SELF-DETERMINATION OF NATIVE PEOPLES:

A CANADIAN PERSPECTIVE ON EMERGING ISSUES IN NEW ZEALAND

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INTRODUCTION

I do not propose to dwell at length in my paper on the early relationships Canada and New Zealand's Aboriginal peoples had with the European newcomers to their lands. Suffice it to say that their initial experience with the European settlers was very similar. Both enjoyed an initial phase of co-operation when the newcomers depended upon the knowledge and skills of the local inhabitants for their survival. This was followed, however, by increasing competition for land for settlement purposes and for resources for economic development. This competition continues in both countries to this day.

In Canada the Royal Proclamation of 1763\(^1\) is viewed as the seminal document setting out the special relationship which was to exist from that date on between the Crown and First Nations peoples. Most important was the section of the Proclamation dealing with Aboriginal land. The right of the Aboriginal peoples to their traditional lands was recognized and a guarantee given that "they should not be molested or disturbed in the possession of such parts of our Dominions and Territories as, not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds".\(^2\) As a protection for the Aboriginal people's land rights, the Proclamation further provided for a new system of land alienation; Aboriginal land could only be purchased or acquired by the Crown and not by individuals or colonial authorities.\(^3\) This was to counter the practice of fraudulent transactions whereby Aboriginal people were being cheated out of their lands by unscrupulous European entrepreneurs. These land restrictions in the Royal Proclamation formed the basis of the treaty system which followed and the Proclamation and the treaties entered into between the various Aboriginal tribes and the Crown were perceived by the Aboriginal peoples as a kind of charter of their Aboriginal rights with the
Crown as their protector and guarantor. They viewed the treaties as setting out the context in which two peoples of different cultures would live together and share the same land.

In New Zealand, the Treaty of Waitangi (1840) constituted the blueprint for Maori-state relations. The Maori would have British citizenship and certain Aboriginal rights in exchange for British sovereignty over New Zealand. Together they would form one people. Unfortunately, as it turned out, that ideal was to be grounded in the primacy of Anglo-Saxon values and institutions. In neither New Zealand nor Canada were the two cultures to be placed on a footing of equality. Both relationships were premised on European racial and cultural superiority which led in both countries to policies of assimilation which, in effect, continued right up until the end of the Second World War.

When a Joint Committee of the Commons and Senate of Canada met in 1946 to review conditions in Indian, Inuit and Métis communities, a sorrowful picture was laid bare. In every category - education, health, employment, housing and income - Aboriginal peoples were second class citizens. The Aboriginal population had declined dramatically due to the low standard of living and the impact of tuberculosis. The advent of the Depression which brought further unemployment to native workers, a dramatic drop in farm income and declining fur prices made the situation worse. In addition, Aboriginal peoples' traditional means of support were being increasingly hampered by federal and provincial fish and game regulations prompted by concerns over animal rights and conservation.

Following the war, neither country could ignore an increasing international focus
on the rights of minorities and a growing awareness of the virtues of diversity. Could there be integration without assimilation? Both countries thought perhaps there could, and the goal of each became to retain the diversity of their two peoples within the framework of a single state. Has it worked? After 50 years, the Aboriginal peoples in both countries would probably say they see little difference between the assimilation and the integration approaches and that they are still a long way from the kind of bicultural partnership they aspire to. Progress, however, has undoubtedly been made in both countries.

**THE RELATIONSHIP IN CANADA**

In recent years, the Supreme Court of Canada has delivered some important decisions dealing with the relationship between Canada and its Aboriginal peoples.

In *Calder v. A.G.B.C.*, Chief Justice Davey, dealing with the Aboriginal rights of the Nishga Nation in 1970, adopted what came to be known as the contingent theory of Aboriginal rights i.e. the theory that the existence of Aboriginal rights depended upon their recognition by the Crown. Since the Crown at the time of European settlement did not recognize the Nishga peoples' rights to hunt and fish on their territories, the Nishga had no Aboriginal title to any land in British Columbia. The underlying assumption in Chief Justice Davey's reasons was that the Crown, and thereafter Canada, acquired sovereignty over the whole of British Columbia by settlement. Any Aboriginal rights, therefore, had to have their source in executive or legislative acts of the Crown; they were in that sense contingent and wholly incompatible with any concept of First Nations sovereignty.
Mr. Justice Hall, on appeal to the Supreme Court of Canada, disagreed with Chief Justice Davey. He held that Aboriginal rights could exist independently of the legal creation of Canada; they did not require executive or legislative act of the State but were inherent in Aboriginal people. Accordingly, the totality of the powers and responsibilities required to maintain Aboriginal identity and Aboriginal forms of government constituted First Nations sovereignty. They existed prior to the advent of the Europeans and continued to exist notwithstanding the creation of the Canadian state.

The debate between the contingent and the inherent approaches to Aboriginal rights in Calder was settled by the Supreme Court of Canada in two landmark decisions, Guerin v. The Queen and R. v. Sparrow in favour of the inherent rights approach. In Guerin, Dickson J. described the nature of the Musqueam Indian Band's interest in their land as "a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the Indian Act, or by any other executive orders or legislative provision". In so doing, he rejected the contingent theory. However, he made it clear that prior to the Constitution Act of 1982 when Aboriginal rights were entrenched in the Constitution, Aboriginal rights existed only at common law; accordingly, they were subject to regulation or extinguishment by the appropriate legislative authority. In other words, while Dickson J. espoused the inherent rights approach to the existence of Aboriginal rights, he did so in the context of Canadian sovereignty over the Aboriginal peoples.

The Guerin case is important for two other findings. The Supreme Court found that the federal government was in a fiduciary relationship with Indian people and was therefore responsible for the proper management of any Indian lands surrendered to it.
Although analogous to commercial fiduciaries, the Court characterized the fiduciary relationship between government and Aboriginal people as *su: generis* and as having the capacity to evolve as the overall relationship between Aboriginal peoples and Canadian society itself evolved.

The Court also found, after a review of previous cases on Aboriginal title, that Aboriginal title was not just a personal right but was an actual beneficial interest in the land itself\(^1\) although that interest too was *su: generis* because, when surrendered to the Crown, the Crown was not free to deal with it as it saw fit. On the contrary, its fiduciary duty was to deal with it for the benefit of the Indians who had surrendered it. The reason for this was that the Indian interest in the land was inalienable except upon surrender to the Crown. It was the combination of Aboriginal title and the restriction on alienation which gave rise to the Crown's fiduciary obligation.

The *Constitution Act of 1982*\(^1\) was already in place when *Sparrow* was decided. It was the first opportunity the Supreme Court had to consider the effect of s. 35\(^1\) of the *Constitution Act, 1982*. Aboriginal peoples' hopes were high that Canadian sovereignty over Aboriginal peoples would now be unequivocally repudiated in favour of an unrestricted Aboriginal right to self-government. The Court re-affirmed the finding in *Guerin* that Aboriginal rights are not contingent on the exercise of executive or legislative authority but inhere in the concept of Aboriginality itself but it also endorsed the concept of Canadian sovereignty over First Nations. It held, however, that since Aboriginal rights were now "recognized and affirmed" in s. 35 of the Constitution, government action that interfered with such rights had to conform to constitutional standards of justification. To do so, the government must:
(a) demonstrate a valid legislative objective; and

(b) once such objective has been implemented, give priority to Aboriginal interests.

Before these governmental obligations arise, however, the Aboriginal complainant must establish the existence of the Aboriginal right in issue -- in Sparrow the Musqueam right to fish. The Court held that this required the complainant to show that fishing was integral to Musqueam self-identity and self-preservation. This was the applicable test. Section 35, in the Court's view, recognizes and affirms that which is essential to or inheres in the unique way of life of the Musqueam people. The right in issue must have been and continue to be "an integral part" of Musqueam life.¹³

This test was applied in Van der Peet v. The Queen¹⁴ in which the Supreme Court held that the right to fish for the purpose of exchange into money or other goods was not an integral part of Stoljo culture. Chief Justice Lamer, writing for the majority, pointed out that this appeal raised the issue left unresolved in Sparrow, namely how the Aboriginal rights recognized and affirmed by s. 35 of the Constitution Act were to be defined. It was not necessary to address that question in Sparrow because the Aboriginal right to fish for food was not contested. In this case, however, the issue was whether the right to fish for sale was protected by s. 35.

The Chief Justice approached the question by applying the purposive approach to interpretation previously enunciated by the Court in R. v. Big M Drug Mart Ltd.,¹⁵ namely that a constitutional provision must be understood "in light of the interests it was meant to protect".¹⁶ He then made reference to the fiduciary nature of the relationship between Aboriginal people and the Crown and found that it mandated a generous and
liberal interpretation of the Aboriginal rights protected by s. 35. Where there is doubt or ambiguity as to the scope of the protected right, that doubt must be resolved in favour of the Aboriginal people. The Chief Justice then offered this explanation of the legal doctrine of Aboriginal rights:

In my views the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.¹⁷

In addition to relying on a number of Canadian and U.S. authorities for that analysis, Chief Justice Lamer relied also on the landmark decision of the High Court of Australia in Mabo v. Queensland.¹⁸ In that case, Brennan J., writing for the majority, held that while the annexation of the Murray Islands to Queensland in 1879 was sufficient to vest the underlying title to the Islands in the Crown, it was not sufficient to eliminate the Aboriginal title. He pointed out that Aboriginal title had its origin in and is given its content by the traditional laws and customs observed by the indigenous inhabitants of a territory and that it is only if one subscribes to the fiction that there was no law and no sovereign lawmaker in the territory prior to the arrival of the colonists, that the territory was in effect an "uninhabited desert", that there is a problem in acknowledging and identifying Aboriginal title.
Chief Justice Lamer, however, went on to find on the evidence adduced that the exchange of fish for money or other goods was not a defining feature of Stoljo culture. Although it did take place, it was not, he said, a practice, tradition or custom which "made Stoljo society what it was". It was not, therefore, a right recognized and affirmed by s. 35.

It would appear that in excluding from s. 35 the right to fish for purposes of exchange for money or other goods, the Chief Justice introduced into s. 35 the principle of interpretation that the only Aboriginal rights protected by the section are those which are reconcilable with Crown sovereignty. He appears to believe that this limitation on protected rights is required by the purposive approach to interpretation. He said:

More specifically, what section 35 does is provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.19

This would appear to be a dubious proposition and quite incompatible with the principles favouring a broad and liberal interpretation to which he had earlier subscribed. One of the aims of the constitution may be the reconciliation of differences between
Aboriginal peoples and the Crown but it is by no means clear that this is to be achieved by imposing limitations on Aboriginal rights. Indeed, the whole tenor of Sparrow would appear to be otherwise - the requirement of justification by the Crown of any restrictions on Aboriginal rights and the need for the Crown as fiduciary to make Aboriginal peoples its "first consideration".

It is interesting that McLachlin J. dissented in Van der Peet on the basis that reconciliation and social harmony should not be adopted as a ground for restricting Aboriginal rights. She also joined with Justice L’Heureux Dubé in rejecting a "frozen rights" approach to Aboriginal fishing rights, stressing the historic reliance of Aboriginal peoples on the resource for sustenance which in modern times, she said, should be interpreted as including trade in the resource to the extent needed to provide them with goods and amenities over and above what is required for food and ceremonial purposes.

The test of whether an activity was and continued to be an integral part of the life and culture of the Aboriginal people concerned was also applied in Pamajewon and Jones v. The Queen and Arnold Gardner et al v. The Queen, a case dealing with the regulation of gambling on Indian reservations. The charges against the plaintiff arose out of the high stakes bingo and other gambling activities which took place on two reservations pursuant to by-laws passed by the respective Band Councils. The First Nations did not have provincial licences authorizing their gambling activities, having refused such licences on the basis of their inherent right to self-government. The plaintiffs were convicted and their convictions were upheld by the Ontario Court of Appeal.

Chief Justice Lamer stated that the issue before the Court was whether the
gambling activities in which the appellants took part and their regulation by the Band Councils fell within the scope of the Aboriginal rights recognized and affirmed by s. 35. This in turn depended on whether they met the test set out in Van der Peet. That test was to be applied, the Chief Justice said, even if s. 35 included a right to self-government because "claims to self-government are no different from other claims to the enjoyment of Aboriginal rights and must, as such, be measured against the same standard". The first task was, therefore, "to identify the exact nature of the activity claimed to be a right" and the second "to determine whether, on the evidence presented to the trial judge, and on the facts as found by the trial judge, that activity could be said to be 'a defining feature of the culture in question' prior to contact with the Europeans".

The decision is disappointing in that it failed to address the issue of the right to self-government either as an incident of Aboriginal title or as a right specifically protected by s. 35 of the Constitution. Instead, the Court expressed the view that even if s. 35 includes the right to self-government i.e. even if the gambling activities of the appellants were perfectly legal under the band's by-laws, they afforded them no defence. Why? Because it was "the exact nature of the activity claimed to be a right" that the Van der Peet test had to be applied to and that was, in the Court's view, the gambling activity itself. The Court refused to consider the claim in terms of the band's right to regulate gambling on the reserve as an aspect of self-government on the ground that "it would be to cast the Court's inquiry at a level of excessive generality". Accordingly, any asserted right to self-government "must be looked at in light of the specific circumstances of each case". The factors laid out in Van der Peet, the Court said, "allow the Court to consider the appellants' claim at the appropriate level of specificity; the characterization put forward by the appellants would not allow the Court to do so".
claim of self-government is sustained, it would appear that any right to self-government under s. 35 is going to have to be built up piecemeal over a prodigiously long period of time.

I believe that the Court should have asked itself in Pamajewon whether the right to Aboriginal self-government met the test laid down in Sparrow as elaborated in Van der Peet. If it found that it did, the Court would then have had to consider whether or not it provided a good defence to the charges which was the whole issue in the case. Does the right to self-government, assuming it is included in s. 35, only exist with respect to underlying activities already protected by the section or is it a self-standing right which itself meets the applicable test? If so, it is presumably not restricted to these activities. This, in my view, is the issue the Court should have addressed.

There is now a substantial body of jurisprudence in Canada and elsewhere testifying to the fact that when the Europeans came the indigenous peoples were already occupying the land, living in organized societies with their own laws, customs and traditions. The country was not an "uninhabited desert" as Brennan J. put it. The indigenous peoples were self-governing; they had to be; there was no-one else there. Self-government was unquestionably a central and significant part of indigenous peoples' culture. The key issue was whether their right to self-government was extinguished by the events which followed. That inquiry is mandated by the fact that only "existing" Aboriginal rights are protected by s. 35.

The Court addressed the concept of extinguishment at length in Sparrow, distinguishing between regulation and extinguishment and holding that there could be no
extinguishment in the absence of a "a clear and plain intention to extinguish."26 The Court in Pamajewon, because it did not view the right of self-government as an important issue in the case, did not apply the "integral to the culture" test to the continued existence of the right. It seems to have accepted without analysis that it was extinguished by Canadian sovereignty. It might have been interesting if the Court had applied the new principle of interpretation enunciated in Van der Peet requiring reconciliation and social harmony to the issue of self-government in Pamajewon.

In two subsequent decisions, R. v. Adams27 and R. v. Cote,28 the Supreme Court held that the Aboriginal rights protected by s. 35 are not confined to rights inexorably linked to Aboriginal title. They can exist on land to which Aboriginal title cannot be established because some Aboriginal peoples were nomadic and they survived through reliance on practices, customs and traditions that were unrelated to Aboriginal title. Aboriginal title, the Court said, was just one manifestation of Aboriginal rights. The Court applied the "clear and plain intention" principle of interpretation in determining that the plaintiffs' fishing rights were not extinguished by the provinces' respective fishing regulations.

It is interesting that in Cote the Court held that it was not necessary for the survival of an Aboriginal right following colonization that it had "received the legal recognition and approval of European colonizers". A failure to recognize the existence of the right did not constitute a "clear and plain intention" to extinguish it.

It is true that in Sparrow the Court affirmed the overarching sovereignty of the British Crown, and therefore of Canada, over the indigenous population apparently on
the basis of discovery or settlement. In so doing it treated the land as terra nullius and excluded any concept of pre-existing Aboriginal sovereignty from s. 35. It would appear, therefore, that while the inherent as opposed to the contingent rights approach applies to other Aboriginal rights, it does not apply to Aboriginal self-government despite the fact that the right to self-government unquestionably meets the test of forming an integral part of Aboriginal life prior to the advent of the Europeans. The Court appears to have concluded that the assertion of Canadian sovereignty manifested a "clear and plain intention" to extinguish any Aboriginal right to self-government that existed prior to 1982; this particular Aboriginal right, unlike the others, was contingent only and could be and had been extinguished by executive or legislative act. The Court did not consider whether if the right to fish is an integral part of Musqueam life, the ability to determine how it is to be carried out on Musqueam lands as between the Musqueam themselves and the Musqueam and others must likewise be integral to Musqueam life and that this could be extrapolated to other recognized rights. If Aboriginal people have an inherent right to all integral components of Aboriginal identity and self-preservation, then must they not also have an inherent right to self-government or Aboriginal sovereignty over those integral components?

Canada's Aboriginal peoples accordingly have mixed views on Sparrow. They are happy that it endorsed the inherent theory of Aboriginal rights generally, but are sharply critical of its unquestioned acceptance of Canadian sovereignty over Aboriginal peoples for purposes of s. 35 on the basis of what appears to be a contingent approach to the specific right of Aboriginal self-government. They hoped that this aspect of Sparrow would be revisited in a future case and that the settlement theory of sovereignty would at least be confined to unoccupied land and not be applied to land already occupied at the
time of first contact by organized indigenous populations.

Do the judgments in Guerin and Sparrow provide any glimmer of hope that this might occur? Some scholars think that they do. They point to the designation in Guerin of Aboriginal title to land as more than a personal right but as an actual beneficial interest in the land itself, albeit an interest that is sui generis or unique in nature i.e. an interest that does not fit into the traditional range of interests contemplated by English land law but that nevertheless arguably constitutes an Aboriginal right within the meaning of s.35 of the Constitution.

They point out also that in Sparrow the Supreme Court elaborated on the fiduciary responsibility the Crown owes to Aboriginal peoples when it stated that Guerin "grounded a general guiding principle" for the interpretation of s. 35, namely that:

... the government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. The relationship between the government and Aboriginals is trust-like rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship.²⁹

These scholars believe that the combination of these two findings by the Supreme Court of Canada in Guerin and Sparrow prevents the Crown from claiming sovereignty over land in relation to which Aboriginal people can establish Aboriginal title. For the Crown to assert such a claim would, they say, violate its fiduciary duty to Aboriginal
peoples and place itself in an adversarial position with respect to them.

I have serious doubts that Pamajewon can be treated as a precedent for the proposition that the assertion of Canadian sovereignty extinguished the Aboriginal peoples' traditional right to self-government in light of the way in which the Supreme Court approached the case. The issue is so important that it would seem to merit more in-depth treatment than it received in either Sparrow or Pamajewon.

Aboriginal Self-Government

The call for Aboriginal self-government is unquestionably frightening for many non-Aboriginal Canadians. Although they are well accustomed to the concept of two orders of government, a federal order and a provincial order, they find the concept of three orders, federal, provincial and Aboriginal, very difficult to envisage. They can envisage Aboriginal government as a form of delegated government - powers conferred on Aboriginal people either by the federal government or the provincial governments or both. After all, we already have municipal government which is a form of government delegated to municipalities by the provinces. This might, in their view, provide an acceptable model for a form of Aboriginal self-government. It is, of course, wholly incompatible with the Aboriginal peoples' concept of their right to self-government as "inherent". It is, therefore, totally unacceptable to the Aboriginal leadership and to most Aboriginal people.

The Royal Commission on Aboriginal Peoples, in its Report released to the public by the federal government in November of last year, came out strongly in favour of the Aboriginal peoples' inherent right to self-government within Canada as a matter of
Canadian constitutional law. The right, in the view of the Commissioners, has its source in the original status of Canada's Aboriginal peoples as independent and sovereign nations in the territories they occupied pre-contact. The Commission points out that this status was recognized and given effect in a variety of formal legal instruments such as the Royal Proclamation of 1763 and the numerous treaties and alliances entered into between the Aboriginal nations and the incoming European settlers. These instruments, the Commission concluded, are an integral part of our Constitution on a par with the arrangements made for the entry of the provinces into the Canadian federation. They were all part of the process of Canadian nation-building.

The Commission also concluded that Aboriginal peoples in Canada had the right to choose self-government within Canada pursuant to their right of self-determination in international law. Canada's Aboriginal peoples have, despite their unjust treatment at the hands of colonial powers in the past, consistently affirmed their desire to continue as self-governing nations within the framework of the Canadian state. Those living in the Province of Quebec have vigorously dissociated themselves from the movement in that Province towards separation from Canada and have insisted that they and their lands cannot be taken out of Canada without their consent. This clearly raises very complex issues of both Canadian constitutional law and public international law which it is beyond the purview of this paper to explore. Suffice it to say that it raises particularly fascinating questions as to the fiduciary obligation of the federal government towards the Aboriginal peoples of Quebec in the event of a real crisis over Quebec separation.

THE RELATIONSHIP IN NEW ZEALAND
It would appear that viewed from a Canadian perspective, the relationship between the Maori and the New Zealand state is developing along parallel lines to that between Canada and its Aboriginal peoples but that the concept of an Aboriginal/non-Aboriginal partnership within a single state has not gained the degree of public acceptance in Canada that it seems to have achieved in New Zealand. Both countries vow that they are engaged in a process of decolonization and power-sharing but non-Aboriginal Canadians appear to have much greater reservations about accepting Aboriginal peoples as self-governing than New Zealanders do. There are probably many reasons for this but I have regretfully concluded after almost five years of intensive study as a member of Canada's Royal Commission on Aboriginal Peoples that there are two main ones and that neither is particularly commendable; one is the widespread ignorance of Canadians about Canada's Aboriginal peoples and the other is the level of racism in Canada which appears to deprive non-Aboriginal Canadians of the motivation to remedy that state of ignorance. If our Commission established nothing else, it established the need for a massive program of public education in Canada about its Aboriginal peoples.

Major steps towards Maori politicization took place in the 1970s and 80s. The emergence of a Western-educated Maori intelligentsia gave rise to a resurgence of Maori pride in their identity and the evolution of the Maori as a culturally unique people capable of governing themselves and achieving economic and institutional independence if equipped with adequate land and resources to do so. Traditional kinship structures and community-based decision-making were perceived as integral elements of self-government with corresponding responsibility and accountability lodged in tribal authorities. Successive National and Labour governments saw the advantages of such a system and
encouraged Maori participation in the political process.

However, one of the major stumbling blocks to the realization of a bicultural partnership was the ambiguous language in the Treaty of Waitangi. The meaning of the provisions continues to be disputed. Was Maori sovereignty extinguished? Did the Crown acquire not only absolute ownership of the land but the right to govern New Zealand in accordance with Western principles? The Maori say no. They point to the fact that the Queen agreed in the Treaty to protect the unqualified exercise by Maori chiefs of their authority over land, villages and "treasures". Traditional Maori authority, in their view, was affirmed in the Treaty and provided the foundation for a true bicultural partnership. The Maori are "nations within a nation" with the right to self-determination over both their physical and cultural resources. The Treaty, they believe, created two nations with two distinct cultures within the framework of a single state.

In 1975, the Waitangi Tribunal was set up pursuant to the provisions of the Treaty of Waitangi Act. Its function was to promulgate principles for the interpretation of the Treaty with a view to identifying government activity incompatible with these principles. Many of the principles enunciated by the Tribunal were subsequently endorsed by the New Zealand courts and incorporated into legislation, thus giving rise to the so-called "Maori constitutional revolution".

New Zealanders appear to have mixed views about the value of the Waitangi Tribunal. Some see it as giving special rights to the Maori not shared by other New Zealanders i.e. as an instrument of discrimination and inequality. Some see the appellate court's role under the Act as a violation of parliamentary supremacy, as the judiciary
usurping the role of the legislature. Canadians are very familiar with these arguments; they are the ones levied at our Charter of Rights and Freedoms. Other New Zealanders argue that the principles of the Treaty cannot be incorporated into the law of New Zealand because the Maori relinquished their sovereignty and subjected themselves to New Zealand law as it existed at the time the Treaty was entered into.

Many Maori are also unhappy with the 1975 Act and say that they are no better off today than they were in 1840. They deny that any "constitutional revolution" has taken place. The Tribunal and the courts, they say, are simply arms of the state. They point to the fact that the Labour government has rewritten the principles of the Treaty to re-affirm the sovereignty of the Crown and that the New Zealand Court of Appeal has asserted that it and not the Tribunal has jurisdiction to decide what the principles of interpretation of the Treaty should be. Indeed, some Maori go further and say that the principles enunciated by the Tribunal are being used by the Crown in the guise of honouring the Treaty and as an additional means of legitimising its exercise of power over them.

There are contrary views, notably that of Paul McHugh, a New Zealand scholar who has played a significant role in persuading the New Zealand courts to view Aboriginal title as part of New Zealand's common law. This is an important development since it means that Maori rights can now be addressed in the context of orthodox legal doctrine. It is, of course, too early to tell what difference in direction, if any, will be taken by Canadian and New Zealand jurisprudence in light of the Supreme Court of Canada's designation of Aboriginal title as sui generis. McHugh believes that the Waitangi Tribunal has been very effective, that it has taken a practical and reasonable
approach to the issues before it, focusing on the needs of the Maori while avoiding an extremist position.

A Model For Canada?

The members of Canada's Royal Commission on Aboriginal Peoples were naturally extremely interested in the Waitangi Tribunal as a possible model for the investigation of Aboriginal land and other claims in Canada. Pursuing such claims through the courts proved to be a slow and expensive process and in many cases was damaging to the relationship between the parties. Moreover, although satisfying the criterion of independence, judges lacked the necessary expertise to deal with Aboriginal issues. The idea of an independent administrative tribunal seemed to have many advantages. Its composition and powers could be tailored to the task; its members could be representative of those they served; they did not have to use formal adversarial procedures; and they did not have to be bound by technical rules of evidence.

The Commission recommended that both the federal and provincial legislatures confer on an Aboriginal Lands and Treaties Tribunal established by Parliament binding decision-making powers over specific claims made by Indian, Inuit and Métis peoples. Specific claims would be construed broadly and would include breach of any treaty obligations including breach of fiduciary duty in relation to such obligations. It would be an important function of the Tribunal to ensure that negotiations in relation to specific claims were conducted in good faith and without undue delay. The Tribunal, in other words, would police the negotiating process but it would also have power to make binding orders against those in breach.
In relation to comprehensive claims, the jurisdiction of the Tribunal would be primarily in relation to the negotiating process. It would not have jurisdiction over substantive issues although the parties would be able by agreement to refer to the Tribunal for arbitration any substantive issues on which they could not agree. If this happened, the Tribunal would have power to make a final adjudication of those issues and make orders that would be legally binding. The Tribunal, in other words, in the case of comprehensive claims, would have authority to monitor the negotiating process and also to act as a consensual arbitrator if called upon by the parties to do so.

An important aspect of the Tribunal's monitoring jurisdiction over the negotiation of land and resource claims would be its authority, once it was satisfied that the claimants had an arguable claim, to provide interim relief in order to ensure that the subject matter of the dispute was not lost or irretrievably diminished before the negotiations were completed and the dispute settled. This jurisdiction would be a powerful tool to ensure that governments do not procrastinate in the conduct of negotiations and delay the settlement of claims.

The Commission has recommended that decisions of the Tribunal be final and binding and not subject to review by the courts except on constitutional grounds or for jurisdictional error or breach of the duty of fairness. In this the Tribunal would have a comparable status to Canada's Labour Relations Board, a specialized tribunal characterized by its high level of expertise in labour matters. It is the Commission's view that by making the decisions of the Tribunal not open to review except on these limited
grounds, many of the problems encountered by the Waitangi Tribunal will be avoided. Likewise, many of the obvious flaws in Canada's existing land claims process will be eliminated, particularly the controlling role of government over the entire negotiating process - the initial vetting of claims, the pace at which those selected are processed, the lack of government funding of the Aboriginal parties, the alleged lack of good faith negotiations by the Crown and the disappearance of the substratum of the claim pending protracted delays.

As already mentioned, the proposed tribunal would be established by the federal legislature which, under Canada's existing constitution, has exclusive legislative jurisdiction over Canada's Aboriginal peoples and their lands.\textsuperscript{34} It will, however, be necessary for the provincial legislatures, which have a direct interest in the settlement of many of the issues outstanding between Aboriginal people and the Crown, to delegate to the tribunal the powers it needs to function effectively. The provinces are crucially important participants in the process of renewing the relationship between Canada and its Aboriginal peoples. They hold title to all public land within their boundaries (subject to Aboriginal interests) and are responsible under the constitution for the provision of services to all residents of the province in certain key areas such as health and education.\textsuperscript{35} Indeed, one of the problems which has dogged Aboriginal people for decades has been the ongoing dispute between the federal and provincial governments as to which of them is responsible for the provision of these services to Aboriginal residents of the province - the federal government which has exclusive legislative jurisdiction in relation to Aboriginal peoples and their lands or the provincial governments which have exclusive legislative jurisdiction in relation to health and education. The Aboriginal people have regrettably fallen between the jurisdictional cracks.
Extinguishment of Aboriginal Rights

We have not had to deal in Canada with the impact of corporatization or privatization on Aboriginal rights but the Royal Commission has had to deal with the concept of extinguishment of Aboriginal rights, particularly in relation to land and resource claims, and has come out strongly against it. Aboriginal people in Canada view land in profoundly spiritual terms. Land is the giver and sustainer of all life and the Creator has charged the Aboriginal people with responsibility for its stewardship. This is why the concept of their agreeing to the extinguishment of their rights and responsibilities in relation to lands and resources is anathema to them. Hence their hostility to any interpretation of treaty documents or claims settlements that involves the abdication by them of their sacred obligations to Mother Earth.

Canadian law treats the Crown as possessing underlying title to all Aboriginal territory. Accordingly, the extinguishment of the Aboriginal interest, in the Crown's view, gives it absolute title and the power to do with the land whatever it pleases. The goal of current federal extinguishment policy in relation to comprehensive land claims is therefore to introduce clarity and certainty into the title which can then be passed on free and clear to third parties. In exchange for the relinquishment or cession of its Aboriginal interest, the Aboriginal claimant receives certain contractual or treaty-based rights set out in the comprehensive land claims settlement. The 1975 James Bay and Northern Quebec Agreement exemplifies this policy. The Aboriginal parties to it agree to "cede, release, surrender and convey all their native claims, rights, titles and interests, whatever they may be, in and to the land in the Territory and in Quebec".
There was considerable criticism of the federal government's insistence on the blanket extinguishment of Aboriginal title particularly after the recognition and affirmation of existing Aboriginal and treaty rights in s. 35 of the constitution. As a consequence, the federal government established a task force to review its policy. The task force proposed a new policy which stated that the extinguishment of all Aboriginal rights and title was not an appropriate government objective. The federal government was, however, adamant that any new policy must introduce clarity and certainty into the title. It was essential, it stated, that settlements resolve once and for all the debates and legal ambiguities associated with the common law concept of Aboriginal title because uncertainty with respect to the legal status of lands and resources was a major obstacle to economic development for the benefit of all Canadians. The government endorsed the concept of partial extinguishment advanced by the task force as a middle ground. Aboriginal claimants would relinquish their rights in some of the lands in exchange for benefits spelled out in the settlement agreement. While this is obviously not a satisfactory outcome in the eyes of Aboriginal claimants, it at least constituted an acknowledgment of the existence of Aboriginal title and seemed to provide a basis for reconciliation and co-existence between Aboriginal people and the Crown in the future. It has not, however, proved to be so thus far.

In the agreement which created the new jurisdiction of Nunavut in the Northwest Territories, the Inuit agree to "cede, release and surrender to Her Majesty in Right of Canada all of their Aboriginal claims, right, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada". Blanket extinguishment is still a central component of federal
government claims policy; the government will not settle without it and this is a continuing source of bitterness and frustration to Aboriginal people. They do take some comfort, however, from the Supreme Court of Canada's findings in Guerin and Sparrow that the Aboriginal interest in land is unlike any other interest known to English land law; that it is sui generis and the Crown continues to have trust-like responsibilities to the Aboriginal people in their dealings with it. Extinguishment may not achieve the objective of clarity and certainty the government is seeking.

The Commission has recommended that instead of extinguishing Aboriginal rights in settlement documents, the Crown should recognize and affirm them and pursue a policy of Aboriginal self-sufficiency and co-existence with non-Aboriginal society particularly now that Aboriginal and treaty rights are protected in the Canadian constitution. The current Canadian policy of extinguishment does not sit well with the Crown's fiduciary obligations to Aboriginal people. Indeed, it exploits the imbalance in the bargaining power of the Crown and the concomitant vulnerability of the Aboriginal people which the trust-like relationship between them is designed to redress.

**The Maori Fisheries Settlement**

A settlement such as the Maori Fisheries Settlement entered into in New Zealand would, I believe, be subject to severe scrutiny in Canadian courts today for the purported blanket extinguishment or unenforceability of all Maori fishing rights including their traditional fishing rights. It was indeed disappointing that the Privy Council did not address the extremely important substantive issues dealt with by the New Zealand Court of Appeal on the ground that these issues were not properly before it.
The Portability of Aboriginal and Treaty Rights

Canada's Aboriginal peoples face many of the issues raised in the Maori Fisheries' case, in particular the status of the large numbers of Aboriginal people who have migrated to the cities in recent years. In Canada today they outnumber the totality of those living on Indian reserves, in Métis settlements and Inuit communities. They are obviously a permanent presence in our urban centres yet little attention has been paid to them. One of their key concerns is raised by the allocation problems in the Maori Fisheries' case, namely the portability of Aboriginal and treaty rights. Does portability depend on whether the rights in issue are individual or collective? For example, the rights to education and health which are viewed as individual may be portable and travel with you to the city but what about fishing and hunting rights which have been held to be collective? What about the right to self-government which belongs to "peoples" and is clearly collective? Do you lose these when you leave your traditional tribe or territory? Or does membership in your tribe continue despite your migration to the city? There are many reasons for moving to the city - for advanced education, for health care, for employment opportunities and most Aboriginal people living in cities strongly resist the idea that they have, by relocating, abandoned their traditional land and people. Indeed, they stress that their connection to their land and people has never been more important. It is fundamental to their culture and their identity and they have to work very hard to preserve it in the alien and often inhospitable setting of the city.

In the Maori Fisheries case, it seems to me that it would have been very relevant to inquire whether or not the urban Maori had fishing rights to relinquish at the time of
the settlement and this in turn might depend on whether, despite their relocation to the city, they continued to be members of their tribe and, as such, participated in the relinquishment of the tribe's collective right.

**Criteria For Identification**

It has been a long-standing complaint of Canada's Aboriginal people that no-one but Aboriginal people themselves should be able to determine who is an Aboriginal person. One of the most offensive features of Canada's Indian Act is, in their view, that it purports to define who is an Indian. Yet herein lies a dilemma; for while only Indians can properly determine who is an Indian for some purposes e.g. for membership of a particular tribe or community, can Indians unilaterally decide who is an Indian for purposes of the receipt of government benefits? In deciding who is an Indian some communities currently adopt the principle of self-identification which is understandably unacceptable to governments for entitlement purposes. Others have adopted specific criteria for membership, some broad and some narrow.

The Royal Commission supports the view that Aboriginal peoples should determine who their own people are and it is basic to self-government that they identify the applicable criteria preferably in constitutions established through the traditional process of consensual decision-making. It will, however, be a matter for negotiation between Aboriginal groups and governments whether these criteria are appropriate for the purpose of government entitlements.

It seems to me that issues such as criteria for tribal membership and portability of
Aboriginal and treaty rights are very germane to the allocation of benefits under the Maori Fisheries Settlement in light of the New Zealand Court of Appeal's finding that the settlement was intended to be a pan-Maori settlement of fishing claims. Presumably then the intention was that all those with rights to extinguish did so in exchange for participation in the benefits and that presumably included Maori regardless of where they resided unless they had lost their rights by relocating. Some doubt may, however, be cast on the soundness of this presumption by the agreement of the parties and the finding of the Court that only those who signed the deed of settlement were bound by it. It would seem to be the responsibility of the Treaty of Waitangi Fisheries Commission to address these issues, after widespread consultation with all Maori or their representatives, in a manner consonant with the principles of the Treaty.

The Principles of the Treaty and the Crown as Fiduciary

In the leading New Zealand case on the principles of the Treaty of Waitangi, New Zealand Maori Council v. Attorney-General, the Court of Appeal emphasised that the Treaty must be broadly interpreted and "be capable of adaptation to new and changing circumstances as they arise". Richardson J. stated, however, that there was one overarching principle and that was that the Treaty "must be viewed as a solemn compact......through which the colonization of New Zealand was to become possible". He points out that in order for this to happen each party must act reasonably and in good faith towards the other.

The difficulty which Canada's Aboriginal people would have in applying this analysis in a Canadian context is that they never saw themselves as partners with the
Crown in the colonization of Canada. Quite the contrary; they were treated as wards of the Crown, people of inferior intelligence and culture who were incapable of deciding what was in their own best interests. Colonization, in their view, was something which was forced upon them through misguided government policies of assimilation, enforced relocation and misappropriation of their lands and resources. What they aspire to now is a true partnership with other Canadians, something which they have never had. But the partnership they seek is a partnership for decolonization. It is important, therefore, to ask whether the remedial justice inherent in a policy of decolonization can be achieved for Aboriginal people in Canada today simply by imposing the mutual partnership obligations of reasonableness and good faith on the parties. Is "fiduciary duty" just another name for "good faith"? Or does a partnership for decolonization change the balance of what is reasonable and in good faith dramatically in favour of the Aboriginal partner? I think it does. I think this is the purpose of the justification test in Sparrow. As the Court said:

.... the words recognition and affirmation incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s.91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s.35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.
The Court went on to address the concept of justification and what it involved and specifically rejected one branch of the test adopted by the Court of Appeal below, namely that legislation would be justified if it was “necessary for the proper management and conservation of the resource or in the public interest”. The Court said:

We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights. 48

Emphasizing that the honour of the Crown is at stake in dealings with Aboriginal peoples, the Court said this:

The special trust relationship and the responsibility of the government vis-à-vis aboriginal must be the first consideration in determining whether the legislation or action in question can be justified. 49

The test of justification as elaborated in Sparrow is, indeed, a stringent one. Nevertheless there has been a tendency in some of the Canadian cases decided since Sparrow to weigh the interests of the minority against the interests of the majority, the so-called "larger" public interest, and find the latter to prevail. This may be a legitimate approach in determining the validity of legislative restrictions on Charter rights generally under s. 1 of the Charter but is it a legitimate approach to restrictions on Aboriginal and treaty rights protected by s.35? It would seem not in light of the special relationship between Aboriginal peoples and the Crown described in Sparrow.
A NEW RELATIONSHIP FOR CANADA?

I believe that the observations made by the Supreme Court in *Pamajewon* as to the requirement of specificity in any self-government claim submitted by Aboriginal peoples reinforces the view expressed by many Aboriginal leaders in Canada today that, despite all its difficulties, political negotiation in a preferable route to court adjudication for the identification and enforcement of their rights. Indeed, the federal and provincial governments were fully prepared in the failed Charlottetown Accord to recognize the inherent right of Aboriginal peoples to self-government and none seem to have retracted from that position. The problem in how it is to be implemented and much of the report of the Royal Commission on Aboriginal Peoples is devoted to that question.

The terms of reference of the Commission were extremely broad and covered almost every aspect of Aboriginal life. The Commission spent the first two years conducting public hearings all across Canada in Indian, Métis and Inuit communities. Those who made submissions at our hearings made it clear to us that in their view this was their last chance to achieve their proper place in Canadian society. This required a restructuring of the relationship between Aboriginal and non-Aboriginal Canadians based on four fundamental principles - mutual recognition, mutual respect, mutual responsibility and sharing.

They also vigorously rejected a piecemeal approach to change; the approach, they told us, should be a holistic one since everything our mandate called upon us to address was interconnected. You could not talk about health without talking about housing and
sewer systems. You could not talk about education without talking about human resource development, empowerment and self-government.

We agreed with their general approach and advanced in our Report a comprehensive blue print for change supported by a massive research program and a wealth of oral and written briefs from Aboriginal and non-Aboriginal participants - business people, labour unions, churches, constitutional experts, health professionals, parents and teachers, tribal councils, elders, women and young people. It took five years in the making and cost over 50 million dollars.

Government reaction so far? Silence. Canadians are on the eve of a federal election and in the middle of a period of drastic fiscal restraint. The Commission may be the author of its own misfortune. Canadian governments tend not to think big; they prefer to nibble around the edges. Holism is not their thing. In the meantime, the Aboriginal people wait and wonder if their worst fears are going to be realized. Is this Report going to disappear into a black hole with all the others that have gone before? Is Canada incapable of putting its own domestic house in order and, if so, how can it with credibility continue to preach human rights abroad?

CONCLUSION

Canada's and New Zealand's indigenous peoples share a common goal - a true partnership relationship with their fellow citizens and a mutual responsibility with them for the land they share. Neither has been successful in achieving its goal. Both countries have, I believe, learned in the course of their long and sometimes turbulent associations
that it is possible to maintain a proper balance between unity and diversity only by continuous care and attention. A relationship between peoples is not a static thing. The Six Nations of the Iroquois Confederacy have traditionally described their relations with other nations as a silver covenant chain. "Silver is sturdy and does not break easily", they say. "It does not rust or deteriorate with time. However, it does become tarnished. So when we come together, we must polish the chain, time and again, to restore our friendship to its original brightness."

Both Canada and New Zealand have a lot of work to do to put their domestic houses in order if they are to play a leadership role in the worldwide movement to restore respect and recognition for indigenous peoples, their distinctive cultures and historic traditions. There is a fair measure of tarnish on both their covenant chains.
ENDNOTES


2. Proclamation, pp. 4-5.


4. The Treaty of Waitangi, 6 February, 1840.


10. But see Delgamuukw v. British Columbia (1991) 3 W.W.R. 97 (B.C.S.C.) in which McEachern C.J. concluded that the right was only a personal one (p. 383). This case raised many issues as to the status of Aboriginal rights in British Columbia and is currently on its way to the Supreme Court of Canada.


12. S. 35 of the Constitution Act, 1982 reads:

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

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

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

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection(1) are guaranteed equally to make and female persons.

16. Big M, p. 344.
23. Pamajewon, p. 834.
29. Sparrow, p. 1108.
30. Treaty of Waitangi Act, 6 February, 1840.
33. See, Roberts v. Canada (1989) 1 S.C.R. 322 in which the Supreme Court of Canada held that Aboriginal title is part of the common law of Canada.

35. The Constitution Act, 1867 s. 92(7, 13-16) health; s. 93 education.


37. Task Force to Review Comprehensive Claims Policy, Chaired by Murray Coolican.


39. See, endnote 36 above.


42. Sparrow, p. 1112.

43. The important issue as to who is entitled to share in the benefits of the settlement would be held in Canadian courts to require consultation with all claimants or their representatives. They probably would not follow Cooke P. (p. 665) or Richardson J. (p. 683) in New Zealand Maori Council v. A.G. (1987) 1 N.Z.L.R. 641 but rather the comments of the N.Z.C.A. on the requirement of consultation as an aspect of natural justice in Te Runanga O Muriwhenua (1990) 2 N.Z.L.R. 641 at p. 655.


47. Sparrow, p. 1109.
A series of constitutional conferences held in 1992 in which the national Aboriginal leadership fully participated resulted in the Charlottetown Accord the most important feature of which was the recognition by all governments in Canada of the Aboriginal peoples' inherent right of self-government and their agreement to include it in the Constitution. The Accord was put before the people of Canada in a national referendum on October 26, 1992 and defeated.

The Royal Commission was born in a time of ferment in Canada. First Nations were blocking roads and rail lines in Ontario and British Columbia. Innu families were encamped in protest against military installations in Labrador. Armed conflict between Aboriginal and non-Aboriginal forces at Oka the year before had tarnished Canada's reputation abroad and in the minds of many Canadians. The role of the Commission was to propose a new kind of relationship between Aboriginal and non-Aboriginal Canadians built on mutual understanding and respect.