlous protection of contingent rights, appears imminent. Those native title rights currently recognised by the contemporary Australian legal system are subject to the plenary power of the State which has steadfastly refused recognition of the survival of indigenous sovereignty.

The chronology of specific litigation involving indigenous rights claims as evidenced by the *Delgamuukw* case, commenced in 1987 and still proceeding, is testimony to the fact that Canada is no more immune than Australia to protracted common law suits. A reading of the Royal Commission on Aboriginal Peoples *Final Report* (21 November 1996),<sup>103</sup> makes abundantly clear that Canada would not suggest for a moment that it holds a panacea for tensions arising from the collision of indigenous and non-indigenous cultures in that country or any other.

Nevertheless, recent developments in Canada suggest that the concept of inherent indigenous rights is not confined to Canadian Native peoples but is increasingly finding recognition in other domains. Some would suggest that any lesser footing in Australia will not support an enduring harmonious relationship between those who have never ceded their indigenous sovereignty and later arrivals.

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<sup>101</sup> Department of the Prime Minister and Cabinet, Wik Taskforce statement of 8 May 1997, updating the original 10 Point Plan released on 1 May 1997. On the internet at <http://www.nla.gov.au/pmc/10net3.html>.

<sup>102</sup> National Indigenous Working Group on Native Title 'Co-existence - Negotiation and Certainty (Preface and Executive Summary)' (1997) 4 *Indigenous Law Bulletin* 10, 11.

<sup>103</sup> Available through Institute of Indigenous Government: Royal Commission on Aboriginal Peoples Access Project, <http://www.indigenous.bc.ca/rcap/rcapeng.html>.