ANALYSEN UND BERICHTE

The Aboriginal Peoples of Canada and their Rights under Canadian Constitutional Law

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I. Introduction

The coming into force of the new Canadian Constitution on April 17, 1982[1] not only marked a turning-point in Canadian constitutional history[2], but also a significant change with regard to the legal status of the aboriginal peoples of Canada. For the first time, their rights were constitutionally recognized and protected by two specific provisions.[3] The inclusion of provisions specifically concerning the aboriginal peoples also marked the culmination of a political process which started in the 1970's and still continues today, and which demonstrates the growing awareness and political articulacy of the aboriginal peoples of Canada.

The interpretation and application of the constitutional provisions protecting the rights of the aboriginal peoples of Canada however has proved to be highly controversial. Attempts to add more specific provisions defining the aboriginal rights to be protected by the Constitution have been unsuccessful, so that the exact scope of the existing provisions remains disputed. At the center of the dispute concerning aboriginal rights is the question whether the aboriginal peoples have a right to self-government and whether this right falls under the rights protected by the Constitution. Canadian courts have so far not been

1 The new part is the Constitution Act, 1982, which was enacted as Schedule B to the Canada Act, 1982, passed by the British Parliament (U.K., Eliz. II, 1982, c. 11). The Constitution Act, 1982, supplements the Constitution Act, 1867, originally enacted as the British North-America (B.N.A.) Act, 1867 (U.K., 30 & 31 Victoria, c. 3). Both acts now form the Canadian Constitution. The B.N.A.Act 1867, marked the beginning of the Canadian Confederation.

2 The major features of the Constitution Act, 1982, are the Canadian Charter of Rights and Freedoms (hereinafter: Charter), which for the first time entrenches fundamental rights and freedoms in the Canadian Constitution, and Part. V., which confers on the Canadian Parliament the power to amend the Constitution (before 1982, the Canadian Constitution could formally only be amended by an Act of the British Parliament).

3 S. (Section) 25 and S. 35 of the Constitution Act, 1982.

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confronted with this issue. However, a number of decisions have taken account of the new constitutional provisions, but do not always appear to interpret them liberally in favour of aboriginal peoples.
Recent political developments show that various models of self-government for aboriginal peoples are being discussed and partly put into practice in certain regions of Canada. It remains to be seen to what extent these models are compatible with the existing Canadian legal and constitutional framework. The situation of the aboriginal peoples of Canada thus raises a number of intricate constitutional problems, the most important of which the present article will attempt to illustrate.

II. Legal and Political Background

Before addressing the constitutional questions raised by the situation of the aboriginal peoples in Canada, it is appropriate to give a brief account of the political developments before and after the coming into force of the Constitution Act, 1982 and of the general legal provisions relating to aboriginal peoples, in order to place the discussion in a proper perspective. It may also be helpful to give a brief description of the "aboriginal peoples of Canada". S. 35 para. 2 of the Constitution Act, 1982 defines this term as including the "Indian, Inuit and Métis peoples of Canada". The total aboriginal population of Canada is estimated at about 1.100.000 people. The Inuit (Eskimos) are estimated at a total of 29.000, the rest of the aboriginal population being divided between the so-called "status Indians"[4], "non-status Indians" and the Métis (or "Half-Breed"). The "status Indians" belong to approximately 580 bands living on over 2000 reserves.[5] It is important to note that the aboriginal peoples of Canada are not a homogenous entity. There are several distinct linguistic groups and numerous different dialects, geographically located in a wide range of different regions. There is therefore a corresponding cultural diversity among the different groups. This fact has to be taken into consideration in an analysis of the aboriginal peoples as a whole.
The right to self-government will for instance have a different significance for aboriginal groups having different cultural backgrounds and ways of life.

4 The term "status Indians" refers to those Indians falling under the Indian Act, s. 2 (1) of which defines an Indian as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian".

5 These figures are given by *Morse*, The Aboriginal Peoples of Canada, in: *Morse* (ed.), Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada, Ottawa 1985.

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1. *The Law Relating to Aboriginal Peoples*

S. 25 and s. 35 of the Constitution Act, 1982 represent the first recognition of the rights of all three groups of aboriginal peoples in Canada. Prior to 1982, however, other constitutional provisions did contain references to Indians and Indian rights. S. 51 (24) of the Constitution Act, 1867 still privides for the competence of the Federal Parliament to legislate for "Indians, and Lands reserved for the Indians". This provision indicates that Indians were recognized as a legally relevant entity. Prior to confederation, the 1763 Royal Proclamation[6] placed the Indians under the special protection of the Crown. S. 25 of the Constitution Act, 1982 makes reference to the rights protected under the Proclamation, which thus has received indirect constitutional recognition although not being part of the Constitution.

Another example of constitutional recognition of Indian rights prior to 1982 is privided by the Constitution Act, 1930,[7] which confirmed agreements between the Parliament and the legislatures of Alberta and Manitoba securing hunting rights to the Prairie Indians, and thereby garanting them constitutional protection.

The concept of "aboriginal rights" as a specific category of rights received judicial recognition prior to 1982. Early decisions recognized the Royal Proclamation as a source of aboriginal rights.[8] In the more recent jurisprudence, the 1973 decision of the Supreme Court in the Calder case[9] can be considered as a landmark, in that it implicitly recognized the concept of an aboriginal title based on the fact of original occupancy.

Subsequent decisions, in particular those made after 1982, demonstrated a gradually more liberal approach to the interpretation of aboriginal rights and their scope.

The Indian Act of Canada[10] is the main legislative instrument dealing with the largest aboriginal group. It was first passed in 1876, under s. 51 (24) of the Constitution Act, 1867. S. 91 (24) was itself the expression of the perception that Indians should and could be better protected against the settlers under federal, central authority. The Indian Act regulates the administration of Indian reserves and treaties by the Department of Indian Affairs and Northern Development (D.I.A.N.D.) and the degree of control exercised by band councils over their members. Since 1876, the Indian Act was amended several times. The powers it confers upon the bands are very limited. The present act has thus been criticized as not significantly departing from its original goal of assimilating and "civilizing" the Indians, by

6 Reproduced in R.S.C. (Revised Statutes of Canada) 1970, Appendices, No. 1, at 123.
7 Reproduced in R.S.C. 1970, Appendices, No. 25, at 365.
8 St. Catharines Milling and Lumber Company v. The Queen, (1989) 14 A.C. 46 (P.C.).
9 Calder et al. v. A.-G. of British Columbia, (1974) 34 D.L.R. (3d) 145.
10 R.S.C. 1970, D. I-6.

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not allowing them any significant control over their culture and way of life.[11] The most recent amendments to the act have slightly increased the control of bands over their membership. It still does not, however, allow for any effective form of autonomy and control over the internal affairs of the bands.

2. *The Aboriginal Policy of the Canadian Government*

Until 1970, the fundamental policy of the Canadian government towards the aboriginal peoples did not significantly differ from the original goal of assimilation and integration into the Canadian society. Due to massive protests by aboriginal groups against governmental plans to repeal the Indian Act and to abolish the special status of Indians in 1970, the federal government progressively changed its attitude and attempted to institute a dialogue with aboriginal representatives.[12] The central issue that emerged from the political debate and which remains unresolved was the right to self-government.

The Canadian governments's policy concerning aboriginal peoples from 1970 onwards can be divided into two main parts. One part is the political process that led to the inclusion of s. 25 and s. 35 in the Constitution act, 1982, and the subsequent constitutional conferences. The other part is formed by the policy and the negotiations undertaken by the government with specific aboriginal groups outside the constitutional amendment process. One example of this process is a proposal for Indian self-government framework legislation tabled by the federal government in 1984, Bill C-92. The language of the bill, in particular its preamble, which recognized the fact that "Indian communities in Canada were historically self-governing", represented significant change from the Indian Act.[13] However, the Bill was never enacted due to a change in government.

In 1986, the Department of Indian Affairs amounced its "New Comprehensive Land Claims Policy". Although mainly concerned with aboriginal land claims, it also made reference to self-government. In addition to this policy, the federal government is pursuing a so-called "community-based" approach to self-government, also announced in a policy statement in 1986.[14] These policies are a slightly changed version of the previous policy, which consisted in negotiating claims and self-government agreements on an individual basis, i.e.

11 *Bartlett*, The Indian Act of Canada, (1977-78) 27 Buffalo Law Review 581 at 583, 585; *Sanders*, Prior Claims: Aboriginal People in the Constitution of Canada, in: *Beck/Berrier* (eds.), Canada and the New Constitution - The Unfinished Agenda, Ottawa 1983, 225 at 261-262.

12 *Long/Little/Bear/Boldt*, Federal Indian Policy and Indian Self-Government in Canada, in: *Boldt/Long/Bear* (eds.), Pathways to Self-Determination-Canadian Indians and the Canadian State, Toronto 1984, 69 at 70.

13 Tennant, Indian Self-Government: Progress or Stalemate?, (1984) 10 Can. Public Policy 211 at 214.

14 D.I.A.N.D., The Process of Indian Sellf-Government Community Negotiations, Ottawa, Sept. 1986, at 1-2.

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with a specific band or tribe, in return for an extinguishment of historic rights. Examples for this type of arrangement are the 1975 James Bay and Northern Québec Agreement[15] and the more recent 1986 settlement reached with the Sechelt Indian band of British Columbia. The essential feature of these agreements is that in exchange for greater self-governing powers, the rights of the concerned aboriginal groups to the lands in question were either surrendered or changed in their character. This policy has been criticized by aboriginal groups on the ground that their ancestral rights to specific lands were a precondition to the exercise of any form of self-government and that therefore the surrender of these rights would correspondingly affect their rights to self-government.[16] The opposition of many aboriginal groups led the government to revise its policy. However, the revision did not affect the fundamental character of the previous policy, but merely introduced a new terminology. Instead of "extinguishment" or "surrender" of aboriginal rights through negotiations, the new concept introduced by the government is that of "conveyance" of title to land by the aboriginal group to the Crown, in exchange for specific self-governing rights.[17] In essence, thus, the new policy has the same character as the precious ones.
It is apparent from the policies of the Canadian government to this date that it seeks to avoid any recognition of an ancestral right to self-government of the aboriginal peoples of Canada as a whole. For this reason, the attempts of the aboriginal peoples obtain a constitutional amendment securing a constitutional recognition of this right eventually failed.

3. The constitutional Developments before and after the Coming into Force of the Constitution Act, 1982

It would go beyond the scope of this article to describe in detail the political process that led to the inclusion of the provisions on aboriginal rights in the constitutional draft. The following account will accordingly only give a brief overview.
By the time the discussions on the constitutional amendment process started, the aboriginal peoples had developed a strong awareness of their political and legal position and potential role in the Canadian federation, end eventually succeeded in building up enough political pressure to obtain the inclusion of two specific sections on aboriginal rights in the constitutional draft, which was being discussed before a Special Joint Committee of the Senate and House of Commons. The process was however complicated by the fact that the various

15 The James Bay agreement was negotiated, after protests and judicial proceedings instituted by the Cree Indians and the Inuit of Québec successfully halted a large-scale hydro-electric power project on their territories.

16 See for example Assembly of First Nations (A.F.N.), Submission to the Task Force on Comprehensive Claims Policy, Ottawa, November 1985, at 10-11. The A.F.N. is the political organization representing the status Indians.

17 D.I.A.N.D., Information, Comprehensive Land Claims Policy, statement delivered by the Minister of Indian Affairs in the House of Commons, Dec. 18, 1986, at 6-7.

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aboriginal groups were devided among themselves on certain issues, and that several provinces were strongly opposed to the entrenchment of aboriginal rights, whereas the federal government was inclined to support the aboriginal demands.[18] The original governmental proposal submitted to the Joint Committee only included s. 24 (now s. 25), which was intended to protect aboriginal rights from the exercise of rights guaranteed by the Charter, in particular the equality clause. In subsequent negotiations, an additional clause recognizing aboriginal rights was agreed upon (s. 34). This clause however was dropped after opposition by some of the provinces, but eventually reinstated (with a change in its wording) after public protest and pressure on the part of aboriginal groups.[19] It must be noted that the participation by aboriginal peoples in the constitutional amendment process was never formalized and that they were thus denied to effectively participate in it, since there was not at anytime a standing forum to discuss and negotiate the issue of entrenching aboriginal rights in the constitution.

It is thus difficult to state whether the eventual inclusion of s. 24 and s. 34 in the constitutional draft (s. 25 and s. 35 of the Constitution Act, 1982) represented a political success for the aboriginal peoples or not.

On the one hand, the political pressure exerted by the aboriginal groups led to the insertion of these provisions in the constitutional draft and to their eventual adoption, thus yielding a palpable result. The entrenchment of aboriginal rights in the Constitution from a legal point of view undoubtedly represents a landmark in Canadian constitutional history.

On the other hand, the contents of the provisions did not prove satisfactory to aboriginal groups. Opposition to the final draft was maintained, in particular because of the addition of the word "existing" to the reinserted s. 34.[20] The aboriginal peoples did also not succeed in entrenching any reference to self-determination, self-government or sovereignty, concepts which were (and are) at the core of their political demands.[21]

Because of the controversial nature of the constitutional entrenchment of aboriginal rights, the provisions eventually adopted had the character of a political compromise and were considered to form a basis for further negotiations. The Constitution Act, 1982, thus also contained a mandate for a constitutional conference (comprising the federal and provincial governments and aboriginal groups) to be held within one year after its coming into force. According to s. 37 (2), the agenda of the conference was to be the "identification and definition of the rights of those (aboriginal) peoples to be included in the Constitution of

18 *Sanders*, supra N. 11, at 234-236.

19 Ibidem.

20 *Zlotkin*, Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference, Discussion Paper No. 15, Institute of Inter-Governmental Relations, Queen's University 1983, at 33.

21 See for example the 1975 Dene Declaration, which is one of the first documents clearly asserting a right to self-determination and to self-government, reproduced in Watkins (ed.), Dene Nation-The Colony Within, Toronto 1977, at 3-4 and the 1980 Declaration of the First Nations, adopted by the A.F.N. conference, reproduced in Asch, Home and Native Land - Aboriginal Rights and the Canadian Constitution, Toronto 1984 at 125 (Appendix E).

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Canada." According to s. 54 of the Constitution Act, 1982, s. 37 was to be repealed one year after its coming into force. The 1983 conference resulted inter alia, in the enactment of a new s. 37.1, which contained a mandate for at least two more constitutional conferences on aboriginal matters to be held within five years of the coming into force of the Constitution Act, 1982. Three more conferences were held, in 1984, 1985 and 1987. The Constitution Act, 1987 now no longer contains a mandate for any further conference, since s. 37.1 was repealed an April 18, 1987, pursuant to s. 54.1 (which section was also added as a result of the 1983 conference).

The 1983 conference's agenda included a wide range of matters, due to aboriginal concerns that it would be the last of its kind. Agreement could be reached on several points, among them the need for a constitutional amendment guaranteeing further negotiations. A provision on sexual equality was added to s. 35 (para. 4), and the wording of s. 25 (b) was altered to make reference to land claims "agreements", which term was considered to be broader than the original "settlement". The conference however did not succeed in identifying and defining the aboriginal rights referred to in s. 35. The mandate for the further conferences agreed upon no longer mentioned the definition of aboriginal rights an agenda item, but only referred to "constitutional matters that directly affect the aboriginal peoples of Canada". No reference to self-determination or self-government was included in the amendments, although these items were on the agenda.

At the 1984 and 1985 conferences, it became clear that the issue of self-government would be at the center of the negotiations between the federal and provincial governments and aboriginal groups. Just before the 1984 conference, a Special Parliamentary Committee on Indian Self-Government had released its report, which recommended inter alia that the right of aboriginal peoples to self-government be expressly entrenched in the Constitution.[22] However, neither the 1984 and 1985 conferences achieved concrete results, for the positions of the federal and provincial governments and of aboriginal peoples on the concrete aspects and implications of self-government could not be reconciled.[23] These two conferences at least had clearly identified the respective positions of the participants, which also formed the starting-point of the 1987 conference. The federal government generally advocated the entrenchment of a "contigent" right to self-government, i.e. to be defined through subsequent negotiations on an case-by-case basis. According to this proposal, the

22 Indian Self-Government in Canada, Report of the Special Committee, House of Commons, Issue No. 40, 1st Session, 32nd Parliament (1982) at 44 (hereinafter: Self-Government Report).

23 For detailed account of the conferences, see *Schwartz*, First Principles: Constitutional Reform with Respect to Aboriginal Peoples of Canada 1982-1984, Background Paper No. 6, Institute of Intergovernmental Relations, Queen's University, 1985; *Hawkes*, Negotiating Aboriginal Self-Government-Developments Surrounding the 1985 First Minister's Conference, Background Paper No. 7, id., 1985.

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right to self-government would not be entrenched as such, but only the concrete result of negotiations would receive constitutional protection.[24]

The aboriginal peoples, on the contrary, favoured the entrenchment of a free-standing, "inherent" right to self-government, to be supplemented by a constitutional commitment for subsequent negotiations to implement the right.[25]

This fundamental opposition was apparent from the beginning of the conference and did not leave much hope for an agreement, since neither side appeared to be willing to compromise. The conference was eventually closed without any agreement having been reached.

The failure of the conference made apparent that there is a fundamental divergence of positions on aboriginal self-government not only between aboriginal peoples and the federal government, but also between the latter and several provincial governments. The failure of the conference can thus partly be explained by the reticence of the Prime Minister to reach a deal without first securing the support of the provinces.

The 1987 conference was the last of its kind and thus marks the end of the formal constitutional process. A specific commitment to continue negotiations was not made by the federal government and does not seem to be considered in the near future. Although the constitutional issue of aboriginal self-government still appears to be a matter of concern in Canada, an institutionalized participation of aboriginal peoples as equal partners in any constitutional emendment process affecting their rights will probably not be achieved. This bacame apparent during the constitutional conference on the so-called "Meech Lake Accord", which was held in September 1987.[26] The Meech Lake agreement was the object of hearings before a special parliamentary committee. In its report, the committee stated that the "important constitutional issues raised by aboriginal peoples remain on the nation's agenda", however rejected demands by aboriginal peoples for a permanent seat at future First Ministers' Conferences.[27]

The exact scope of the aboriginal rights protected by the Constitution thus remains unclear. It will be the task of the courts to interpret these provisions. Several judicial decisions have attempted to define the scope of s. 35. A decision of the Supreme Court of Canada on this matter is however still pending.

24 Notes for an opening statement by the Right Honorable Brian Mulroney, Prime Minister of Canada, to the First Ministers' Conference, Aboriginal Constitutional Matters, Ottawa, March 26, 1987, (hereinafter: 1987 F.M.C.) Doc. 800-23/014, at 1.

25 Opening remarks by George Erasmus, National chief, A.F.N., 1987 F.M.C., Doc. 800-23/007

26 The Meech Lake agreement secured the approval of Québec to the Constitution Act, 1982 (Québec had not signed the act in 1982).

27 The 1987 Constitutional Accord, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons, Senate/House of Commons, Issue No. 17, Wednesday, Sept. 9, 1987 (2nd session, 33nd Parliament), at 111-113 (para. 18-26).

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III. The Constitution Act, 1982

With regard to the two provisions of the Constitution Act, 1982, protecting the rights of aboriginal peoples, namely s. 25 and s. 35, a Canadian commentator wrote that they "lead us from darkness to darkness, that they substitute impenetrable obscurity for what was formerly mere shadowy gloom".[28] The interpretatioon of the two provisions is indeed made difficult by a number of factors. The circumstances of their insertion in the constitutional draft, namely their compromise character, do not permit to determine what the intentions of the drafters were. Their wording presents discrepancies. They do not provide definitions of the rights they purport to protect. The jurisprudence relating to the two provisions is to date very sparse. They cannot to be treated as "ordinary" constitutional provisions, since they reflect the special status of aboriginal peoples, although formally being an integral part of the Canadian Constitution. These factors, in particular the special character of aboriginal rights, have to be taken into account in determining the scope of these provisions.

1. Section 25 of the Charter

S. 25 is located among the general provisions of the Canadian Charter of Rights and Freedoms, which itself forms Part I of the Constitution Act, 1982. It reads:

> "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763, and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired."

The position of s. 25 among the "general provisions" of the Charter and its negative wording indicate prima facie that it is not a positive guarantee of rights to the same effect as its substantive provisions. S. 25 is thus characterized as an interpretative provision, limiting the scope of the rights contained in the Charter - in particular with regard to the equality clause in s. 15 -, but not an additional protection of and source of rights.[29] The question remains, however, whether s. 25 is only a derogating clause (limiting the scope of Charter rights) or a saving clause, i.e. also excepting aboriginal rights from the Charter and thereby placing aboriginal rights on a different level than Charter rights. The wording of s. 25 does indeed not make clear whether in case of conflict between a Charter right and an aboriginal

28 *Slattery*, The Constitutional Guarantee of Aboriginal and Treaty Rights, (1982-83) 8 Queen's L.J. 232.

29 *Mc Neil*, The Constitutional Rights of the Aboriginal Peoples of Canada, (1982) 4 S.C.L.R. 255 at 262; *Gibson*, The Law of the Charter: General Principles, Toronto 1986, at 72.

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right the latter would automatically prevail or whether the Charter rights would still apply, although limited in their scope by s. 25. Related aspects of this question are whether s. 25 can be interpreted as protecting the collective status of aboriginal peoples from interference through the exercise of Charter rights and whether s. 25 also contemplates the exercise of a right to self-government allowing for instance the infringement of individual rights. The question also arises whether s. 25 has the effect of entrenching the rights referred to in it. S. 52 (1) of the Constitution Act, 1982 provides that any law inconsistent with the Constitution is of no force or effect. Technically, it is difficult to see how any law can be inconsistent with s. 25 if it is only an interpretative provision with no substantive character of its own. If s. 25 is interpreted narrowly, thus, it is conceivable that an ordinary statute could abrogate from the rights referred to in it, since s. 25 only states that the aboriginal rights remain unaffected by the Charter. It has indeed been held that ordinary federal on provincial statutes could affect the rights protected under s. 25.[30] Such a narrow reading of s. 25 however run counter to the principle that constitutional provisions have to be interpreted liberally, in particular in the context of fundamental rights and freedoms.[31] S. 25 has to be construed so as to protect aboriginal rights from the application of the rights guaranteed by the Charter and similar statutory rights.
Further problems of interpretation arise, if s. 25 is compared to s. 35 (1) of the Constitution Act, 1982.

2. *Section 35 (1) of the Constitution Act, 1982*

S. 35 is contained in Part II of the Constitution Act, 1982. The only other provision contained in Part II is s. 35.1, which provides that a constitutional conference including the aboriginal peoples will be convened before any amendments to the constitutional provisions relating to aboriginal rights.
S. 35 (1) reads:

> "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

Subsection (2) defines the term "aboriginal peoples", subsection (3) clarifies the term "treaty rights", and subsection (4) contains a sexual equality clause.
The scope of s. 35 (1) prima facie appears to be narrower that that of s. 25, since the former provision protects the "existing aboriginal and treaty rights", whereas the latter refers to "any aboriginal, treaty or other rights or freedoms". The discrepancy in the wording of the two provisions adds to the difficulties surrounding their interpretation. There does not appear to be any reasonable explanation why certain categories of rights should only be protected from the impact of the Charter, but not receive constitutional protection through

30 *Slattery*, supra N. 28 at 240.
31 *Hogg*, Constitutional Law of Canada, 2d. ed. Toronto 1985, at 658-659.

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s. 35 (1). The difficulty posed by s. 35 and s. 254 is that neither provision defines the rights protected therein. S. 35 (1) only specifies that "treaty rights" also include rights deriving from land claims agreements.

"Aboriginal rights" could include rights such as hunting and fishing rights, and possibly also a right to self-government. Fishing and hunting rights have been recognized by Canadian courts as rights deriving from the historic fact of aboriginal occupancy of specific territories and may thus be qualified as "aboriginal rights".[32] Treaty rights would include the rights guaranteed by the treaties concluded between the European settlers and Indians and all subsequent agreements. In most cases, however, these treaty rights would also be hunting and fishing rights, so that these two categories of rights overlap. It seems unclear which rights would fall under the "other rights" and the "freedoms" mentioned in s. 25.

On the whole, it is apparent that the different types of rights mentioned in s. 25 and s. 35 cannot be understood as constituting strictly separate categories, but that they overlap to a large extent and should not be considered as being mutually exclusive. The main controversy surrounding the interpretation of s. 35 (1) is posed by the word "existing".

This word was added when the provision was reinserted into the constitutional draft.[33] It has been contended that the word did not add anything to the meaning of the provision, since it seemed self-evident that only existing rights could be protected.[34] However, it has to be presumed that the wording of a provision has a specific meaning and that no superfluous words have been inserted. A number of different interpretations have been given by commentators to the word "existing". According to a restrictive interpretation its effect is to exclude any aboriginal rights that have been extinguished with the consent of aboriginal peoples or by legislation before April 17, 1982, and that only those rights existing on that date were protected, thus precluding the protection of future aboriginal rights.[35] Courts have so far adopted a similar, restrictive approach. In a recent decision by the British Columbia Court of Appeal (B.C.C.A.) concerning an aboriginal right to fish, a higher court for the first time attempted to determine in detail the scope of s. 35 (1) and in particular the effect of the term "existing".[36] The B.C.C.A. held that the right in question had already been subject to limitations (through fishing regulations) before April 17, 1982, and that therefore only the contents of the right as defined and limited by the regulations was protected by s. 35 (1), the term "existing" having, in other words, the effect of preserving the "liability" attached to the right. The B.C.C.A. in effect ruled that s. 35 (1) did not preclude a limitation of the entrenched rights, but that the limiting statute or regulation was

32 See for example Simon v. The Queen, (1986) 24 D.L.R. (4th) 390 at 403 (S.C.C.).

33 See the statement of the Minister of Justice in the Parliamentary debate on the constitutional draft, House of Commons Debates, 24. Nov. 1981, Vol. 124, No. 262 at 13203-13204.

34 *Lyon*, S. 25 of the Canadian Charter of Rights and Freedoms, in: Current Issues in Aboriginal and Treaty Rights, The Canadian Bar Association of Ontario, May 1984, 1 at 8.

35 *Sanders*, The Rights of the Aboriginal Peoples of Canada, (1983) 61 Can. Bar. R. 314 at 331; *McNeil*, supra. N. 29, at 257; *Hogg*, supra N. 31 at 565.

36 Sparrow v. The Queen, unreported, B.C.C.A. (CA 005 325), decision of Dec. 24, 1986.

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itself subject to a standard of reasonableness similar to the one contained in s. 1 of the Charter.[37] The effect of s. 35 (1) was thus seen by the Court as prohibiting an undue limitation or an extinguishment of aboriginal rights.[38]

The decision of the B.C.C.A. can be criticized insofar as it did not provide an adequate justification for the application of a standard of reasonableness to s. 35 (1). It is apparent from the Court's reasoning that it did not take proper account of the specific character of aboriginal rights and the special character of aboriginal societies underlying this right, since it readily assumed that the Federal Parliament was also competent to legislate with regard to the specific interests of Indian bands - in matters of conservation policy -, an assumption that is no longer evident, if aboriginal rights, such as the right to hunt and fish, are placed in the wider context of self-government.

The fact that s. 35 (1) was placed outside the Charter in a separate part of the Constitution Act, 1982, can be interpreted as a reflection of the special status of aboriginal peoples. Consequently, it may be said that if it had been intended to subject s. 35 (1) to a standard of reasonableness, it would have been placed among the Charter provisions, so that s. 1 would have been applicable to s. 35 (1).

Although the scope of s. 35 (1) is thus disputed, it is generally accepted that it affords positive constitutional protection to the rights of aboriginal peoples.[39] The wording "recognized and affirmed" clearly indicates that s. 35 was meant to be a guarantee of aboriginal rights.

The difficulty, however, remains to find an interpretation reconciling the discrepancies between s. 35 (1) and s. 25 and to define with more precision the term "aboriginal rights". The Supreme Court of Canada so far has not rendered any decision concerned with the interpretation of s. 35 (1).

In particular, the question of the right to self-government remains open.

IV. The Right to Self-Government of the Aboriginal Peoples of Canada

It has already been mentioned that the right to self-government had been the main issue on the agenda of the last constitutional conference in 1987. The aboriginal peoples have consistently maintained the position that the right to self-government was an inherent aboriginal right protected under s. 35 (1) of the Constitution Act, 1982, a position consistently rejected by the Canadian government.

The aboriginal position can, however, be supported by several arguments.

37 S. 1 of the Charter reads: "The Canadian Charter of Rights and Freedoms 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".

38 Id., at 30, 40-41.

39 *Slattery*, supra N. 28, at 254-255; *O'Reilly*, La Loi Constitutionelle de 1982-Droit des Autochthones, (1984) 25 C. de D. 125 at 140; *Mc Neil*, supra N. 29 at 256.

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It appears to be accepted in the Canadian jurisprudence relating to aboriginal rights that they find their source in the historic fact of original occupancy. In its 1973 Calder decision, the Supreme Court of Canada acknowledged that the aboriginal title to the lands in question (a territory in North-West British Columbia) was rooted in the fact that at the time, when the settlers came to British Columbia, the Indian tribes were already present, organized in societies and occupying the lands.[40] This historic fact of original occupation was considered to be the source of the aboriginal title to the land. To the extent that such an aboriginal title has not been extinguished subsequently, it remains valid. In subsequent decisions, Canadian courts elaborated specific criteria to determine the existence of an occupancy-based title.[41]
More recent decisions by the Supreme Court of Canada indicate that as far as rights to use a specific territory, i.e. to hunt or to fish are concerned, the concept of original occupancy-based aboriginal rights is no longer in dispute. It is also apparent from the judicial decisions of Canadian courts relating to aboriginal rights that they recognize the fact that the aboriginal peoples were organized in societies and had customary laws regulating their life.
It is interesting to note in this respect that the early U.S. decisions relating to Indian rights went further than their Canadian counterparts in that they not only acknowledged that Indian societies had institutions of their own, and were governing themselves by their own laws, but constituted distinct political communities and nations that had a right to self-government and even limited sovereignty.[42]

It can be inferred from these judicial decisions alone, without examining in detail anthropological and historic studies on the development of aboriginal societies in North-America, that these societies were considered as having a degree and form of political organization such as to qualify as self-governing.
Although not expressly referring to any form of aboriginal "government", the relevant Canadian decisions appear to acknowledge this fact in using the term "organized" with regard to aboriginal societies. While it seems obvious that aboriginal societies in North-America did not, on the whole, have systems of government that can be measured by the same standard as modern Western democracies, the fact nonetheless remains that they had decision-making processes that functioned according to specific rules and customs. It must also be kept in mind in this context that aboriginal peoples have a different perception of authority and decision-making (in the sense that emphasis is placed to a large extent on the collectivity and not on the individual) and that aboriginal models of self-government differ from Western-style democracies also for that reason. It is noteworthy in this regard that one

40 *Calder*, supra N. 9 at 160.

41 Guérin et al. v. The Queen, (1985) 13 D.L.R. (4th) 321 at 335-336; *Simon*, supra N. 32 at 407.

42 Johnson and Graham's Lessee v. Mc. Intosh, (1823) 21 U.S. (8 Wheaton) 543 at 574; Cherokee Nation v. State of Georgia, (1831) 30 U.S. (5 Peters) 1 at 17; Worcester v. State of Georgia, (1832) 31 U.S. (6 Peters) 515 at 559-560.

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of the largest Indian communites, the Six-Nation Iroquois Confederacy, is described as having had a constitution and a government with corresponding decision-making institutions based there on dating back far beyond the arrival of the first European colonizers or "discoverers".[43] The model of the Iroquois constitution is even said to have provided inspiration for the drafters of the American Declaration of Independence.[44]

There are thus sufficient indications to warrant the assumption that aboriginal societies were historically self-governing.

If the concept of original occupancy as a root of title to the land is applied to the historic fact of self-government, this fact should consequently be the root of a corresponding right. It may thus be assumed that a right to self-government of aboriginal peoples came into existence before the arrival of the European settlers.[45] The question then arising is whether this right still exists today, i.e. whether it may have been extinguished in the course of time. The right to self-government may lawfully have been extinguished either by legislation or by consent of the aboriginal peoples, i.e. by treaty.

Two different approaches may be taken to determine whether an aboriginal right has been extinguished or not. These two approches are illustrated by the diverging positions taken by the judges in the Calder case, in which the seven-member court was split three to three, the casting vote (dismissing the appeal) being grounded on a procedural point only. Three judges were of the opinion that the right to land of the aboriginal people in question had been extinguished by virtue of the sovereign authority of Parliament to legislate with regard to these lands, i.e. by the mere fact that the lands were opened up for settlement by competent legislation.[46] The other three judges, dissenting, held that the aboriginal title based on continuos occupation was presumed to continue until the contrary was proven and could only be extinguished either by surrender to the Crown or by specific legislation, i.e. by legislation expressly purporting to extinguish aboriginal title.[47]

The doctrine of parliamentary supremacy is generally invoked with regard to the extinguishment of common law rights.

43 *Porter*, Traditions of the Constitution of the Six Nations, in: *Bold/Long/Bear*, supra N. 12, 14 at 15-16, *Hurley*, children or Brethren, Aboriginal Rights in Colonial Iroquoia, University of Saskatchewan Native Law Centre, Saskatoon 1985, at 28-30.

44 *Ahenakew*, Aboriginal Title and Aboriginal Rights: The Impossible and Unnecessary Task of Identifikation and Definiton, in: *Boldt/Long* (eds.), The Quest for Justice-Aboriginal Peoples and Aboriginal Rights, Toronto 1985, 24 at 28-29.

45 It must be noted here that the concept of aboriginal rights, i.e. their legal existence, is only meaningful after the arrival of the European colonizers and the establishment of a legal system capable of recognizing such rights. The factual basis for that right, however, predates the arrival of the first settlers. In retrospect, thus, it may be said that the aboriginal rights "existed" before that date.

46 *Calder*, supra N. 9 at 167.

47 Id. at 208.

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It seems doubtful, however, whether this doctrine can be applied to aboriginal rights in view of their special character, which has been recognized in more recent decisions by the Supreme Court, which held that aboriginal rights were "sui generis" rights of a unique nature and that the terminology used to characterize them was often inappropriate.[48]

It, therefore, seems justified to adopt the latter view with regard to the extinguishment of aboriginal rights, namely that only legislation specifically and unequivocally intending to extinguish an aboriginial right also has this effect.

With regard to an aboriginal right to self-government, there does not appear to be any Canadian legislation fulfilling this condition. The only statute specifically concerned with Indians is the Indian Act. The Indian Act does provide for a limited form of self-government, which should, however, more appropriately be termed self-administration. By virtue of these provisions Indian bands have limited powers to exercise some control over their internal affairs. Nothing from the language of the Indian Act allows to infer that the art purported to extinguish a right to self-government. However, the act may be considered as limiting or regulating the right to self-government, to the extent that it sets limits on the bands' competences to regulate their own affairs.

With regard to an extinguishment of a right to self-government by treaty, i.e. by consensual and express surrender of the right, a survey of the early treaties concluded between the European settlers and Indian tribes shows that these treaties were treaties of peace and friendship and that the Indians were considered as allies of the British Crown.[49] In most instances, the Indian tribes agreed to subject themselves to the Crown and its laws. Some of the treaties guaranteed the exercise of specific rights. None of these treaties made any reference to a right to self-government. After confederation, eleven treaties were concluded between different Indian groups and the Canadian government as a representative of the British Crown. Essentially, these treaties provided for the cession or surrender of the Indian people's right to land, in exchange for a guarantee of specific rights and the allocation of reserves for their exclusive use.[50] These treaties did not make specific reference to self-government or to Indian political institutions either. More recent agreements, such as the James Bay and Northern Québec Agreement, also provide for a cession or surrender of rights to the land in exchange for specific rights to use the land for hunting, trapping or fishing.[51]

48 *Guérin*, supra N. 40 at 339.

49 *Wildsmith*, Pre-Confederation Treaties, in: *Morse* (ed.), supra N. 5, 112 at 189-190

50 *Zlotkin*, Post-Confederation Treaties, in: *Morse* (ed.), supra N. 5, 272 at 273-274.

51 S. 2.1 of the Agreement reads: "In consideration of the rights and benefits herein set forth in favour of the James Bay Crees and the Inuit of Québec, the James Bay Crees and the Inuit of Québec hereby cede, release, surrender and convey all their Native claims, rights, titles and interests, whatever they may be, in and to land in the Territory and in Québec, and Québec and Canada accept such surrender." (emphasis added), The James Bay and Northern Québec Agreement, Editeur Official du Québec, 1976, at 5.

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In the absence of any specific reference to a right to self-government in these treaties, it cannot be assumed that they implicitly intended to also extinguish a right to self-government. Such an interpretation would be contrary to the principle recently reaffirmed by the Supreme Court - that Indian treaties should receive a large and liberal interpretation favourable to the Indians.[52]
Therefore, in the absence of a specific reference to self-governing powers of Indians in these treaties, it must be presumed that a right to self-government has not been affected by them. This result is not contradicted by the fact that Indian or generally aboriginal peoples may not have exercised their right to self-government for a certain period of time. A distinction has to be made between the existence and the exercise of a right. The extent to which a right has been exercised does not affect its existence as such. It must be noted in this context that Indian communities in Canada were, far a long period of time, in many instances, forcefully prevented from exercising traditional forms of community life,[53] which can be considered as an integral part of self-government. Correspondingly, the legislation concerning Indians, namely the Indian Act, was to a large extent the expression of the denial of the existence of organized native political communities.[54] This, in turn, can be seen as a consequence of the fact that the legal system established in Canada by the British Empire was in essence of a colonial character.

In view of these considerations, there appears to be sufficient legal ground to hold that an aboriginal right to self-government can still be presumed to exist.
Consequently, a right to self-government would also fall under the aboriginal rights protected by s. 35 (1) of the Constitution Act, 1982.
This result, it is submitted, follows from an objective application of the legal principles developed by Canadian courts with regard to aboriginal rights.
It must be kept in mind, however, that this strictly legal position remains theoretical and has not so far been expoused by Canadian courts. The reticence of Canadian courts to resolve this legal issue can, to a large extent, be explained by the complex political issues surrounding the question of aboriginal self-government in Canada. From a political but also from a constitutional perspective, the quesstion indeed remains as to how self-government for aboriginal peoples could be implemented in the context of the Canadian federation. In

52 *Simon*, supra N. 32 at 409. The principle was recently reaffirmed by two provincial courts. The courts in both cases had to determine the legal effect of early treaties reserving specific rights to the Indians and held that in case of ambiguity, such treaties would be construed against its makers and in favour of the Indians. See Claxton et al. v. Saanichton Marina Ltd. and A.G.B.C., British Columbia Supreme Court, (1987) 4 C.N.L.R. 48 at 55; Sioui et al. c. Le Procureur Général de la Province de Québec, unreported, Cour d'Appel du Québec, No. 200-10-000137-856 (8 Sept. 1987), at 7 and 10.

53 *Bartlett*, supra N. 11 at 585.

54 *Sanders*, supra N. 11 at 261-262.

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Canada, there are several examples of aboriginal self-government, which may, serve as an illustration for the future implementation of the right.

V. Existing and proposed forms of self-government in Canada

1. Self-government under the Indian Act

The Indian Act was passed in 1876 under s. 91 (24) of the Constitution Act, 1867, which confers upon Parliament the competence to make laws relating to "Indians, and lands reserved for the Indians". It confers upon Indian bands limited powers of self-government, to be exercised on the reserve bands through an elected band council as the political organ of each band. The band council thus has the competence to enact by-laws on specific subject-matters, enumerated in s. 81 of the Indian Act. They are limited to matters of a local nature and subject to the control of the Minister for Indian Affairs.
The authority exercised by the band council is clearly a delegated authority. S. 74 of the Indian Act determines the criteria and the voting procedures for the band elections, which are implemented by regulations issued by the Minister. The Minister also has the power to determine the size of bands and to create new bands. The Indian Act also lays down criteria to determine the membership of bands. Recent amendments to the Act, however, conferred a larger degree of autonomy on the bands in this regard.[55]
It is apparent from these basic features of the Indian Act that it does not confer an effective power of self-government, i.e. of deciding without external interference on crucial matters such as the setting-up of political institutions. The band council system, therefore, must rather be qualified as a form of self-administration. This has been acknowledged by the Department of Indian Affairs itself.[56] The Special Committee on Indian Self-Government stated in its 1983 report that the Indian Act was the main obstacle to Indian self-development and self-sufficiency[57], which are undoubtedly aspects to the fact that the Indian peoples played no part in negotiating confederation or in drafting the British North-America Act, 1867.[58]
The Indian Act can similarly be considered as lacking legitimacy with regard to Indians, since they were only allowed to vote in federal elections in 1960 and the basic structure of the act was established before that date.

55 Bill C-31, An Act to Amend the Indian Act, 1st. session, 33nd Parliament, 1983-84 (assented to 28 June 1985).
56 Self-Government Report, supra N. 22 at 17.
57 Id. at 47.
58 Id. at 39. The B.N.A. Act, 1867 is now the Constitution Act, 1867, see supra N. 1.

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2. *The Cree-Naskapi Act*

The Cree-Naskapi Act was passed in 1984, pursuant to s. 9 of the James Bay and Northern Québec Agreement.[59] The Cree-Naskapi Act was one of the two federal statutes passed to implement the agreement and to protect the rights guaranteed therein. The act confers on the bands a range of powers far more extensive than under the Indian Act, which is no longer applicable to the bands coming under the Cree-Naskapi Act. S. 21 of the act provides that the objects and powers of the band shall be, inter alia, to act as local governments, to use, administer and regulate lands and its natural resources, to regulate the use of buildings, to promote the general welfare, and to promote and preserve its culture and traditions. Under s. 45, the band has the power to make by-laws of a local nature for the "good government of its lands and its inhabitants", concerning matters such as public order and safety, protection of the environment and of natural resources, the prevention of pollution, the maintenance and operation of local services and local taxes. The bands have jurisdiction for the enforcement of by-laws on their territories and the administration of justice with regard to minor offences.

However, these powers remain under the control of the provincial government, which has the power to disallow specific by-laws relating to hunting and fishing and also to regulate the band's taxation powers. In this respect, the act does not provide for a full measure of autonomy for the Cree Indians. It must also be noted that neither the James Bay Agreement nor the Cree-Naskapi Act recognize a right to self-government. There is no indication, either, that the autonomous powers conferred on the Cree and Naskapi communities implicitly recognize an inherent right to self-government. The two instruments, however, make refernce to specific rights, such as hunting, fishing and trapping rights. The James Bay Agreement being a treaty in the meaning of s. 35 (1) of the Constitution Act, 1982, these rights are consequently protected by that section. The James Bay Agreement also received support from the populations concerned, since it was developed in close consultation with them. It may thus be argued that their participation as equal negotiators and their corresponding influence on the outcome of the negotiations constitutes an element of self-determination, albeit limited, in this process. The Grand Council of the Crees (of Québec), which acted as a representative of the Cree Indians in the course of negotiations, was the result of an initiative of the Cree community to form an entity for the negotiations and the subsequent exercise of self-government. To the extent that the James Bay Agreement and the Cree-Naskapi Act adequately reflected the aspirations of the Cree Indians, the whole negotiation process can be considered as a limited exercise of self-government.

59 An Act respecting certain provisions of the James Bay and Northern Québec Agreement and the Northeastern Québec Agreement relating principally to Cree and Naskapilocal government and to the land regime governing Category IA and Category IA-N land, (1982-84) 32-34 Eliz. II, c. 18.

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3. *The Sechelt Indian Band Self-Government Act*

The Sechelt Act was passed in June 1986, pursuant to an informal agreement between the federal government and the Sechelt band of British Columbia.[60] In its preamble further indicates that the legislation was approved by the members of the band in a referendum.
The legislative powers granted to the band council are similar to those enumerated in the Cree-Naskapi Act. The Sechelt Act does not make express reference to any competence of the band in relation to the enforcement of its by-laws and to the administration of justice; these powers, however, would fall under the general competence of the band council "to make laws far the good government of the band". The Sechelt Act also marks a significant departure from the Indian Act in that it confers on the band a greater capacity to administer and control its own affairs. The type of self-government can be compared to that of a municipality. In that respect, however, the authority conferred on the band is more a delegated one than an original one. S. 15 of the Sechelt Act expressly contemplates the possibility of a delegation of legislative powers to the band council by the legislature of British Columbia. With regard to application of provincial laws on the territory of the band, the Sechelt Act provides that the laws of British Columbia apply as a general rule except to the extent that the band council is competent to enact by-laws. The Cree-Naskapi Act, by comparison, contains a presumption against the applicability of provincial legislation. The Sechelt Act thus is far more restrictive than the Cree-Naskapi Act. In effect, it appears that the Sechelt Act does not offer sufficient protection against infringement of the band's autonomy by provincial laws. It does not expressly or implicitly recognize a right to self-government. The autonomy granted to the band is consequently not protected by s. 35 (1) of the Constitution Act, 1982, although the Sechelt Act provides in s. 3 that it does not derogate from any existing aboriginal right. The act itself does, however, not purport to guarantee specific aboriginal rights.

4. *The Nunavut and Dene Public Government Model*

The concepts of aboriginal self-government underlying the Nunavut and Dene proposals were initiated by the Indian and Inuit peoples in the Northwest Territories. The specific legal, historical and geographical situation of the Northwest Territories gave the original impulse to that development.[61] The main feature of both concepts is that they advocate a public - as opposed to ethnic - government representing all persons residing in the Nunavut and Dene territories. The Inuit and Dene have proposed the division of the Northwest

60 An Act relating to self-government for the Sechelt Indian Band, (1986) 33-34-35 Eliz. II, c. 27.

61 See Completing Canada: Inuit Approaches to Self-Government, Inuit Committee on National Issues (I.C.N.I.) position paper, Institute of Intergovernmental Relations, Queen's University 1987 at 29-32. The I.C.N.I. is the political organization representing the Inuit.

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Territories into two territories (Nunavut and Denendeh). The Canadian government appears, in principle, willing to accede to the proposal. In January 1987, an agreement concerning the division of the territory was concluded between the Western Constitutional Forum and the Nunavut Constitutional Forum, representing the residents of the Northwest Territories and the Dene and Inuit peoples respectively. The agreement was preceded by a referendum held in 1982, which approved the division.

The governmental models proposed by the Dene and the Inuit[62] both emphasize the need for an effective transfer of jurisdictional powers necessary to preserve the "essential identity" of the aboriginal peoples and those relating to the economy and decision - making. An interesting feature are provisions for the protection of minorities and individual rights, to be implemented through a specific human rights code.[63]

It is apparent from the working papers submitted by the Dene and Inuit that the proposed governments would have a status similar to that of a province in the Canadian federation, i.e. have a range of exclusive powers corresponding to the specific needs and interests of their territories and peoples, but also with provision for concurrent powers and joint policy-making in certain areas. The exclusive powers in specific areas would be those linked to the specific situation of the aboriginal peoples and to their historic rights. The Dene concept envisages that the Dene people, forming the majority in the proposed territory, would have "exclusive ownership, use, control, occupancy and resource ownership over a large area of land within Denendeh...". With regard to the protection of fundamental rights and freedoms, a "Charter of Founding Principles" entrenching fundamental rights is also part of the proposal. Contrary to the Nunavut model, the Dene proposal would also provide for the entrenchment of specific collective aboriginal rights of the Dene, in addition to the provisions protecting individual rights and freedoms.[64] The Nunavat proposal contemplates a government representing all residents of the territory, with some safeguards to preserve the specific cultural, linguistic and economic traditions of the Inuit people. The exclusive powers relating to self-government would include the organization of governmental institutions, and the establishment and amendment of a Nunavut Constitution. Other legislative powers would include matters of a local and private nature. In the field of natural non-renewable resources, the proposal advocates that the powers should be ultimately exclusive, after a certain transition period.

The Dene and Nunavut models would thus represent a fundamentally different form of self-government than the ones described previously. If put into practice, the aboriginal peoples

62 See Building Nunavut - Today and Tomorrow (The Nunavut Constitutional Proposal), Nunavut Constitutional Forum, Ottawa 1985; Public Government for the People of the North, Dene Nation and Métis Association of the Northwest Territories, Yellowknife, 1981.

63 Building Nunavut, supra N. 61 at 22.

64 Dene Nation, supra N. 61 at 6-10.

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in the new territories would have a substantial power of self-government, which would in essential areas not be under the control of the provincial or federal governments.[65]

VI. Conclusion

The forms of self-government discussed here only represent a cross-section of the current developments towards greater autonomy for the aboriginal peoples of Canada.[66] However, they do provide an illustration of the fundamentally different approaches to aboriginal self-government in Canada.
The Cree-Naskapi Act and the Sechelt Act represent a form of limited self-government through delegated authority. Although these acts were enacted subsequently to agreements with the concerned aboriginal peoples, they were nonetheless passed by virtue of the Federal Parliament's jurisdiction over Indians under s. 91 (24) of the Constitution Act, 1867. The powers exercised by the bands are thus formally deriving from the Canadian Parliament's sovereign authority. This appears to be incompatible with aboriginal self-government based on an original right to self-government, a concept which implies that the aboriginal peoples exercise an inherent authority deriving from their original presence on Canadian territory. If their original right to self-government has not been extinguished, this right can legally only be recognized by Canadian legislation, but not conferred or granted upon aboriginal peoples.
The legislative and constitutional recognition of aboriginal rights cannot have a constitutive effect, since these rights do not derive from the authority of the Canadian Parliament.

The Nunavut and Dene proposals, on the contrary, advocate a third order of government with in the Canadian federation, with aboriginal governments exercising a limited, internal sovereign authority in specific areas. These models, if implemented, would represent a more adequate and effective form of self-government, for they would allow for decision-making powers of a vital character for the aboriginal peoples concerned.
Such an extensive form of self-government would not be incompatible with the existing constitutional structure of the Canadian federation. S. 35 (1) of the Constitution Act, 1982, if construed as entrenching an aboriginal right to self-government, could form the basis of further constitutional amendments recognizing specific forms of self-government. Aboriginal self-government would imply a co-existence of aboriginal and federal jurisdiction, with

65 *Malone*, Nunavut: The Division of Power, Working Paper No. 1, Nunavut Constitutional Forum, Ottawa 1985 at 68.

66 Other recent examples of local initiatives towards self-government are the Kativik Regional Government in Northern Québec, see Completing Canada, supra N. 60 at 19-22 and the initiative taken by the Haida Indians of British Columbia, which have drafted their own constitution containing their basic principles of political organization and a statement of collective and individual rights, see The Globe and Mail, March 24, 1987, p. A5

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areas of exclusive as well as shared jurisdiction, similar to the distribution of competences between the Federal Parliament and the provincial legislatures laid down in the Canadian Constitution. Such a constitutionally entrenched distribution of powers between the federal, provincial and aboriginal governments would ultimately represent the only concept adequately reflecting the aspirations of the aboriginal peoples of Canada.
In view of the failure of the recent constitutional conferences to implement this fundamental change, the burden now rests on the Canadian courts to rule on the legal and constitutional implications of an aboriginal right to self-government.

Abbreviations:

A.-G.	Attorney-General
C.	chapter
C. de D.	Cahiers de Droit (Université Laval)
Can. Bar.R.	Canadian Bar Review
C.N.L.R.	Canadian Native Law Reporter
D.L.R.	Dominion Law Reports
L.J.	Law Journal
N.	Note
P.C.	Privy Council (House of Lords)
S.C.C.	Supreme Court of Canada
S.C.L.R.	Supreme Court Law Review

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ABSTRACTS

The Aboriginal Peoples of Canada and their Rights under Canadian Constitutional Law

By *Stephan Marquardt*

The new Canadian Constitution, which came into force in 1982, makes specific reference to the rights of the aboriginal peoples of Canada. The constitutional recognition of their rights is the reflection of their special status in the Canadian legal and political system. This special status raises a number of complex legal and political issues.
The new constitutional provisions relating to aboriginal rights add to this complexity. The central issue is whether the aboriginal peoples have an inherent right to self-government protected by the Constitution and what the legal and political implications of this right are. The article attempts to illustrate the main aspects of this issue.

The Peculiar Policy of Recognition of Indigenous Laws in British Colonial Africa. A Preliminary Discussion

By *Gordon R. Woodman*

The British provided that the courts in their African colonies should apply both English law and indigenous laws. This recognition of indigenous laws within pluralist state legal systems may afford insights into issues concerning the recognition of indigenous laws. Two of the influences possibly operating upon the British decisionmakers are discussed.

According to existing English law, in overseas territories acquired by settlement, English law applied. In territories acquired by conquest or cession, the previously existing laws, including indigenous laws, continued in force. However, in the latter territories English law sometimes applied to localities subsequently settled by British, or to the relations of British settlers or westernised indigenes.

Legal theory in Britain presented arguments as to the essential features of a legal system. These tended to be incompatible with the recognition of customary law.

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